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Presidential Documents

Title 3—

The President

Presidential Determination No. 2010–03 of December 3, 2009

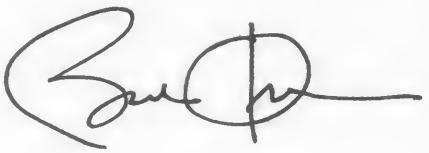
Suspension of Limitations Under the Jerusalem Embassy Act

Memorandum for the Secretary of State

Pursuant to the authority vested in me as President by the Constitution and the laws of the United States, including section 7(a) of the Jerusalem Embassy Act of 1995 (Public Law 104–45) (the "Act"), I hereby determine that it is necessary, in order to protect the national security interests of the United States, to suspend for a period of 6 months the limitations set forth in sections 3(b) and 7(b) of the Act.

You are hereby authorized and directed to transmit this determination to the Congress, accompanied by a report in accordance with section 7(a) of the Act, and to publish the determination in the *Federal Register*.

This suspension shall take effect after transmission of this determination and report to the Congress.



THE WHITE HOUSE,
WASHINGTON, December 3, 2009

[FR Doc. E9–29456
Filed 12–8–09; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 214, 274a, and 299

[DHS Docket No. USCIS–2008–0038; CIS No. 2459–08]

RIN 1615–AB76

Commonwealth of the Northern Mariana Islands Transitional Worker Classification; Reopening the Public Comment Period

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Interim rule; reopening and extending the public comment period.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) announces the reopening and extension of the public comment period for the interim rule entitled "Commonwealth of the Northern Mariana Islands Transitional Worker Classification." The interim rule was initially published on October 27, 2009 and intended to become effective on November 27, 2009. On November 25, the United States District Court for the District of Columbia enjoined implementation of the rule until DHS considers public comments and issues a final rule. To provide the public and the CNMI with optimum opportunity to comment on the proposed transitional worker classification provisions, USCIS is reopening the comment period for an additional 30 days. USCIS will consider comments received during the entire public comment period in its development of the final rule.

DATES: Written comments must be submitted on or before January 8, 2010.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2008–0038, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* You may submit comments directly to USCIS by e-mail at *rfs.regs@dhs.gov.* Include DHS Docket No. USCIS–2008–0038 in the subject line of the message.
- *Mail:* Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. To ensure proper handling, please reference DHS Docket No. USCIS–2008–0038 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Contact Telephone Number (202) 272–8377.

Public Participation: Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. DHS also invites comments that relate to the economic or federalism effects that might result from this rule. Comments that will provide the most assistance to DHS will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and DHS Docket No. USCIS–2008–0038. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210.

FOR FURTHER INFORMATION CONTACT: Paola Rodriguez Hale, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529–2060, telephone: 202–272–8100.

SUPPLEMENTARY INFORMATION:

On May 8, 2008, Congress enacted Public Law 110–229 to extend U.S. immigration laws to the CNMI with transition provisions unique to the CNMI. *See* Consolidated Natural Resources Act of 2008, Pub. L. 110–229, Title VII, 122 Stat. 754, 853 (2008) (CNRA). The purpose of the CNRA is to ensure effective border controls and properly address national and homeland security concerns by extending U.S. immigration law to the CNMI, and to phase-out the CNMI's nonresident immigration system in a manner that minimizes adverse economic and fiscal effects while maximizing the CNMI's potential for future economic growth. The effective date for this transition is November 28, 2009.

On October 27, 2009, USCIS published an interim rule entitled "Commonwealth of the Northern Mariana Islands Transitional Worker Classification" at 74 FR 55094. That rule established a new CNMI-only transitional worker classification (CW classification) intended to be effective for the duration of the transition period. The CW classification would allow workers not otherwise eligible for any other lawful status under the INA to enter or remain in the CNMI as a transitional worker during the transition period. The interim rule was to become effective on November 27, 2009.

On November 25, 2009, the U.S. District Court for the District of Columbia enjoined implementation of the interim rule until DHS considers public comments, makes any necessary changes to the interim rule in response to such comments, and issues the final rule. *Commonwealth of the Northern Mariana Islands* v. *United States,* No. 08–1572 (D.D.C. Nov. 25, 2009). Although not required to do so under the court's order, USCIS is providing an additional opportunity for the public to comment on its proposed transitional worker classification provisions set forth in the interim rule. USCIS, therefore, is reopening the public comment period for an additional 30 days. USCIS also is extending the original comment period until January 8, 2010 and will consider comments received throughout the entirety of the public comment period in development

of its final transitional worker classification rule.

Please visit *http://www.regulations.gov* to view the rule and all supporting documents.

Alejandro N. Mayorkas,

Director, U.S. Citizenship and Immigration Services.

[FR Doc. E9–29331 Filed 12–8–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 149, 160, 161, and 162

[Docket No. APHIS-2006-0093]

RIN 0579-AC04

National Veterinary Accreditation Program

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations regarding the National Veterinary Accreditation Program to establish two accreditation categories in place of the former single category, to add requirements for supplemental training and renewal of accreditation, and to offer program certifications. We are making these changes in order to support the Agency's animal health safeguarding initiatives, to involve accredited veterinarians in integrated surveillance activities, and to make the provisions governing our National Veterinary Accreditation Program more uniform and consistent. These changes will increase the level of training and skill of accredited veterinarians in the areas of disease prevention and preparedness for animal health emergencies in the United States.

EFFECTIVE DATE: February 1, 2010.

FOR FURTHER INFORMATION CONTACT: Dr. Todd Behre, National Veterinary Accreditation Program, VS, APHIS, 4700 River Road Unit 200, Riverdale, MD 20737; (301) 734-0853.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR chapter I, subchapter J (parts 160 through 162, referred to below as the regulations), govern the accreditation of veterinarians and the suspension and revocation of such accreditation. These regulations are the foundation for the National Veterinary Accreditation Program (NVAP). Accredited veterinarians are approved by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), to perform certain regulatory tasks to control and prevent the spread of animal diseases throughout the United States and internationally.

We published a proposal to amend the regulations in the **Federal Register** on June 1, 2006 (71 FR 31109-31121, Docket No. APHIS-2006-0093). We proposed to establish two accreditation categories (Category I and Category II) in place of the current single category, to add requirements for supplemental training and renewal of accreditation every 3 years, and to provide for accreditation specializations.

We solicited comments concerning our proposal for 60 days ending July 31, 2006. We received 23 comments by that date. They were from State departments of agriculture, veterinary medical associations, universities, and individual veterinarians.

In the process of considering the comments we received, we identified four changes that we believed would improve the June 2006 proposed rule. On February 27, 2007, we published a supplemental proposed rule [1] in order to take public comment on these four changes (72 FR 8634-8639). We amended the June 2006 proposal by changing the scope of Category I and Category II accreditation; requiring initial accreditation training for all veterinarians seeking accreditation; requiring newly accredited veterinarians to renew their accreditation within 3 years of the initial accreditation training; and reducing the amount of training required for renewal of accreditation.

We solicited comments concerning the supplemental proposal for 60 days ending April 30, 2007. We received 15 comments by that date. They were from a State department of agriculture, a veterinary medical association, and individual veterinarians.

The comments on both the June 2006 proposal and the February 2007 supplemental proposal are discussed below by topic.

General Comments

One commenter stated that safeguarding the health of animals would best be done through owner education and training, not through regulations. Another commenter stated that education of veterinarians should be performed by the Department of Education, rather than APHIS.

APHIS has been given the authority to establish the NVAP under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*). The NVAP is necessary to ensure that tasks associated with the health of livestock, such as participating in disease surveillance, issuing animal health certificates, and conducting APHIS-Veterinary Services program activities, are performed by qualified individuals. Owner education and training, while important to overall veterinary health, cannot provide assurance that qualified individuals perform such tasks.

One commenter asked us to include specific language in the regulations stating that the accreditation program will be implemented, maintained, and amended in cooperation with State animal health officials.

The regulations provide for consultation with State animal health officials in developing orientation materials and reviewing applications for accreditation. We did not propose to change those provisions; they are included in paragraphs (e)(4) and (d), respectively, of § 161.1 in this final rule. We consult with State animal health officials routinely on matters affecting the NVAP; it would be impossible to administer the program without their cooperation. We do not believe it is necessary to add a specific statement about that cooperation to the regulations.

One commenter stated that accreditation should be a national program; once a veterinarian is authorized to perform accredited duties in one State, that veterinarian should be authorized in every State in which the veterinarian is eligible to practice veterinary medicine.

Every State has a different orientation program that addresses animal disease issues unique to that State; as mentioned earlier, State animal health officials are invited to contribute to the development of this orientation program. We consider providing State-specific information in the orientation to be important to the success of the NVAP. We are making no changes in response to this comment.

One commenter recommended that we consider streamlining the process for authorizing the performance of accredited duties in a new State in a disease emergency situation, assuming the veterinarians are licensed to practice veterinary medicine in the new State.

We agree with the commenter that it is important to ensure the availability of accredited veterinarians to respond to disease emergencies. The new

[1] To view the June 2006 proposed rule, the February 2007 supplemental proposal, and the comments we received on both rules, go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0093*).

accreditation process we are developing will allow for rapid accreditation of veterinarians to perform accredited duties in new States when necessary. In addition, when veterinarians are hired on a full-time, temporary basis by APHIS or by a State to participate in disease response efforts, those veterinarians may perform accredited duties in any State without being accredited in that State, as full-time Federal and State veterinarians may perform accredited duties without being accredited under 9 CFR part 161.

Category I and Category II Accreditation

In the June 2006 proposal, we proposed to establish two categories for accreditation: Category I, which was limited in scope to companion animals and related activities, and Category II, which encompassed all animal species and accredited activities. The addition of Category I was intended to allow for the accreditation of veterinarians who can complete certificates for the international movement of companion animals, diagnose exotic animal diseases in companion animals, and perform veterinary tasks during animal disease emergencies.

We received several comments on our June 2006 proposal that asked for clarification regarding various aspects of the scope of duties that Category I and Category II accredited veterinarians would be authorized to perform, as well as comments on what tasks Category I and Category II veterinarians should be able to perform. Two commenters noted that the phrase "commonly kept as pets" in our proposed definition of *companion animals* appeared to exclude exotic animals and nontraditional pets, such as hedgehogs, falcons, or primates, that are sometimes brought to veterinarians for health certificates; it was not clear which category of veterinarians would have been authorized to perform accredited duties on such species. One commenter asked which category of accreditation would be appropriate for zoo veterinarians. Regarding the tasks Category I and Category II veterinarians would have been required to be able to perform, one commenter recommended that Category I veterinarians be able to develop flock health plans for bird flocks, a task that we had only proposed to require for Category II veterinarians.

These comments led us to reconsider the division between Category I and Category II. In the February 2007 supplemental proposal, we amended the June 2006 proposal so that Category I veterinarians would be authorized to perform accredited duties only on animals other than food and fiber animals, horses, farm-raised fish, poultry, all other livestock, birds, and zoo animals that could transmit exotic animal diseases to livestock. The listed animals are susceptible to animal diseases that can infect livestock and that are subject to APHIS control or eradication programs. Requiring that veterinarians performing accredited duties on those animals be accredited under Category II would ensure that the veterinarians have the necessary training to recognize symptoms of those diseases and the necessary knowledge and skills to take appropriate action.

The February 2007 supplemental proposal referred to the animals on which Category I veterinarians would have been able to perform accredited duties as nonregulated animals; that document proposed to add a definition of *nonregulated animals* in § 160.1 and replaced all the references to companion animals in the June 2006 proposed rule with references to nonregulated animals. Our definition of *nonregulated animals* indicated that dogs and cats were examples of nonregulated animals. The February 2007 proposal also indicated that Category II accredited veterinarians would be authorized to perform accredited duties on all animals, both regulated and nonregulated.

These changes addressed the comments on the June 2006 proposal. Hedgehogs and primates were now clearly classified as Category I animals, while falcons, being birds, were classified as Category II animals. Zoo veterinarians who work with animals that could transmit exotic animal diseases to livestock would have to be accredited under Category II; other zoo veterinarians could be accredited under Category I. A veterinarian who worked with birds would have to be accredited under Category II, and thus would have to be able to develop a flock health plan under proposed § 161.1(g)(2)(xi).

We received several comments on the changes in the February 2007 supplemental proposal. In response to these comments, we now include definitions of "Category I animals" and "Category II animals" rather than regulated animals and nonregulated animals, to avoid any confusion about the meaning of the term "regulated." We have replaced references to regulated animals and nonregulated animals with references to Category I and Category II animals, respectively, in the regulatory text.

We have also further refined the distinction between Category I and Category II animals. This final rule includes a definition of *Category II animals* that reads as follows: "Food and fiber animal species; horses; birds; farm-raised aquatic animals; all other livestock species; and zoo animals that can transmit exotic animal diseases to livestock." The definition of *Category I animals* in this final rule reads: "Any animals other than Category II animals, *e.g.*, cats and dogs."

This final rule indicates that Category I veterinarians may perform accredited duties on Category I animals, while Category II veterinarians may perform accredited duties on both Category I and Category II animals.

The comments we received on this issue in response to the supplemental proposal are addressed below.

Two commenters questioned whether *nonregulated animals* was the most appropriate term that could be used to refer to this class of animals. One commenter stated that the fact that these animals are not included in an APHIS-Veterinary Services regulatory program does not necessarily mean that the animals are "unregulated." If these animals were imported, the commenter stated they most likely had to comply with regulations in order to get into the country. If they are native, they may not be covered by an APHIS program, but they may be included in a State animal health or public health program. Using the term "nonregulated animals," this commenter stated, will result in a significant level of confusion and misunderstanding by accredited veterinarians, animal owners and producers, and USDA and State animal health officials. The commenter suggested using some other term to differentiate these animals from livestock or carefully specifying that "nonregulated" applies only to regulation by USDA and that there may be regulation on some of these species at the State level and the international level.

The second commenter stated that it will cause confusion if APHIS tells veterinarians, animal owners, and the public that APHIS is promulgating rules for nonregulated animals. The commenter also stated that defining nonregulated animals through exclusion ("other than") and the same time by inclusion ("all other livestock, birds, ...") is confusing.

We agree with these commenters. Thus, we have changed the terms we use in this final rule to *Category I animals* and *Category II animals*, as described earlier. In addition we agree with the second point made by the second commenter, which is why we have added definitions of both *Category I animals* and *Category II animals* in this final rule and defined *Category I*

animals as animals other than Category II animals.

One commenter addressed the distinction between livestock and other animals. The commenter was concerned that many animals are bred, grown, or otherwise "cultured," and thus could conceivably be considered "livestock," but are not kept for food, feed, or fiber; rather, they are used as pet, ornamental, display, or companion animals. The commenter recommended that we indicate in the regulations that Category I veterinarians would be allowed to perform accredited duties on pet, ornamental, display, or companion animals.

Another commenter noted that the supplemental proposal stated that the term "livestock" refers to all farm-raised animals. The commenter stated that many thousands of producers of various species of native and exotic hoofstock and other wildlife species do not consider themselves to be farmers and do not consider their animals to be farm-raised animals. Likewise, these animals are not considered to be zoo animals, since they are not raised in zoos or animal parks. The commenter stated that while APHIS may have an understanding that all of these animals come under the loose definition of "livestock" in the Animal Health Protection Act, the persons who would have to comply with the regulations may not have that understanding. The commenter urged that the proposed regulations be amended to clarify the definition of nonregulated animals relative to native and non-native hoofstock, other wildlife species that are housed on farms, ranches or other facilities, and zoo animals that are not housed on zoos or zoological parks.

The Animal Health Protection Act defines livestock as "all farm-raised animals." We recognize that it will be difficult to clearly define what is and is not a farm in some circumstances. In general, a typical farm is one on which food and fiber species are raised for agricultural purposes. We would not consider a canine breeding facility to be a farm, for example. By emphasizing food and fiber species, we believe the definition of *Category II animals* helps to clarify our intent.

However, it would be inappropriate to revise the definition of *Category I animals* to refer to pet, ornamental, display, or companion animals. For example, pet birds are not bred for food or fiber, but they can transmit avian diseases such as avian influenza or exotic Newcastle disease to poultry. Similarly, pot-bellied pigs are susceptible to the same diseases as farm-raised swine, such as pseudorabies. Because of this, we believe that veterinarians performing accredited duties on pet birds, and livestock species that are raised for purposes other than food or fiber, should be required to be accredited under Category II.

In response to the second commenter, wildlife species that are raised for food or fiber, such as captive cervids, are included in the definition of *Category II animals*. Similarly, zoo animals that are imported under the regulations in 9 CFR 93.404(c) pose a risk of transmitting foot-and-mouth disease or rinderpest to U.S. livestock, and in fact are only allowed to be exhibited at specific approved zoos. We believe the definition of *Category II animals* is clear on these points. We will communicate to accredited veterinarians that the definition of *Category II animals* includes non-traditional food and fiber species such as cervids.

One commenter stated that Category I veterinarians should be able to issue certificates of veterinary inspection for pet birds, rabbits, pocket pet rodents, and other "minor species."

The February 2007 supplemental proposal specifically indicated that veterinarians would need Category II accreditation to perform accredited duties on pet birds, because of the potential for avian diseases to spread from pet birds to poultry. The commenter did not give any reasons why Category I accreditation would be sufficient for performing accredited duties on pet birds. Rabbits and pocket pet rodents would both be types of animals on which a Category I accredited veterinarian could perform accredited duties. We have made no changes to the proposed regulations in response to this comment.

One commenter stated that Category I veterinarians should be able to perform accredited duties on horses. The commenter, a companion animal veterinarian, stated that she commonly writes health certificates for horses as well as dogs and cats, and draws blood samples for Coggins tests for horses. The commenter stated that she does not inspect exotic animals or food animals. The commenter further stated that horses were treated as companion animals in her veterinary school education, meaning that many other veterinarians also consider horses to be companion animals. Finally, the commenter stated, zoonotic disease potential in horses is similar to that in dogs and cats; horses are not, under most circumstances, a threat to our food supply.

It would be inappropriate to categorize horses as Category I animals in this final rule because APHIS-Veterinary Services recognizes horses as livestock and regulates their importation and interstate movement to prevent the introduction and spread of equine diseases. For example, the regulations in § 75.4 regulate the interstate movement of horses that are reactors to equine infectious anemia. In addition, the regulations in 9 CFR part 93, subpart C, set out requirements for the importation of horses, and APHIS recently undertook an emergency disease response when contagious equine metritis was found in Wisconsin. For this reason, we have determined that it is necessary for veterinarians who perform accredited duties on horses to be accredited under Category II.

One commenter, responding to the term "farm-raised fish" that was used in the definition of *nonregulated animals* in the February 2007 supplemental proposal, stated that "aquatic animals" was a more inclusive term and thus more appropriate.

We agree, and we refer to "farm-raised aquatic animals" in the definition of *Category II animals* in this final rule.

We also received some general comments about our proposal to establish two accreditation categories.

One commenter objected to the proposed accreditation categories, stating that no other country in the world has two classes of veterinarians. Another commenter, a veterinarian, stated that he only writes health certificates for cats and dogs because that is what he sees in his practice; the new accreditation category would not be necessary to indicate that he cannot do accreditation work for other species.

We have determined that the accreditation structure we proposed maximizes our resources and makes the best possible use of the time of U.S. accredited veterinarians. The establishment of categories of accreditation is related to our separate requirement that accredited veterinarians complete training for renewal of accreditation. Veterinarians who are not performing accredited duties on livestock do not need as much training in livestock disease issues as veterinarians who are. Our intent is to allow veterinarians such as the second commenter to continue participating in the NVAP while completing less training than is required to maintain Category II accreditation.

The first commenter is incorrect in stating that no other country in the world has two classes of veterinarians. For example, Canada has two classes for government accreditation.

One commenter stated that restricting the types of animals a veterinarian is

allowed to treat would be incredibly detrimental to all animals. The commenter noted that there are many veterinarians that have a mixed practice and treat both small and large animals simply because they are the only ones available to perform these services.

The new accreditation categories do not restrict the animals a veterinarian is allowed to treat. Rather, they restrict the animals on which a veterinarian can perform accredited duties, such as endorsing certificates of veterinary inspection. A veterinarian accredited under Category I will be free to perform general veterinary care for any animal.

The June 2006 proposal did not clearly state that veterinarians with Category II accreditation would be allowed to perform accredited duties on all animals, not just those for which Category II accreditation is necessary to perform accredited duties. The February 2007 supplemental proposal and this final rule have added a statement to that effect in § 161.1(b).

Four commenters requested that the accreditation categories be more specific to certain types of animals. One requested a separate accreditation category for avian species, and another requested a separate category for equines. Two commenters stated that there should be separate categories for all types of species, or at the least that there should be separate training for different species; the latter point was echoed by another commenter.

We will provide a number of training options from which veterinarians can choose in order to fulfill the training requirement for renewal of accreditation under Category II. Some training units that apply across all species—for example, general training regarding the NVAP, or training regarding foreign animal diseases—will be required training for all Category II veterinarians. However, there will be some species-specific training courses that accredited veterinarians can elect to take—for example, training on exotic avian diseases or international equine health certificates. We believe that this method of organizing the training addresses the commenters' concerns and makes establishing separate, species-specific accreditation categories unnecessary.

In the preamble to the June 2006 proposal, we stated that Category I veterinarians could be asked to participate in surveillance in livestock or poultry during an outbreak of a livestock or poultry disease, when finding enough personnel to perform adequate surveillance may become a significant issue; for example, Category I veterinarians would be capable of drawing blood for testing from poultry or livestock in the event of a disease outbreak. One commenter stated that APHIS should not assume that a veterinarian accredited under Category I is necessarily qualified to draw blood for livestock testing.

We agree with the commenter. Before allowing Category I veterinarians to participate in surveillance during a disease outbreak, we would ensure that they had adequate training to perform the tasks that we would need them to perform. We continue to believe that Category I veterinarians, in general, could serve as a valuable resource during disease outbreaks.

One commenter stated that, while APHIS clearly intends to include performing accredited duties on dogs and cats as Category I work, the full extent of what would be required of Category I veterinarians is unclear.

We are requiring that Category I veterinarians complete initial accreditation training and an initial orientation program before becoming accredited; that they be able to perform the tasks listed in § 161.1(g)(1) in the February 2007 supplemental proposal and in this final rule; that they comply with the standards for accredited veterinarian duties, listed in § 161.4 under this final rule; and that they complete three supplemental training units every 3 years for renewal of their accreditation.

Requirements and Application Processes for Accreditation

In the June 2006 proposal, we proposed to revise § 161.1 to set out requirements and application processes for initial accreditation. In the February 2007 supplemental proposal, we amended some of these requirements and moved other requirements to new paragraphs. Because we are using the organization in the February 2007 supplemental proposal in this final rule, we will refer to the paragraph citations in the February 2007 supplemental proposal in the discussion below.

The regulations at § 161.1(a)(2)(iii) have required that veterinarians seeking initial accreditation complete an orientation program approved by the Veterinarian-in-Charge for the State in which the veterinarian wishes to practice. We proposed to move this requirement to § 161.1(e)(4) and add two new topics to the list of topics the orientation program must address: Foreign animal disease awareness and animal health emergency management.

One commenter stated that core and State-modified orientation programs should be continued to ensure that State-specific regulations, requirements, and animal-related issues are adequately presented and updated for veterinary accreditation.

We agree with the commenter; we did not propose to change the orientation program, other than by adding the two topics mentioned earlier.

The June 2006 proposal contained a list of tasks that applicants for accredited status would have to be able to perform. The February 2007 supplemental proposal moved these tasks to § 161.1(g), but otherwise did not amend the June 2006 proposal. We received some comments on these tasks.

Proposed paragraph (g)(1)(i) of § 161.1 indicated that Category I veterinarians would be required to be able to perform physical examinations of individual nonregulated animals to determine whether they are free from any clinical signs suggestive of communicable disease. Paragraph (g)(2)(i) indicated that Category II veterinarians would be required to be able to perform physical examinations of individual animals and visually inspect herds or flocks for clinical signs suggestive of communicable disease.

One commenter recommended that we change "disease" to "condition," on the basis that there is some disagreement regarding whether things like mange, coccidiosis, and ringworm are diseases, although they are certainly communicable. Changing "disease" to "condition," the commenter suggested, would preclude any arguments over the matter.

Our regulations in 9 CFR chapter I commonly refer to communicable diseases of livestock or poultry. For example, the regulations in 9 CFR 71.2 provide that the Secretary of Agriculture may determine that animals are affected with any contagious, infectious, or communicable disease for which a quarantine should be established. To ensure that the regulations are consistent, we continue to refer to "disease" in this final rule.

Proposed paragraph (g)(2)(vi) indicated that Category II veterinarians would be required to be able to develop a herd or flock health plan. One commenter stated that a Category I veterinarian should be able to develop a disease control plan which addresses situations where nonregulated animal species aggregate or congregate.

We understand this comment as suggesting that Category I veterinarians should be able to develop a plan to control diseases among Category I animal species, such as a plan to control kennel cough or distemper at a dog breeding premises. The Animal Health Protection Act does not give us the authority to require Category I veterinarians to be able to address

diseases that occur in and affect only Category I animals. (A facility covered by the Animal Welfare Act would be required to provide veterinary care for the animals in the facility.) Therefore, requiring Category I veterinarians to be able to develop disease control plans for these animals would be inappropriate.

Proposed paragraph (g)(2)(xii) indicated that Category II veterinarians would be required to be able to vaccinate for USDA program diseases and accurately complete the vaccination certificate. One commenter recommended that this task be expanded to include a more general description of vaccination. Category II accredited veterinarians, the commenter stated, are not only involved in vaccinating for USDA program diseases, but they are also involved in disease control by vaccinating for the general health of livestock, equines, and poultry. Vaccinating animals appropriately and being able to certify their vaccination status can also be important for interstate and international movements.

We can only require that accredited veterinarians have the skills necessary to perform accredited veterinarian duties, which relate to diseases for which APHIS has a control or eradication program. We are making no changes in response to this comment.

Proposed paragraph (g)(2)(xiv) indicated that Category II veterinarians would be required to be able to properly perform testing for tuberculosis (*e.g.*, caudal fold test). One commenter asked whether the requirement that a Category II veterinarian be able to perform the caudal fold test would include comparative cervical testing as well.

The only veterinarians authorized to perform comparative cervical testing are Federal and State veterinary medical officers. Therefore, it is not appropriate to include comparative cervical testing in the list of tasks a Category II veterinarian must be able to perform.

We are making two changes to the list of tasks a Category II veterinarian must be able to perform in this final rule. Proposed paragraph (g)(2)(vi) indicated that Category II veterinarians would be required to be able to certify the health status of a poultry flock regarding diseases of domestic or international regulatory concern; and evaluate records pertaining to flock testing and participation in Federal and State poultry health programs and classifications. Because the definition of *Category II animals* in this final rule indicates that all birds, not just poultry, are regulated animals, we are amending this task to refer to certifying the health status of an avian flock. Ongoing Federal and State programs, however, only address poultry diseases, so we have not amended the other references to poultry in this paragraph.

In addition, proposed paragraph (g)(2)(ii) had referred to recognizing the common breeds of nonregulated animals and the common breeds of poultry and livestock; in this final rule, paragraph (g)(2)(ii) instead refers to recognizing the common breeds of Category I and Category II animals, including poultry and livestock.

We proposed to require in § 161.1(h) that an accredited veterinarian may not perform accredited duties in a State until after receiving written authorization from APHIS. In addition, we proposed to require that, if a Category I accredited veterinarian completes the necessary training requirements and becomes a Category II accredited veterinarian, the veterinarian may not perform Category II accredited duties in a State until after receiving written authorization from APHIS. One commenter was concerned that APHIS might not be able to provide this written authorization in a timely manner. Failure to do so, the commenter stated, could have a potentially significant impact on the veterinary care at a zoo or aquarium or on an individual veterinarian's ability to perform the necessary duties of the profession. The commenter strongly encouraged APHIS to employ an electronic approval process for this authorization.

It is important to note that the NVAP does not regulate general veterinary practice, but rather the performance of specific accredited duties; veterinarians who are not accredited may still provide general veterinary care to any animal.

We plan to employ an electronic approval process for providing written authorization. Under this system, accredited veterinarians with e-mail access will receive an e-mail authorizing them to perform accredited duties. The authorization process for performing accredited duties in another State will continue to require the completion of the requirements in § 161.2.

Required Training for Renewal of Accreditation

We proposed to add new requirements for renewal of accreditation. Under the June 2006 proposal, accredited veterinarians who wish to continue participating in the NVAP would have to renew their accreditation every 3 years. Accredited veterinarians who wish to renew their accreditation under Category I would have had to complete 4 supplemental training units approved by APHIS by the end of their 3-year tenure as an accredited veterinarian. Accredited veterinarians who wish to renew their accreditation under Category II would have had to complete 9 supplemental training units approved by APHIS by the end of their 3-year tenure as an accredited veterinarian.

Based on comments we received on the amount of supplemental training we were requiring, in the February 2007 supplemental proposal, we reduced the amount of training required for renewal of Category II accreditation from nine supplemental training units to six, and the amount of training required for the renewal of Category I accreditation from four units to three.

We received several comments stating that there should be no supplemental training required for accredited veterinarians. Some commenters stated that their experience provides a sufficient body of knowledge and that additional training is unnecessary.

As we stated in the June 2006 proposal, we are requiring that veterinarians complete supplemental training to renew their accreditation for several reasons. First, accredited veterinarians need to be aware of the most up-to-date information regarding foreign animal diseases and the risks associated with them. The diversity of regions from which animals and animal products are exported means that the international animal disease profile, including emerging diseases that may be relevant to accredited veterinary practice within the United States, are continually changing. The import and export requirements that are placed on the trade of animals and animal products by countries also change frequently, and any deficiencies in knowledge of these requirements on the part of accredited veterinarians could pose a risk to U.S. animal health. The fast pace of change in these areas can mean that the personal experience of accredited veterinarians may not provide enough knowledge to allow them to best contribute to APHIS efforts to deal with emerging issues.

Other commenters stated that the additional training we provide would simply review the regulations for the interstate or international movement of animals whose requirements accredited veterinarians satisfy, and that such information could be provided without having to administer supplemental training. One commenter stated that licensed veterinarians are already familiar with their State's laws governing the performance of veterinary tasks, whether in an emergency or not.

The idea that the supplemental training would focus only on regulatory requirements is incorrect. For example,

the training provided for renewal of accreditation will include units on "Foreign Animal Diseases, Program Diseases, and Reportable Diseases"; "Preventing Disease Introduction and Spread"; and "Disease Eradication and Lab Diagnosis." Accredited veterinarians would not be able to learn everything they need to know about these topics by simply reading Federal, State, and foreign animal disease laws and regulations.

Several commenters (mostly veterinarians themselves) stated that any increase in the amount of work required to be an accredited veterinarian will encourage veterinarians to give up their accreditation; some of these commenters suggested that, given predicted shortages in large-animal veterinarians in general, this could prove detrimental to animal health. One of these commenters indicated that there was not enough money in performing accredited duties to justify continuing to do so with the supplemental training requirement in place.

For the reasons stated earlier, we believe it is crucial to the NVAP to ensure that our accredited veterinarians have up-to-date disease control and prevention education. Such training ensures that our accredited veterinarians serve as an effective disease control force in the United States and that certificates signed by them are accepted by our trading partners. The February 2007 supplemental proposal did reduce the amount of supplemental training required for renewal of accreditation, thus making it easier for currently accredited veterinarians to continue to participate. With regard to a possible shortage of accredited veterinarians, we believe that as long as there is a market for services for which accreditation is required, an adequate number of veterinarians will maintain accreditation in order to provide those services.

Two commenters stated that APHIS should offer the supplemental training on a voluntary basis only.

As we noted in the June 2006 proposal, duties performed by accredited veterinarians in the United States are typically performed by government-employed veterinarians in other countries. Some U.S. trading partners have expressed concern regarding the fact that our veterinary accreditation program does not require supplemental training. Requiring training is necessary to increase the rigor of the program and thus address this concern.

Another commenter stated that if there must be a renewal period, it should be much longer than 3 years.

As noted earlier, the international animal disease profile, including emerging diseases that may be relevant to accredited veterinary practice within the United States, is continually changing, and the import and export requirements that are placed on the trade of animals and animal products by countries also change frequently. We believe 3 years is an appropriate interval that balances the need for up-to-date training for accredited veterinarians with other demands on their time.

One commenter asked whether the Government requires medical doctors to be tested routinely on their knowledge of infectious or communicable diseases.

We are not aware of any Federal Government programs that require testing for knowledge of infectious or communicable diseases, although State medical boards often test medical doctors. To address the commenter's implied concern, there is no testing requirement associated with the supplemental training. APHIS is requiring that veterinarians complete the supplemental training, but we will not test them on it.

One commenter stated that the supplemental training should address animal welfare issues.

Animal welfare issues are handled within APHIS by our Animal Care program. Consistent with the statutory authority under which it is established, the NVAP focuses on animal disease issues.

We received several comments that mentioned State continuing education requirements in the context of the supplemental training requirement. Three commenters stated that 3 supplemental training units every 3 years would be sufficient to ensure that Category II accredited veterinarians are adequately informed on animal disease issues. One of these commenters stated that the six-unit requirement in the February 2007 supplemental proposal was excessive when compared to continuing education requirements in the commenter's State. Six units every 3 years represented more than 10 percent of that State's total continuing education requirement; this commenter stated that most veterinarians spend less than 10 percent of their time doing accreditation work, meaning that the supplemental training requirement should be reduced.

One commenter stated that the supplemental training requirement was unnecessary due to the State continuing education requirements that are already in place.

Two commenters suggested that APHIS require that State veterinary licensing authorities accept the supplemental training units to fulfill the States' requirements. Another commenter stated that the commenter would support the supplemental training requirement if the training was not in addition to the training already required for the commenter's State license renewal.

Given the diversity of topics on which accredited veterinarians must be informed in order to perform their duties effectively, we believe that it is necessary to require six units of supplemental training for the renewal of Category II accreditation. Since each unit of training is expected to take 1 hour to complete, this requirement works out to 2 hours per year of supplemental training. We do not believe this requirement is excessive.

We could accept State-required continuing education towards the supplemental training requirement if the State courses addressed topics relevant to the NVAP. We would have to review the State content and approve it to be used to fulfill the supplemental training requirement. States that believe their content can be used in such a way are welcome to discuss it with us.

In order to reduce the training burden on accredited veterinarians and encourage their participation in the NVAP, we are working with State veterinary licensing authorities to have our supplemental training accepted as fulfilling their continuing education requirements. Iowa's veterinary licensing authority has already indicated that it will do so. We expect that we will be able to secure approval for use of the supplemental training to fulfill continuing education requirements in other States as well. However, we have no authority to require that States accept our supplemental training.

Costs and Logistics of Supplemental Training

In the June 2006 proposal, we stated that the majority of the supplemental training units would be delivered through the World Wide Web and that we would also make the training available by mail for those who lack Internet access. In the section of the proposal headed "Executive Order 12866 and Regulatory Flexibility Act," we further stated that the Web-based training would be provided at no cost to accredited veterinarians.

We received several comments on the cost and logistics of supplemental training. One asked how much the training, tests, and accreditation

certificate would cost. Six commenters stated that training should be provided at no charge. Another noted that additional training requirements may create an economic hardship for some veterinarians. One commenter noted that the June 2006 proposal did not address the cost of non-Web-based training and stated that many veterinarians in rural practice do not have computer access and could not participate in Web-based training.

We will make the supplemental training available through the Web at no charge. For veterinarians without Internet access, we will make the training available in other media (*e.g.*, CD-ROM or paper) at a minimal cost to cover the costs of production and of any necessary shipping and handling. There are no tests associated with the supplemental training. The accreditation certificate will continue to be provided at no cost.

One commenter stated that APHIS should pay veterinarians to complete the supplemental training.

We do not believe this would be an appropriate use of APHIS' resources.

One commenter suspected that the new regulations would be followed in a couple of years with a user fee, which the commenter opposed.

We have no plans to establish a user fee for the supplemental training. It is in our interest to encourage widespread participation in the supplemental training, which is why we are making the training available free through the Web or at minimal cost through other media.

One commenter stated that Web-based training is subject to problems like technical difficulties, lack of resources to keep up the training sites, and lack of technical staff to provide assistance. Another commenter asked us to make sure that technical support would be available.

We agree with these commenters. We are using a modern Web-based training interface through AgLearn ((*http://www.aglearn.usda.gov*)), and we are working to provide the best possible support for it.

One commenter suggested that we provide the training as a course at regional or State veterinary continuing education meetings as well as through the Web. Another commenter agreed and added national, regional, and State annual meetings of veterinary medical associations as possible venues.

We agree with the commenters. We are planning to offer the training through these venues as well.

One commenter was concerned that the training requirements may create extra work in surveillance and monitoring that will not be compensated. The commenter stated that APHIS does not pay accredited veterinarians enough for the services they render.

When APHIS pays accredited veterinarians for performing their duties, the individual disease control programs decide how much to pay. The veterinary accreditation program exists simply to provide a structure and requirements for the accreditation of veterinarians and to keep track of which veterinarians are accredited. The training requirements themselves will not create any surveillance or monitoring work for accredited veterinarians.

One commenter stated that the renewal process should involve minimal paperwork and logistics that might deter veterinarians from participation in the program. Another commenter was concerned that APHIS may not have the financial and human resources to review and renew licenses and to develop and administer supplemental training units to veterinarians every 3 years.

We agree with the first commenter. We anticipate that the new NVAP Web site, plus the associated database of accredited veterinarians, will centralize access to information and training for accredited veterinarians, reducing the amount of time necessary to fill out paperwork. We also expect that the Web site and the database of accredited veterinarians will help us to provide timely service to our customers.

One commenter suggested that we grant eligibility for developing supplemental training units to industry organizations. Another suggested that we grant the same eligibility to State animal health authorities.

If industry organizations or State animal health authorities are willing to work with us to develop training that addresses NVAP issues, we would welcome and support their efforts. Final approval of the training would rest with APHIS. We are already working with Iowa State University to develop the training that will be initially offered to accredited veterinarians.

One commenter stated that, even with the 3-year renewal period, a veterinarian could lack appropriate knowledge of emerging diseases. The commenter suggested that APHIS develop a method for rapid information dissemination to accredited veterinarians regarding emerging diseases or disease outbreaks.

We agree. The updated contact information in the database of accredited veterinarians and our Web site will allow us to communicate information to accredited veterinarians rapidly when we need to.

One commenter, the Association of Zoos and Aquariums, asked for information regarding waivers from the supplemental training requirements for institutions accredited by that association.

Accreditation by the Association of Zoos and Aquariums does not address all the issues that arise in the performance of NVAP accredited duties. Therefore, we would not provide waivers for institutions accredited by that association. The same would apply to other such industry organizations.

One commenter asked whether the cost of supplemental training units or training for accreditation specializations would be tax deductible.

The supplemental training will be provided free of charge through the Web. We recommend that veterinarians consult with their tax preparers regarding whether costs associated with training are tax deductible.

One commenter asked whether accredited veterinarians would be compensated by APHIS for work performed during a disease emergency.

APHIS compensates accredited veterinarians for any work they perform on behalf of the agency.

One commenter asked what topics would be addressed in the training.

Some of the topics have been mentioned earlier in this document. In general, the topics are a mix of general disease control and prevention topics and species-specific information. Some other topics addressed in the training modules include: "Vesicular Diseases," "Small Ruminant Health Certificates and Scrapie," and "Federal Animal Health Laws." A complete list of topics is available on the NVAP Web site at (*http://www.aphis.usda.gov/animal_health/vet_accreditation/*).

One commenter asked how long each supplemental training unit will take to complete.

Each supplemental training unit will take approximately 1 hour to complete.

One commenter asked how effective online veterinary training programs are.

APHIS has experience delivering Web-based training through the AgLearn site at (*http://www.aglearn.usda.gov*). We have found it to be effective.

Notification and Procedures for Renewal

We received several comments regarding the process APHIS will use to notify accredited veterinarians that they need to renew their accreditation and regarding the procedures for renewal.

In the June 2006 proposed rule, proposed paragraph (d) of § 161.3 outlined the process we would use to

notify accredited veterinarians that they need to renew their accreditation. We stated in the Background section of the proposed rule that APHIS would contact currently accredited veterinarians, by postal mail, fax, or e-mail, to notify them that they must elect to participate in the NVAP as Category I or Category II veterinarians. Veterinarians would not be required to complete any additional training to continue their participation in the NVAP, but they would be required to notify APHIS that they elect to participate within 3 months of this notification; otherwise, their accreditation would expire. After APHIS received notice from a currently accredited veterinarian that he or she elects to continue to participate in the program as a Category I or Category II veterinarian, APHIS would notify the veterinarian of his or her initial renewal date. The accredited veterinarian would then have to complete all the training requirements for renewal by the initial renewal date.

One commenter stated that procedures should be implemented to ensure and verify that all currently accredited veterinarians have been contacted with the information necessary for their continuation of accreditation activities and that they have responded to APHIS. The elimination of veterinarians from the list of accredited veterinarians without verification that they have been contacted and made aware of the changes, the commenter stated, could create problems if an individual not aware of the changes in the regulations continues to issue health certificates.

Since the publication of the June 2006 proposed rule, we have developed a new plan for ensuring that accredited veterinarians are aware of the need to elect to continue to participate in the accreditation program. We no longer anticipate that we will contact veterinarians individually. Instead, we plan to publish announcements of the new accreditation regulations and veterinarians' resultant obligations in veterinary list serves, veterinary medical association newsletters, State regulatory organization publications, and industry publications. These media all have high visibility in the veterinary medicine community and are effective ways to reach the highest number of accredited veterinarians possible. We will also announce the new renewal requirements at State veterinary medical association meetings. These announcements will include a link to the NVAP Web site, which will contain information about the new regulations, along with a phone number and an address to contact for more information. We will provide notice of the new requirements through these methods for 3 months. After the 3-month notification period, accredited veterinarians will have 3 months to elect to continue to participate in the veterinary accreditation program, the same as the response period we described in the June 2006 proposed rule.

Although contacting each accredited veterinarian individually, as we discussed in the June 2006 proposal, would provide the highest level of assurance that all accredited veterinarians are aware of the new renewal requirements, logistical and cost issues make such individual contact unrealistic. In part due to the previous lack of renewal requirements for veterinary accreditation, APHIS does not have current contact information for many accredited veterinarians; in order to obtain such contact information, we would have to place announcements in the same media as we are planning to use to notify veterinarians of the new requirements. Placing announcements of the new requirements in high-visibility media like those listed earlier will also be more cost-effective than sending individual notifications to approximately 66,000 accredited veterinarians. Therefore, we are no longer planning to contact accredited veterinarians individually. Accordingly, we have changed proposed paragraph (d), which stated that APHIS would contact currently accredited veterinarians to notify them that they must elect to participate in the NVAP as a Category I or Category II veterinarian, to state that APHIS will provide notice for 3 months to currently accredited veterinarians that they must elect to continue to participate in NVAP.

In response to the commenter's concern, we recognize that despite the duration and magnitude of the multimedia notifications that we have planned, there may be some accredited veterinarians who fail to receive notice of their obligations to renew their accreditation in order to continue to participate in the accreditation program. As the 3-month response period nears its end, Veterinary Services will notify veterinarians who routinely perform accredited veterinarian duties and have not yet elected to continue participating as accredited veterinarians, to ensure that such veterinarians do not inadvertently let their accreditation lapse. However, for the reasons discussed above, we will not be able to notify those accredited veterinarians who rarely or never perform accredited duties.

Two commenters stated that APHIS should notify veterinarians before the deadline for renewal even after the initial accreditation.

We agree with these commenters. Once accredited veterinarians have completed an initial renewal, we will be able to send out notifications to all veterinarians well before their deadline for renewal, reminding them of the supplemental training requirements they must fulfill. Veterinarians will also be able to access their profile on a Web site to review their renewal and training status, as well as their address and other aspects of their profile.

Proposed paragraph § 161.3(a) stated that accredited veterinarians who wish to continue participating in the NVAP must submit their renewal forms to APHIS. One commenter recommended that renewal forms be submitted in duplicate to both APHIS and the Area Veterinarians-in-Charge (AVICs) of the States in which the veterinarian is accredited, or that a mechanism be established to notify the AVICs in question immediately. Two other commenters suggested that we require that the form be sent to the AVICs and forwarded to APHIS.

If we required veterinarians who are accredited in multiple States to send their renewal forms to the AVICs of each of the States in which they are accredited, the veterinarians would have to send multiple copies of forms containing the same information to different addresses. We would like to minimize such paperwork burdens. Instead, we are requiring that the forms be sent to APHIS.

The database containing the accredited veterinarians will be updated immediately when an accredited veterinarian completes his or her renewal. In this way, instant notice of the renewal would be provided to the AVICs, since they would have access to the database. We are planning to send electronic notifications to the AVICs as well.

We are making a related change in this final rule to require veterinarians who wish to become accredited to submit their applications for initial accreditation and applications for changes in accreditation category to APHIS, rather than to the AVIC. This will reduce confusion by providing one common point of contact for veterinary accreditation.

One commenter recommended that APHIS maintain and publish a single, accurate, and up-to-date list of accredited veterinarians by accreditation category.

The new database of accredited veterinarians will allow AVICs and State animal health officials to access this information. We would not publish

a veterinarian's name for the general public, however, unless the veterinarian gave us permission to release it.

We are making a few changes in this final rule to the renewal requirements in the February 2007 supplemental proposal. In that document, we proposed to require that newly accredited veterinarians renew their accreditation within 3 years of completing the initial accreditation training in proposed § 161.1(e)(3), regardless of when their accreditation is granted. This training is typically given by veterinary schools at some point during the veterinarians' course of study; our proposed requirement was intended to ensure that veterinarians had up-to-date training based on the last training they had received. However, the NVAP presently does not have a means to track when veterinarians complete the initial accreditation training. In addition, we believe that dating the renewal period from the completion of the core orientation program described in § 161.1(e)(4) is more appropriate and would place less of a burden on accredited veterinarians, since the core orientation program covers topics essential to accreditation and is typically given after the initial accreditation training. Therefore, this final rule requires newly accredited veterinarians to renew their accreditation 3 years after completion of the core orientation program in § 161.1(e)(4). In addition, under § 161.1(e)(4), this final rule requires applicants for accreditation to apply within 3 years of completing core orientation.

Proposed paragraph § 161.3(d) set out the conditions under which veterinarians who are accredited as of the effective date of this final rule would renew their accreditation. This paragraph referred both to these veterinarians' "first renewal" and their "initial renewal." We are amending the paragraph to refer only to the veterinarians' "first renewal" to avoid ambiguity. Additionally, the last sentence of this proposed paragraph indicated that, after their first renewal, veterinarians accredited as of the effective date of this final rule would be required to renew their accreditation in accordance with the provisions of § 161.3. We have removed this sentence from this final rule, as we believe it is self-evident.

Program Certifications (Accreditation Specializations)

We proposed to add a new § 161.5 to the regulations setting out the conditions under which accredited veterinarians could earn accreditation specializations. Certain APHIS disease programs have additional training requirements that accredited veterinarians must fulfill in order to perform certain activities, because performing these activities requires specialized technical knowledge. These training programs have been known as accreditation specialization programs.

We are making one change to proposed § 161.5 in this final rule. In the June 2006 proposal, we introduced the term "accreditation specializations." We have since decided that this term could create confusion given the common meaning of the term "specialization" in veterinary medicine. In veterinary medicine, "specialization" refers to a discipline such as oncology or thoracic surgery in which a veterinarian has completed extensive training over a period of years and achieved a board certification. We believe the term "program certification" refers more directly to what the training will allow a veterinarian to do — participate in program-specific Veterinary Services activities — and will be less likely to cause confusion. Therefore, in the regulatory text in § 161.5, we have replaced all references to "accreditation specializations" with references to "program certifications" in this final rule.

Currently, APHIS is developing program certifications for testing in the tuberculosis program for cervidae and in the scrapie program for ovines.

In a final rule published in the **Federal Register** on October 10, 2008 (73 FR 60463-60488, Docket No. APHIS-2006-0089), and effective on November 10, 2008, we established a voluntary swine herd certification program for trichinae. To accommodate this program, we added a new § 161.5 to the regulations that provides for accreditation specializations. This final rule revises § 161.5 as it was established in the October 2008 final rule to refer to program certifications and to add provisions from the June 2006 proposed rule, such as requiring Category II accreditation in order to earn a program certification, that are not currently included in § 161.5.

In addition, the October 2008 final rule added a definition of *qualified accredited veterinarian* to § 160.1 that refers to accreditation specializations. The regulations in 9 CFR part 149, which was established by the October 2008 final rule, also contain references to accreditation specializations. This final rule updates those references to refer instead to program certifications.

One commenter stated that future program certification requirements should only be made after consulting with industry and State animal health officials to prevent the process from imposing undue costs on accredited veterinarians.

In all cases, Veterinary Services will work with affected industries and States to ensure that the program certifications we establish are useful and rigorous. Specific decisions about the structure and content of program certifications will be made by the programs that establish them.

One commenter recommended that we develop a program certification for aquaculture.

The aquaculture program in Veterinary Services presently plans to develop a program certification. It is important to note that the decision to develop an accreditation specialization is made by the specific program for which the specialization will be used, and not by the NVAP. The NVAP will document which accredited veterinarians have earned program certifications and, if renewal requirements exist, when renewal is due.

We are making one other change related to program certifications in this final rule. In the June 2006 proposed rule, paragraph (a) of § 161.7 would have required full-time Federal (including military) and State employed veterinarians to qualify under § 161.5 in order to perform duties for which a program certification is required. However, these veterinarians are not required to be accredited in order to perform duties under subchapters B, C, and D of 9 CFR chapter I, and veterinarians are required to be accredited under Category II in order to earn a program certification. In addition, the authorization of any full-time Federal (including military) and State employed veterinarian to perform duties under the regulations is contingent on delegation of authority by the Administrator or cooperative agreements; APHIS would not delegate authority to perform duties that would otherwise require a program certification unless the full-time Federal (including military) and State employed veterinarian had the appropriate training. Accordingly, this final rule does not include that proposed requirement.

In a related matter, proposed paragraph (a) of § 161.7 in the June 2006 proposed rule referred to authorization for full-time Federal (including military) and State employed veterinarians to perform Category II accredited duties. This paragraph was based on a footnote to the definition of *accredited veterinarian* in § 160.1; the footnote referred to authorization to perform

functions specified in subchapters B, C, and D of 9 CFR chapter I. As full-time Federal (including military) and State employed veterinarians are not accredited, it is inappropriate to refer to "Category II accredited duties" in this context. Therefore, we are amending proposed paragraph (a) of § 161.7 in this final rule to refer instead to functions specified in subchapters B, C, and D of 9 CFR chapter I.

Suspension and Revocation of Veterinary Accreditation

The regulations in § 161.4 have provided for the suspension or revocation of veterinary accreditation as well as civil and criminal penalties. We proposed to move these requirements to § 161.6, add relevant requirements from § 161.2, and update the requirements to make them clearer and to enhance the integrity of the NVAP.

One commenter stated that it is unclear whether a veterinarian who has requested a hearing to challenge a suspension, revocation, or denial of accreditation may perform accredited duties while waiting for the hearing. The commenter stated that common sense would indicate such duties could not be performed if accreditation was denied, but in the case of veterinarians under suspension or revocation, it could be argued that the duties could continue to be performed until accreditation is removed after the hearing.

The regulations in 9 CFR part 162 set out the rules of practice governing revocation or suspension of veterinarian' accreditation. Section 162.10 sets out conditions for summary suspension of veterinary accreditation, including the circumstances in which the Administrator may determine that it is necessary to summarily suspend a veterinarian's accreditation. The summary suspension regulations may apply pending the final outcome of a proceeding either to suspend or revoke accreditation. Once an accredited veterinarian's accreditation has been summarily suspended, that veterinarian may not perform accredited duties until a final determination of his or her status has been made.

In response to the comment, this final rule amends § 162.10 to make it clear that summary suspension may be appropriate in cases that may ultimately lead to either suspension or revocation.

We are making an additional changes to the regulations in § 162.10 in this final rule. These regulations have provided that the Administrator may summarily suspend accreditation in any situation where the Administrator has reason to believe that any veterinarian accredited under the provisions of parts 160 and 161 of this subchapter has not complied with the "Standards for Accredited Veterinarian Duties," and the Administrator determines that summary suspension is necessary to prevent the introduction of certain diseases or to ensure that exports to foreign countries were free from disease. This language predates the enactment of the Animal Health Protection Act (AHPA). The AHPA allows summary suspension of accreditation whenever the Secretary of Agriculture has reason to believe that a veterinarian has knowingly violated the AHPA. (Because the NVAP regulations are promulgated under the AHPA, any violation of the "Standards for Accredited Veterinarian Duties" is necessarily a violation of the Act.) Therefore, to be consistent with our statutory authority, we are amending § 162.10 to refer to violation of the AHPA as a reason for summary suspension.

In the June 2006 proposal, we proposed to modify § 162.10 to include the need to maintain the integrity of the NVAP as one of the circumstances the Administrator may consider in determining whether to summarily suspend a veterinarian's accreditation. We received no comments on this aspect of the proposal. However, we have determined that it is not necessary to add such a provision to the summary suspension regulations, as any breach of the integrity of the NVAP would also necessarily be a violation of the NVAP regulations promulgated under the AHPA. Accordingly, this final rule does not include the integrity of the NVAP as a reason for summary suspension.

Veterinarians whose application for accreditation is denied are covered by § 161.7(b) in this final rule, which states that, except for full-time Federal and State employed veterinarians, anyone who performs accredited veterinarian duties that he or she is not authorized to perform will be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) or other applicable Federal statutes or regulations. Paragraph (b) of § 161.7 also states that performing accredited duties without having been accredited will be considered grounds for the Administrator to deny an application for accreditation.

One commenter stated that public complaints lodged against an accredited veterinarian in the performance of accredited duties should be considered when determining whether to reaccredit the veterinarian. However, the commenter stated, in order to do so there must be a process by which such complaints can be lodged, and there is currently no clear point of contact for a member of the public who may have a legitimate complaint against an accredited veterinarian regarding an improperly issued health certificate. The commenter recommended that we address this issue in the regulations, including the process by which such complaints would be investigated.

Veterinary Services area offices are the points of contact for members of the public who wish to lodge a complaint about an accredited veterinarian's performance of accredited duties. Contact information for Veterinary Services area offices can be found on the Veterinary Services Web site at (*http://www.aphis.usda.gov/animal_health/area_offices/*). Paragraph (c)(2)(iii) of § 161.6 provides that the NVAP will consider the professional integrity and reputation of applicants for reaccreditation when determining whether to reaccredit such veterinarians.

Activities Performed by Non-Accredited Veterinarians

We proposed to add a new § 161.7 to describe the accredited duties that may be performed by veterinarians who are not federally accredited. Full-time Federal (including military) and State employed veterinarians would be authorized to perform Category II accredited duties, pursuant to delegation of authority by the Administrator or cooperative agreements, without specific accreditation under the provisions of the regulations. The proposed rule further stated that, except for full-time Federal (including military) and State employed veterinarians, veterinarians who are not federally accredited and who attempt to perform accredited duties would be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act or other applicable Federal statutes or regulations.

One commenter stated that the authorization granted to Federal and State full-time veterinarians should be granted to veterinarians employed by tribal governments as well, if the tribal veterinarians are acting in the same function for their tribal government that Federal and State employed Veterinarians are providing. The commenter stated that tribal veterinarians are even more aware of current regulatory requirements for interstate movement and export of animals because of the nation-to-nation agreements necessary to allow such movement from tribal lands.

We appreciate the commenter's suggestion. However, there would be

several obstacles to allowing veterinarians employed by tribes to perform accredited duties without being formally accredited. Much of accreditation work involves certifying an animal for entry into interstate or international commerce. State and country laws and regulations are typically set up to recognize the State or country of origin for an animal in commerce. States or countries may not be able to recognize accredited work performed on a reservation, which is considered to be a nation, for animal health movement purposes.

In addition, Federal and State employed veterinarians who are exempt from accreditation requirements function within a hierarchical structure that provides them with training and with continual updates regarding regulatory changes and animal health-related events. The regulatory work performed by these individuals is reviewed by a supervisory chain of command for accuracy and comprehensiveness. A veterinarian who is exempt from accreditation requirements but allowed to perform accredited duties on a reservation would not have an analogous animal health infrastructure to provide necessary updates or evaluate performance. Therefore, we are making no changes to the proposed regulations in response to this comment.

Noting that the proposed rule would have prohibited the performance of accredited duties by "veterinarians who are not federally accredited," two commenters recommended that this section address the problem of people who are not veterinarians who perform accredited duties, such as when non-veterinarians issue fraudulent health certificates. One of these commenters also recommended that we address the problem of an accredited veterinarian performing duties that he or she is not authorized to perform.

We agree that these situations need to be addressed. In this final rule, we are changing the proposed language to state: "Anyone who performs accredited veterinarian duties that he or she is not authorized to perform will be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) or other applicable Federal statutes or regulations." This statement indicates that both non-veterinarians who perform accredited duties and accredited veterinarians who perform duties that they are not authorized to perform (for example, an accredited veterinarian performing program certification work for which he or she is not authorized) will be subject to criminal and civil penalties.

Customer Service

We received five comments addressing various aspects of the NVAP's customer service. These comments are not related to the provisions in the June 2006 proposal or the February 2007 supplemental proposal, and we are making no changes in this final rule based on them. We address these comments below.

Four commenters asked us to make information more readily available to accredited veterinarians through the Web and to make our Web site easier to navigate. They requested that the relevant State and foreign regulations for animal movement be posted on a Web site, and that this information be separated from information about training. They also requested that we explore the use of electronic templates for certificates of veterinary inspection, encourage the use of eHealth certificates, and format the official certificates to fit printers.

We agree with these commenters, and we are working to develop such resources. We plan to provide links to State and foreign regulations for animal movement on the NVAP Web page. We are developing an electronic certificate of veterinary inspection (also referred to as the eCVI), which will provide many benefits to users. We encourage additional feedback on the NVAP Web site, as we are continually looking for ways to better serve accredited veterinarians with Web resources.

Three commenters were concerned about the assistance that APHIS area offices provide to accredited veterinarians. One asked us generally to be more customer-friendly and supportive of veterinarians in the field. Another commenter cited a frustrating experience when attempting to process a certificate of veterinary inspection. One commenter requested that we provide not more than 24-hour turnaround time for documents such as endorsements of certificates of veterinary inspection, and that we respond to telephone or e-mail inquiries in less than 24 hours. This commenter also requested that we provide 24-hour-a-day, 7-day-a-week contact information so that accredited veterinarians can get information at night or on weekends.

We appreciate these commenters' concerns. Our area offices always strive to provide the highest possible level of customer service to accredited veterinarians and to respond promptly to requests for services and information. Planned upgrades to our information technology systems may address some of these concerns. For example, the eCVI will facilitate the completion and endorsement of inspection certificates. Additionally, the NVAP Web site will feature responses to frequently asked questions as well as resources for topics of interest.

We always respond to requests for information as quickly as we are able to do so. At this time, we do not have the resources to provide continuous access to APHIS employees that was requested by one commenter. We will continue to pursue means by which to make information easily and promptly available to accredited veterinarians.

Miscellaneous Changes

We are making three miscellaneous changes in this final rule.

The definition of *herd or flock health plan* in the June 2006 proposal stated that participants in such a plan undertake actions to "control a disease or diseases." However, a herd or flock health plan may be necessary for a herd or flock in which a disease has recently been eradicated, meaning that the goal of the plan would be to prevent the disease from recurring. We have amended this definition to refer instead to maintaining the health of the animals and detecting signs of communicable disease.

The current regulations in § 161.2(a)(2)(iii), which describe the State-specific orientation program that a veterinarian must complete prior to accreditation, refer to the veterinarian completing an orientation program approved by the Veterinarian-in-Charge for the State in which the veterinarian wishes to practice. As discussed earlier in this document, a non-accredited veterinarian may practice normal veterinary medicine on any animal; accreditation allows a veterinarian to perform specific, disease control-related accredited tasks. To ensure clarity, we are replacing the word "practice" with the words "perform accredited duties" as part of moving this paragraph to § 161.1(e)(4) in this final rule.

The February 2007 supplemental proposal removed references to specific form titles and numbers in the parts of the June 2006 proposal that the supplemental proposal amended. We removed those references because we do not believe it is necessary to refer to specific forms in the regulations, and doing so may impede efforts to simplify the application and renewal processes in the future. This final rule removes the remaining references to specific form titles and numbers that appeared in the June 2006 proposal.

Therefore, for the reasons given in the proposed rule and in this document, we

are adopting the proposed rule as a final rule, with the changes discussed in this document.

Effective Date

In order to give all involved parties time to prepare for the new requirements for renewal of accreditation, we are making this final rule effective on February 1, 2010.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Authority for the Secretary of Agriculture to create a veterinary accreditation program is provided in the Animal Health Protection Act (7 U.S.C. 8309). Participation by private veterinarians in the NVAP is voluntary. However, accredited veterinarians participating in the NVAP must carry out their duties in compliance with the regulations in 9 CFR part 161 and in compliance with all other regulations issued under the Animal Health Protection Act.

This final rule will establish two accreditation categories (Category I and Category II) in place of the current single category, add requirements for supplemental training and renewal of accreditation every 3 years, and provide for program certifications.

Category I accreditation will require the completion of 3 supplemental training units every 3 years in order to renew accreditation and will allow the veterinarians who choose it to perform accredited duties only for Category I animals, as that term is defined in § 160.1 of the regulations. Category II accreditation, however, will require the completion of 6 supplemental training units every 3 years in order to renew accreditation; veterinarians who select it will be able to perform the full spectrum of accredited duties that do not require a program certification. For both categories, the majority of the supplemental training will be delivered through the World Wide Web, with no charge to the participating veterinarians. The Internet-based training will eliminate the need for additional costs for travel and accommodations for the veterinarians taking the training. We will provide the training in other media (*e.g.*, CD-ROM or paper) at minimal cost, and we will provide the training in a classroom setting at meetings of veterinary associations. Thus, there will be, at the most, minimal additional costs associated with the new aspects of the NVAP apart from the time spent taking the training. Each supplemental training unit will take approximately 1 hour to complete.

The program certification component that APHIS will add to the NVAP could involve some cost to the accredited veterinarians who choose to voluntarily participate in these program certifications.

The primary cost of changes to the program will be the new training requirements, and these costs will be borne primarily by APHIS. If an accredited veterinarian wants to be qualified in a program certification, some costs may be borne by the accredited veterinarian.

Impact on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic effects of their rules on small entities. According to the Small Business Administration's (SBA's) Office of Advocacy, regulations create economic disparities based on size when they have a significant economic impact on a substantial number of small entities.

This action changes a continuing program. Entities that will be affected as a result of the proposed changes in the regulations will be the participating veterinarians who enter into the new NVAP program. Under the North American Industrial Classification System (NAICS), Veterinary Services (NAICS 541940) is included under the Professional, Scientific and Technical Services subsector.

The veterinary services industry comprises establishments of licensed veterinary practitioners primarily engaged in the practice of veterinary medicine, dentistry, or surgery for animals (*i.e.*, animal hospitals, veterinary clinics, and veterinarians' offices); and establishments primarily engaged in providing testing services for licensed veterinary practitioners (*i.e.*, veterinary testing laboratories). Veterinary services entities that have less than $5 million in annual revenues are considered small according to the SBA's standards.

The number of U.S. veterinary establishments was reported to be 27,247 in 2005; they employed 269,724 people with an annual payroll of $7.34 billion (2005 County Business Patterns, NAICS, U.S. Census Bureau).

We do not know how many of these establishments are considered small entities under the SBA's standards. However, the changes in this final rule are not expected to have any significant economic effect on any of these 27,247 establishments whether they are small or large, since the vast majority of program costs will be borne by the Agency.

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) Has no retroactive effect; and (2) 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 0579-0297.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

List of Subjects

9 CFR Part 149

Animal diseases, Hogs, Laboratories, Meat and meat products, Meat inspection, Reporting and recordkeeping requirements.

9 CFR Part 160

Veterinarians.

9 CFR Part 161

Reporting and recordkeeping requirements, Veterinarians.

9 CFR Part 162

Administrative practice and procedure, Veterinarians.

■ Accordingly, we are amending 9 CFR parts 149, 160, 161, and 162 as follows:

PART 149—VOLUNTARY TRICHINAE CERTIFICATION PROGRAM

■ 1. The authority citation for part 149 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301-8317; 21 U.S.C. 136a; 7 CFR 2.22, 2.80, and 371.4.

§ 149.1 [Amended]

■ 2. Section 149.1 is amended as follows:

■ a. In the definition of *qualified accredited veterinarian (QAV)*, by removing the words "an accreditation specialization" and adding the words "a program certification" in their place.

■ b. In footnote 2, by removing the word "specializations" and adding the words "program certification" in its place.

PART 160—DEFINITION OF TERMS

■ 3. The authority citation for part 160 continues to read as follows:

Authority: 7 U.S.C. 8301-8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

■ 4. Section 160.1 is amended as follows:

■ a. In the definition of *accredited veterinarian*, by removing footnote 1.

■ b. By adding definitions of *Category I animals*, *Category II animals*, and *herd or flock health plan* in alphabetical order, to read as set forth below.

■ c. In the definition of *qualified accredited veterinarian (QAV)*, by removing the words "an accreditation specialization" and adding the words "a program certification" in their place.

§ 160.1 Definitions.

* * * * *

Category I animals. Any animals other than Category II animals, *e.g.*, cats and dogs.

Category II animals. Food and fiber animal species; horses; birds; farm-raised aquatic animals; all other livestock species; and zoo animals that can transmit exotic animal diseases to livestock.

* * * * *

Herd or flock health plan. A written herd or flock health management plan, which may include an agreement signed by the owner of a herd or flock, the accredited veterinarian, and a State or APHIS representative, in which each participant agrees to undertake actions specified in the agreement to maintain the health of the animals and detect signs of communicable disease.

* * * * *

PART 161—REQUIREMENTS AND STANDARDS FOR ACCREDITED VETERINARIANS AND SUSPENSION OR REVOCATION OF SUCH ACCREDITATION

■ 5. The authority citation for part 161 continues to read as follows:

Authority: 7 U.S.C. 8301-8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

■ 6. Section 161.1 is amended by revising the section heading and paragraphs (b) and (c) and adding new paragraphs (d) through (h) and an OMB citation to read as follows:

§ 161.1 Statement of purpose; requirements and application procedures for accreditation.

* * * * *

(b) *Categories of accreditation.* A veterinarian may be accredited as a Category I veterinarian or a Category II veterinarian. A veterinarian who is accredited under Category I is only authorized to perform accredited duties on Category I animals, as defined in § 160.1. A veterinarian who is accredited under Category II is authorized to perform accredited duties on both Category I animals and Category II animals.

(c) *Application for initial accreditation.* A veterinarian may apply for accreditation by completing an application for accreditation and submitting it to APHIS. In completing the application, the veterinarian will choose one of the accreditation activity categories, either Category I or Category II, as discussed in paragraph (b) of this section. Applications for Category I accreditation must include certification that the applicant is able to perform the tasks listed in paragraph (g)(1) of this section. Applications for Category II accreditation must include certification that the applicant is able to perform the tasks listed in paragraph (g)(2) of this section. An accredited veterinarian must not perform duties requiring a program certification unless he or she is accredited under Category II and qualified to perform such duties in accordance with § 161.5 of this part.

(d) *Review of application.* Applications for accreditation received by APHIS shall be forwarded to the State Animal Health Official for the State in which the veterinarian wishes to perform accredited duties for approval. Within 14 days after receiving an application, a State Animal Health Official shall either endorse the application or send a written statement to the Administrator explaining why it was not endorsed; but if the State Animal Health Official fails to take one of these actions within 14 days, APHIS shall proceed to review the application. The Administrator will review the application and the written statement, if any, and determine whether the applicant meets the requirements for accreditation contained in this part.

(e) *Accreditation requirements.* The Administrator is hereby authorized to accredit a veterinarian when he or she determines that:

(1) The veterinarian is a graduate with a Doctorate of Veterinary Medicine or an equivalent degree (any degree that qualifies the holder to be licensed by a State to practice veterinary medicine) from a college of veterinary medicine;

(2) The veterinarian is licensed or legally able to practice veterinary medicine in the State in which the veterinarian wishes to perform accredited duties. APHIS will confirm the licensing status of the applicant by contacting the State board of veterinary medical examiners or any similar State organization that maintains records of veterinarians licensed in a State;

(3) The veterinarian has completed initial accreditation training, using content provided by APHIS; and

(4) The veterinarian has completed an orientation program approved by the Veterinarian-in-Charge for the State in which the veterinarian wishes to perform accredited duties, and upon completion of the orientation, has signed a written statement listing the date and place of orientation, the subjects covered in the orientation, and any written materials provided to the veterinarian at the orientation. The Veterinarian-in-Charge shall also give the State Animal Health Official an opportunity to review the contents of the orientation, and invite him or her to participate in developing orientation materials and conducting the orientation. The veterinarian applying for accreditation must have completed the orientation program within 3 years prior to submitting the application for accreditation. The core orientation program shall include the following topics:

(i) Federal animal health laws, regulations, and rules;

(ii) Interstate movement requirements for animals;

(iii) Import and export requirements for animals;

(iv) USDA animal disease eradication and control programs;

(v) Laboratory support in confirming disease diagnoses;

(vi) Ethical and professional responsibilities of an accredited veterinarian;

(vii) Foreign animal disease awareness;

(viii) Animal health emergency management; and

(ix) Animal health procedures, issues, and information resources relevant to the State in which the veterinarian wishes to perform accredited duties.

(f) *Change in accreditation category.* (1) *Category I to Category II.* A veterinarian who is accredited under Category I may become accredited under Category II if the veterinarian applies for accreditation under Category II by completing an application for accreditation, including certification that the applicant is able to perform the tasks listed in paragraph (g)(2) of this section, and submitting it to APHIS. The veterinarian must also have fulfilled the training requirements in § 161.3(b) that are associated with renewal of accreditation under Category II.

(2) *Category II to Category I.* A veterinarian who is accredited under Category II may become accredited under Category I if the veterinarian applies for accreditation under Category I by completing an application for accreditation, including certification that the applicant is able to perform the tasks listed in paragraph (g)(1) of this section, and submitting it to APHIS. The veterinarian must also have fulfilled the training requirements in § 161.3(b) that are associated with renewal of accreditation under Category I.

(g) *Tasks that applicants for accredited status must be able to perform.* Applicants for accredited status must be able to:

(1) *Category I.*

(i) Perform physical examination of individual Category I animals to determine whether they are free from any clinical signs suggestive of communicable disease.

(ii) Recognize the common breeds of Category I animals and accurately record breed information on official documents.

(iii) Apply common animal identification for Category I animals.

(iv) Properly complete certificates for domestic and international movement of Category I animals.

(v) Perform necropsies on Category I animals.

(vi) Recognize and report clinical signs and lesions of exotic animal diseases that occur in Category I animals.

(vii) Vaccinate Category I animals and accurately complete the vaccination certificates.

(viii) Properly collect and ship specimen samples to the appropriate laboratory for testing with complete and accurate paperwork.

(ix) Develop appropriate biosecurity protocols, as well as cleaning and disinfection protocols, to control communicable disease spread in Category I animals.

(2) *Category II.*

(i) Perform physical examination of individual animals and visually inspect herds or flocks to determine whether the animals are free from any clinical signs suggestive of communicable disease.

(ii) Recognize the common breeds of Category I and Category II animals, including the types of poultry as defined by the National Poultry Improvement Plan in subchapter G of this chapter and the common breeds of livestock, and be able to accurately record breed information on official documents.

(iii) Recognize all USDA animal identification systems.

(iv) Estimate the age of livestock using a dental formula.

(v) Apply USDA-recognized identification (*e.g.*, eartag, microchip, tattoo) for the USDA animal identification system.

(vi) Certify the health status of an avian flock regarding diseases of domestic or international regulatory concern, and evaluate records pertaining to poultry flock testing and participation in Federal and State poultry health programs and classifications.

(vii) Properly complete certificates for domestic and international movement of animals.

(viii) Apply and remove official seals.

(ix) Perform necropsies on animals.

(x) Recognize and report clinical signs and lesions of exotic animal diseases.

(xi) Develop a herd or flock health plan consistent with requirements in subchapters B, C, and D of this chapter.

(xii) Vaccinate for USDA program diseases and accurately complete the vaccination certificate.

(xiii) Properly collect and ship sample specimens to an appropriate laboratory for testing with complete and accurate paperwork.

(xiv) Properly perform testing for tuberculosis (*e.g.*, caudal fold test).

(xv) Develop appropriate biosecurity protocols, as well as cleaning and disinfection protocols, to control communicable disease spread.

(xvi) Explain basic principles for control of diseases for which APHIS or APHIS-State cooperative programs presently exist.

(h) *Authorization to perform duties.* An accredited veterinarian may not perform accredited duties in a State until after receiving written authorization from APHIS. If a Category I accredited veterinarian completes the necessary training requirements and becomes a Category II accredited veterinarian, the veterinarian may not perform Category II accredited duties in a State until after receiving written authorization from APHIS.

(Approved by the Office of Management and Budget under control number 0579-0297)

■ 7. Section 161.2 is revised to read as follows:

§ 161.2 Performance of accredited duties in different States.

(a) If an accredited veterinarian wishes to perform accredited duties in a State other than the State in which the veterinarian was initially accredited in accordance with § 161.1(e), the accredited veterinarian must complete an application to request authorization to perform accredited duties in the new State from the Veterinarian-in-Charge of that State. The Veterinarian-in-Charge of the new State may require the accredited veterinarian to complete, prior to performing any accredited duties in the new State, an orientation in animal health procedures and issues relevant to the new State. The Veterinarian-in-Charge shall review the content of each such orientation and shall approve its use after determining that it includes adequate information about animal health agencies, regulatory requirements, administrative procedures, and animal disease issues in the new State, to prepare an accredited veterinarian from another State to perform accredited duties in the new State. The Veterinarian-in-Charge shall also give the State Animal Health Official of the new State an opportunity to review the contents of the orientation, and invite him or her to participate in developing orientation materials and conducting the orientation.

(b) An accredited veterinarian may not perform accredited duties in a State in which the accredited veterinarian is not licensed or legally able to practice veterinary medicine.

(c) An accredited veterinarian may not perform accredited duties in a State other than the one in which the veterinarian was initially accredited until the veterinarian receives written authorization from APHIS to perform accredited duties in the new State.

(Approved by the Office of Management and Budget under control numbers 0579-0032 and 0579-0297)

§§ 161.3 and 161.4 [Redesignated]

■ 8. Section 161.4 is redesignated as § 161.6, and § 161.3 is redesignated as § 161.4.

■ 9. A new § 161.3 is added to read as follows:

§ 161.3 Renewal of accreditation.

(a) Accredited veterinarians who wish to continue participating in the National Veterinary Accreditation Program must renew their accreditation every 3 years by completing an application for accreditation renewal and submitting it to APHIS. Newly accredited veterinarians must renew their accreditation within 3 years of completing the orientation program described in § 161.1(e)(4) of this part, regardless of when their accreditation was granted. Other veterinarians must renew their accreditation within 3 years of the previous renewal.

(b) Accredited veterinarians who wish to renew their accreditation under Category I must complete 3 supplemental training units approved by APHIS by the end of their 3-year tenure as an accredited veterinarian. Accredited veterinarians who wish to renew their accreditation under Category II must complete 6 supplemental training units approved by APHIS by the end of their 3-year tenure as an accredited veterinarian. Accredited veterinarians who wish to change the category in which they are accredited, rather than renew accreditation in their current accreditation category, should follow the procedure in § 161.1(f) of this part.

(c) Accredited veterinarians who do not complete the required training within 3 years as specified in paragraph (a) of this section will have their accredited status expire. Veterinarians whose accreditation has expired will not be allowed to perform accredited duties until they receive notification of their reinstatement from APHIS. Veterinarians who perform duties that only accredited veterinarians are authorized to perform while their accredited status has expired will be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) or other applicable Federal statutes or regulations. To be reinstated, the veterinarian must complete the necessary supplemental training units for the appropriate category and submit an application for renewal of veterinary accreditation to APHIS. A veterinarian who allows his or her accredited status to expire must have completed the required number of supplemental training units within 3 years of his or her application for renewal in order to be approved for renewal. Supplemental training units completed since the veterinarian's last renewal but more than 3 years before the veterinarian's application for renewal will not count towards fulfilling his or her training requirement.

(d) Veterinarians who are accredited as of February 1, 2010, may continue to perform accredited duties between February 1, 2010, and the date of their first renewal. APHIS will provide notice for 3 months to accredited veterinarians who are accredited as of February 1, 2010, to notify them that they must elect to participate in the NVAP as a Category I or Category II veterinarian. Veterinarians must elect to continue to participate within 3 months of the end of the notification period, or their accredited status will expire. When APHIS receives notice from an accredited veterinarian that he or she elects to participate, APHIS will notify the accredited veterinarian of his or her date for first renewal. The accredited veterinarian must then complete all the training requirements for renewal, as described in this section, by his or her first renewal date.

(Approved by the Office of Management and Budget under control number 0579-0297)

■ 10. Section 161.5 is revised to read as follows:

§ 161.5 Program certifications.

A program certification recognized by the Administrator may be granted to an accredited veterinarian in Category II upon completion of an additional orientation or training program approved by APHIS that focuses on the specific area for which the veterinarian is seeking program certification. Veterinarians accredited under Category I are not eligible to earn program certifications. Accredited veterinarians may elect to participate in a program certification on a voluntary basis. Participants in these program certifications will be qualified in a particular area or specialty. In addition to Category II training, qualification for a program certification will include additional specialized training, which may include periodic training updates. For certain program certifications, the cost of orientation or training may be borne by the accredited veterinarian. An accredited veterinarian granted a program certification will be referred to as a qualified accredited veterinarian or QAV. A QAV will be authorized to perform those accredited duties related to the program certification he or she has earned; accredited veterinarians not granted program certifications will not be permitted to perform accredited duties related to that particular program certification. If a QAV allows his or her Category II accreditation to expire, the QAV's program certification expires as well, and the QAV must be qualified for the program certification again in accordance with this section.

■ 11. Newly redesignated § 161.6 is amended as follows:

■ a. By revising the section heading to read as set forth below.

■ b. By revising paragraph (a) to read as set forth below.

■ c. By redesignating paragraphs (b), (c), and (d) as paragraphs (d), (e), and (f), respectively.

■ d. By adding new paragraphs (b), (c), and (g) to read as set forth below.

§ 161.6 Suspension or revocation of veterinary accreditation and reaccreditation; criminal and civil penalties.

(a) The Administrator is authorized to suspend for a given period of time, or to revoke, the accreditation of a veterinarian when he or she determines that the accredited veterinarian has not complied with the "Standards for Accredited Veterinarian Duties" as set forth in § 161.4 of this part or with any of the other regulations in this subchapter, or is otherwise found to be unfit to be accredited. Veterinarians who perform duties that only accredited veterinarians are authorized to perform while their accredited status is suspended or revoked will be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) or other applicable Federal statutes or regulations. Performing accredited duties while accreditation status is suspended or revoked will be considered grounds for the Administrator to suspend accreditation, revoke accreditation, or deny application for reaccreditation, as circumstances warrant. A veterinarian whose accreditation has been suspended or revoked or whose application for reaccreditation has been denied may request a hearing under § 162.13 to challenge the Administrator's decision.

(b) *Reinstatement after suspension.* A veterinarian whose accreditation has been suspended for less than 6 months (other than a summary suspension that is changed to a revocation as a result of an adjudicatory proceeding) will be automatically reinstated as an accredited veterinarian upon completion of the suspension. A veterinarian whose accreditation has been suspended for 6 months or more must complete a reaccreditation orientation program in accordance with paragraph (c)(2)(ii) of this section before accreditation will be reinstated.

(c) *Reaccreditation after revocation.* A veterinarian whose accreditation has been revoked may apply for reaccreditation by completing an

application for reaccreditation and submitting it to the Veterinarian-in-Charge of the State or area where he or she wishes to perform accredited work. The application may be submitted when the revocation has been in effect for not less than 2 years, unless the revocation order specifies that the veterinarian whose accreditation has been revoked may not submit an application for reaccreditation until the revocation has been in effect for a period of time longer than 2 years.

(1) Completed applications for reaccreditation received by a Veterinarian-in-Charge shall be reviewed by the State Animal Health Official for the State in which the veterinarian wishes to perform accredited duties. Within 14 days after receiving an application, the State Animal Health Official shall either endorse the application or send a written statement to the Administrator explaining why it was not endorsed; but if the State Animal Health Official fails to take one of these actions within 14 days, the Veterinarian-in-Charge shall proceed to review the application. The Administrator will review the application and the written statement, if any, and determine whether the applicant meets the requirements for reaccreditation contained in this part.

(2) Once a veterinarian whose accreditation has been revoked has correctly applied for reaccreditation in accordance with the requirements of paragraph (c) of this section, the Administrator will determine whether to reaccredit or to deny reaccreditation. This determination will be based on whether the veterinarian has fulfilled the following conditions:

(i) The veterinarian is licensed or legally able to practice veterinary medicine in the State in which the veterinarian wishes to perform accredited duties;

(ii) The veterinarian has completed a reaccreditation orientation program approved by the Veterinarian-in-Charge for the State in which the veterinarian wishes to perform accredited work, and upon completion of the orientation, has signed a written statement listing the date and place of orientation, the subjects covered in the orientation, and any written materials provided to the veterinarian at the orientation. The Veterinarian-in-Charge shall also give the State Animal Health Official an opportunity to review the contents of the reaccreditation orientation, and invite him or her to participate in developing orientation materials and conducting the orientation. The orientation program shall include topics addressing the subject areas which led to loss of accreditation for the applicant, and subject areas which have changed since the applicant lost accreditation; and

(iii) The professional integrity and reputation of the applicant support a conclusion that the applicant will faithfully fulfill the duties of an accredited veterinarian in the future. In making this conclusion, the Administrator shall review all available information about the applicant, including recommendations of the State Animal Health Official, and shall consider:

(A) Any criminal conviction records indicating that the applicant may lack the honesty, integrity, and reliability to appropriately and effectively perform accredited duties and to uphold the integrity of the National Veterinary Accreditation Program;

(B) Official records of the applicant's actions participating in Federal, State, or local veterinary programs;

(C) Judicial determinations in civil litigation adversely reflecting on the honesty, integrity, and reliability of the applicant; and

(D) Any other evidence reflecting on the honesty, professional integrity, reliability and reputation of the applicant.

(3)(i) If a veterinarian is reaccredited under paragraph (c)(2) of this section, the veterinarian may begin performing accredited duties again upon receipt of notification from the Administrator that he or she is eligible to do so.

(ii) If an application for reaccreditation is denied under paragraph (c)(2) of this section, the veterinarian may apply for reaccreditation in accordance with this paragraph (c) not less than 2 years after the application was last denied, unless the decision specifies that the veterinarian may not reapply for reaccreditation until a period of time longer than 2 years has passed.

* * * * *

(g) *Notice of warning.* In lieu of suspension or revocation, the Administrator is authorized to issue a written notice of warning to an accredited veterinarian when the Administrator determines a notice of warning will be adequate to attain compliance with the Standards for Accredited Veterinarian Duties in § 161.4 of this part.

■ 12. A new § 161.7 is added to read as follows:

§ 161.7 Activities performed by non-accredited veterinarians.

(a) Full-time Federal (including military) and State employed veterinarians are authorized to perform functions specified in subchapters B, C, and D of this chapter, pursuant to delegation of authority by the Administrator or cooperative agreements, without specific accreditation under the provisions of this subchapter.

(b) Except as provided by paragraph (a) of this section, anyone who performs accredited veterinarian duties that he or she is not authorized to perform will be subject to such criminal and civil penalties as are provided by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) or other applicable Federal statutes or regulations. Performing accredited duties without having been accredited will be considered grounds for the Administrator to deny an application for accreditation.

PART 162—RULES OF PRACTICE GOVERNING REVOCATION OR SUSPENSION OF VETERINARIANS' ACCREDITATION

■ 13. The authority citation for part 162 continues to read as follows:

Authority: 7 U.S.C. 8301-8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

■ 14. Section 162.10 is revised to read as follows:

§ 162.10 Summary suspension or revocation of accreditation of veterinarians.

In any situation where the Administrator has reason to believe that any veterinarian accredited under the provisions of parts 160 and 161 of this subchapter has knowingly violated the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Administrator may summarily suspend the accreditation of such veterinarian pending final determination in either a suspension or revocation proceeding, effective upon oral or written notification, whichever is earlier. In the event of oral notification, a written confirmation thereof shall be given to such veterinarian as promptly as circumstances permit.

§ 162.12 [Amended]

■ 15. In § 162.12, paragraphs (b), (c), and (d) are redesignated as paragraphs (c), (d), and (b), respectively.

Done in Washington, DC, this 1st day of December 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–29253 Filed 12–08–09; 1:26 pm]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 166

[Docket No. APHIS-2008-0120]

RIN 0579-AC91

Swine Health Protection; Feeding of Processed Product to Swine

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the swine health protection regulations to clarify the applicability of the regulations regarding the treatment of garbage that consists of industrially processed materials. The interim rule made clear that such materials are subject to the same treatment requirements as other regulated garbage, except for materials that meet the definition of *processed product* that we added to the regulations in the interim rule. The interim rule was necessary to ensure that garbage fed to swine has been treated to inactivate disease organisms that pose a risk to the U.S. swine industry.

DATES: Effective on December 9, 2009, we are adopting as a final rule the interim rule published at 74 FR 15215-15218 on April 3, 2009.

FOR FURTHER INFORMATION CONTACT: Dr. Dave Pyburn, Senior Staff Veterinarian, Swine Health Programs, VS, APHIS, Room 891, 210 Walnut Street, Des Moines, IA 50309; (515) 284-4122.

SUPPLEMENTARY INFORMATION:

Background

The Swine Health Protection Act (7 U.S.C. 3801 *et seq.*, referred to below as the Act) is intended to protect the commerce of the United States and the health and welfare of the people of the United States by ensuring that food waste fed to swine does not contain active disease organisms that pose a risk to U.S. swine. The regulations in 9 CFR part 166 regarding swine health protection (referred to below as the regulations) were promulgated in accordance with the Act. The regulations contain provisions that regulate food waste containing any meat products fed to swine. Compliance with the regulations ensures that all food waste fed to swine is properly treated to kill disease organisms. Raw or undercooked meat may transmit numerous infectious or communicable diseases to swine, including exotic viral diseases such as foot-and-mouth disease, African swine fever, classical swine fever, and swine vesicular disease. In accordance with the regulations, food waste containing meat may be fed to swine only if it has been treated to kill disease organisms.

In an interim rule[1] effective and published in the **Federal Register** on April 3, 2009 (74 FR 15215-15218, Docket No. APHIS-2008-0120), we amended the regulations to clarify the applicability of the regulations regarding the treatment of garbage that consists of industrially processed materials. The interim rule made clear that such materials are subject to the same treatment requirements as other regulated garbage, except for materials that meet the definition of *processed product* that we added to the regulations in the interim rule.

Comments on the interim rule were required to be received on or before June 2, 2009. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 9 CFR Part 166

Animal diseases, Hogs, Reporting and recordkeeping requirements.

PART 166—SWINE HEALTH PROTECTION

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR part 166 and that was published at 74 FR 15215-15218 on April 3, 2009.

Done in Washington, DC, this 27th day of November 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–29265 Filed 12–8–09: 8:45 am]

BILLING CODE 3410–34–S

[1] To view the interim rule, go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0120*).

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A; Docket No. R–1371]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: This final rule amends Regulation A to provide a process by which the Federal Reserve Bank of New York may determine the eligibility of credit rating agencies in the Term Asset-backed Securities Loan Facility. The final rule does not apply to discount window lending or other extensions of credit provided by the Federal Reserve System. In addition, the final rule only applies to asset-backed securities that are not backed by commercial real estate. The amendment does not represent a change in the stance of monetary policy.

DATES: Final rule is effective on January 8, 2010.

FOR FURTHER INFORMATION CONTACT: William R. Nelson, Senior Associate Director (202/452–3579), Division of Monetary Affairs; Christopher W. Clubb, Senior Counsel (202/452–3904), Legal Division; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

Proposed Rule. On October 8, 2009, the Board of Governors of the Federal Reserve System (the "Board") published for public comment a notice of proposed rulemaking ("NPRM") that would amend Regulation A to provide a process by which the Federal Reserve Bank of New York ("FRBNY") may determine the eligibility of credit rating agencies in the Term Asset-backed Securities Loan Facility ("TALF").[1] The Board has determined the terms and conditions for TALF borrowing and

[1] Proposed rule, 74 FR 51806 (Oct. 8, 2009). The TALF is a funding facility to help market participants meet the credit needs of households and businesses by supporting the issuance of new asset-backed securities (ABS) collateralized by loans of various types to consumers and businesses of all sizes. The TALF was established under section 13(3) of the Federal Reserve Act, which permits the Board of Governors of the Federal Reserve Board, in unusual and exigent circumstances, to authorize Reserve Banks to extend credit to individuals, partnerships and corporations that are unable to obtain adequate credit accommodations. For the terms and conditions and frequently asked question of the TALF, refer to *http://www.federalreserve.gov/monetarypolicy/talf.htm.*

eligible collateral, including minimum credit ratings and the set of credit rating agencies whose ratings may be accepted for purposes of TALF by FRBNY. Since TALF was established, the Board and FRBNY have accepted credit ratings from three credit rating agencies (Standard & Poor's, Moody's Investors Service, and Fitch Ratings). The proposed amendment was designed to provide FRBNY with a consistent framework for determining the eligibility for use in TALF of ratings issued by individual credit rating agencies when used in conjunction with a separate asset-level risk assessment process.

The NPRM proposed an objective minimal experience-based approach specific to the types of assets accepted as collateral in TALF. As a threshold requirement, the proposed rule would permit FRBNY to accept only a credit rating issued by a credit rating agency that is registered with the Securities and Exchange Commission as a "nationally recognized statistical rating organization" (NRSRO) for issuers of asset-backed securities.(ABS) pursuant to the Credit Rating Agency Reform Act of 2006 (CRARA).[2] The proposed rule also would require that the NRSRO had issued ratings on at least ten transactions within a specified asset category since September 30, 2006. The asset categories are:

- Category 1—auto loans, floorplan loans, and equipment loans TALF sectors;
- Category 2—credit card receivables and insurance premium finance loans TALF sectors;
- Category 3—mortgage servicing advance receivables TALF sector;[3] and
- Category 4—student loans TALF sector.

In addition, the proposed rule would allow FRBNY to accept credit ratings only from a credit rating agency that has a current and publicly available rating methodology specific to ABS in the particular TALF asset sector (as defined in the TALF haircut schedule) for which the credit rating agency wishes its ratings to be considered for TALF.

The proposed rule also described the process whereby FRBNY would determine whether an NRSRO becomes eligible to have its ratings accepted for TALF ABS. In addition, under the proposed rule, FRBNY could, at any time, review the continued use of ratings from a credit rating agency in one or more TALF ABS sectors and determine that such credit ratings were no longer acceptable if the credit rating agency no longer met the eligibility requirements or conditions. Finally, the proposed rule set out two conditions that FRBNY would have to ensure were met by an NRSRO in order for the NRSRO to have its credit ratings accepted for TALF ABS. First, the NRSRO would have to agree to discuss with the Federal Reserve its views of the credit risk of any transaction within the TALF asset sector that has been submitted to TALF and upon which the NRSRO is being or has been consulted by the issuer. Second, the NRSRO would have to agree to provide any information requested by the Federal Reserve regarding the credit rating agency's continued eligibility under the factors set out in the proposed rule, such as continuing to be properly registered as an NRSRO with the Securities and Exchange Commission and continuing to have a current and publicly available rating methodology specific to ABS in the particular TALF asset sector.

Public comments. The Board received only one comment that was responsive to the NPRM.[4] The comment was from a credit rating agency that was supportive of the proposed rule. In particular, the commenter supported the objective, experience-based approach adopted by the proposal. The commenter also agreed that registration as an NRSRO for issuers of ABS should be a threshold requirement, but not the sole requirement, for TALF. The commenter also supported the experience and publicly available rating methodology requirements of the proposed rule. Finally, the commenter endorsed the proposed rule's requirement that the NRSRO confer with the Federal Reserve regarding relevant TALF credit risk issues and provide requested information regarding the NRSRO's continuing eligibility with respect to TALF. The commenter did not suggest any changes to the proposed rule.

Final rule. After carefully considering the comments received and other facts of record, and for the reasons discussed herein and in the NPRM, the Board has adopted a final rule in essentially the same form as the proposed rule, except for minor clarifying revisions. An NRSRO may submit the information necessary for FRBNY to make an eligibility determination for the NRSRO under the final rule at any time, including prior to the effective date of the final rule. FRBNY may make the NRSRO eligible for TALF under the final rule as of the effective date or thereafter. The set of NRSROs eligible pursuant to this final rule will take effect commencing with the February 2010 TALF subscription.

II. Administrative Law Matters

A. Final Regulatory Flexibility Analysis

An initial regulatory flexibility analysis (IRFA) was included in the NPRM in accordance with the Regulatory Flexibility Act (RFA).[5] In the IRFA, the Board specifically solicited comment, including from small entities, on whether the proposed rule would have a significant economic impact on a substantial number of small entities. No small entities submitted comments regarding quantification of their projected costs. The Board expects this rule to affect a number of small entities; however, the cost this rule imposes would not appear to have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

Even though this rule does not appear to have a significant economic impact on a substantial number of small entities, the Board has not formally certified the rule as not having a significant economic impact on a substantial number of small entities, as provided under section 605(b) of the RFA. Instead, the Board has prepared a Final Regulatory Flexibility Analysis (FRFA) as described in the RFA, 5 U.S.C. 604.[6]

The RFA requires each FRFA to contain:

- A succinct statement of the need for, and objectives of, the rule;
- A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

[2] CRARA (Pub. L. 109–291, 120 Stat. 1327) is primarily codified at 15 U.S.C. 78o–7.

[3] The proposed rule would permit an NRSRO to aggregate ratings on residential mortgage-backed securities (not currently included in the TALF) for purposes of meeting the ten-transaction requirement for Category 3 (mortgage servicing advance loans TALF sector).

[4] Another comment was filed by a consumer in the NPRM docket, but it did not provide comments responsive to the NPRM. The comment letters are available from the Board's Freedom of Information Office by calling (202) 452–3684, as well as on the Board's public Web site at: *http://www.federalreserve.gov/generalinfo/foia/index.cfm?*

[5] 5 U.S.C. 601 *et seq.*

[6] When promulgating a final rule, the RFA requires agencies to prepare a FRFA unless the agency finds that the final rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604(a) and 605(b).

• A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

• A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[7]

1. *Statement of the need for, and objectives of, the final rule.* As discussed in the preamble above, the Board is adopting this rule to govern FRBNY's determination of eligibility of NRSROs and their credit ratings for use in TALF. The objective of the final rule is to provide for an objective, prudent, and reasonably consistent process for FRBNY to determine the eligibility of NRSROs and their credit ratings for purposes of TALF ABS. The Board anticipates that implementation of the final rule will permit an expansion of the set of NRSROs accepted for TALF ABS, while maintaining appropriate protection against credit risk for the U.S. taxpayer in connection with TALF.

2. *Significant issues raised by comments in response to the IRFA.* Commenters did not raise any issues in response to the IRFA. The Board is adopting the final rule in essentially the same form as the proposed rule.

3. *Description and estimate of classes of small entities affected by the final rule.* As noted in the IRFA, there are ten NRSROs registered with the SEC. Of those ten, the Board's review of publicly available information indicates that three NRSROs are not "small entities" under the RFA because their asset size (or the asset size of the NRSRO's parent company) is larger than the level set in the SBA regulation. For purposes of this FRFA, the Board will assume that all seven of the remaining NRSROs would qualify as "small entities" under the SBA regulations.

4. *Recordkeeping, Reporting and Other Compliance Requirements.* The Board believes that the final rule does not establish any reporting, recordkeeping, or other compliance requirements that are not already part of the NRSRO registration process with the Securities and Exchange Commission or involve records that would not otherwise be created in the normal and customary course of an NRSRO's business. In addition, other than that which is normally required in the credit rating agency industry, special expertise should not be required to compile the information necessary to submit an eligibility request to FRBNY for use of an NRSRO's credit ratings in TALF. Most NRSRO's should have this information readily available in the normal and customary course of business.

The conditions required for FRBNY to accept ratings may similarly require minimal expenditure of resources by an NRSRO, but the Board believes that such information should be readily available in the normal and customary course of the business of a credit rating agency. FRBNY may request information from an NRSRO for the purpose of determining that the NRSRO continues to meet the eligibility requirements under the final rule. Also, an NRSRO that has been consulted on a transaction in TALF may be requested by FRBNY to discuss its views of the particular transaction, but it would not be required to conduct any more analysis than it had already conducted in the course of its business.

5. *Steps Taken to Minimize the Economic Impact on Small Entities.* As discussed in the IRFA, the Board considered alternatives to the approach adopted in the proposed rule and selected the approach adopted in the proposed rule for the reasons set out in the IRFA. The Board did not receive any comments suggesting any additional alternatives to the approach adopted in the proposed rule. The Board is adopting the final rule in essentially the same form as the proposed rule.

B. Paperwork Reduction Act Analysis

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number will be assigned.

The collection of information that is revised by this rulemaking is found in 12 CFR 201.3(e)(1)(ii) and (iii). This information is required to permit FRBNY to determine eligibility of credit rating agencies to have their ratings accepted in TALF in accordance with Board standards. The respondents are NRSROs, which may be small entities. There is no record retention requirement in the final rule.

The estimated burden per response is two hours. It is estimated that there will be ten respondents providing information on a one-time basis. Therefore the total amount of annual burden is estimated to be 20 hours. No comments specifically addressing the burden estimate were received.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100—to be assigned), Washington, DC 20503.

C. Plain Language

Each Federal banking agency, such as the Board, is required to use plain language in all proposed and final rulemakings published after January 1, 2000. 12 U.S.C. 4809. The Board has sought to present the final rule, to the extent possible, in a simple and straightforward manner.

III. Statutory Authority

Pursuant to the authority set out in the Federal Reserve Act and particularly section 11 (codified at 12 U.S.C. 248(j)), the Board adopts the rules set out below.

IV. Text of Final Rules

List of Subjects in 12 CFR Part 201

Credit.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. In § 201.3, paragraph (e) is added to read as follows:

§ 201.3 Extensions of credit generally.

* * * * *

(e) *Credit ratings for Term Asset-Backed Securities Loan Facility (TALF).*

[7] 5 U.S.C. 604(a).

(1) If the Board requires that a TALF advance, discount, or other extension of credit be against collateral (other than commercial mortgage-backed securities) that is rated by one or more credit rating agencies, the Federal Reserve Bank of New York may only accept the ratings of any credit rating agency that:

(i) Is registered with the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization for issuers of asset-backed securities;

(ii) Has a current and publicly available rating methodology specific to asset-backed securities in the particular TALF asset sector (as defined in the TALF haircut schedule) for which it wishes its ratings to be accepted; and

(iii) Demonstrates that it has sufficient experience to provide credit ratings that would assist in the Federal Reserve Bank of New York's risk assessment on the most senior classes of newly issued asset-backed securities in the particular TALF asset sector by having made public or made available to a paying subscriber base, since September 30, 2006, ratings on at least ten transactions denominated in U.S. dollars within the particular category to which the particular TALF asset sector is assigned as set out below—

(A) Category 1—auto, floorplan, and equipment TALF sectors;

(B) Category 2—credit card and insurance premium finance TALF sectors;

(C) Category 3—mortgage servicing advances TALF sector; and

(D) Category 4—student loans TALF sector.

(2) For purposes of the requirement in paragraph (e)(1)(iii) of this section, ratings on residential mortgage-backed securities may be included in Category 3 (servicer advances).

(3) The Federal Reserve Bank of New York may in its discretion review at any time the eligibility of a credit rating agency to rate one or more types of assets being offered as collateral.

(4) *Process.*

(i) Credit rating agencies that wish to have their ratings accepted for TALF transactions should send a written notice to the Credit, Investment, and Payment Risk group of the Federal Reserve Bank of New York including information on the factors listed in paragraph (e)(1) of this section with respect to each TALF asset sector for which they wish their ratings to be accepted.

(ii) The Federal Reserve Bank of New York will notify the submitter within 5 business days of receipt of a submission whether additional information needs to be submitted.

(iii) Within 5 business days of receipt of all information necessary to evaluate a credit rating agency pursuant to the factors set out in paragraph (e)(1) of this section, the Federal Reserve Bank of New York will notify the credit rating agency regarding its eligibility.

(5) *Conditions.* The Federal Reserve Bank of New York may accept credit ratings under this subsection only from a credit rating agency that agrees to—

(i) Discuss with the Federal Reserve its views of the credit risk of any transaction within the TALF asset sector that has been submitted to TALF and upon which the credit rating agency is being or has been consulted by the issuer; and

(ii) Provide any information requested by the Federal Reserve for the purpose of determining that the credit rating agency continues to meet the eligibility requirements under paragraph (e)(1) of this section.

By order of the Board of Governors of the Federal Reserve System, December 4, 2009.

Jennifer J. Johnson,

Secretary.

[FR Doc. E9–29296 Filed 12–8–09; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 806

[Docket No. 090130108–91414–02]

RIN 0691–AA70

Direct Investment Surveys: BE–605, Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate With Foreign Parent

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends regulations of the Bureau of Economic Analysis (BEA) setting forth reporting requirements for the BE–605 quarterly survey of foreign direct investment in the United States. The survey obtains quarterly sample data on transactions and positions between foreign-owned U.S. business enterprises (U.S. affiliates) and their "affiliated foreign groups" (*i.e.*, their foreign parents and foreign affiliates of their foreign parents).

Through this rule, BEA will make a number of changes to the BE–605 survey. BEA will discontinue the use of separate forms for banks. Beginning with the first quarter of 2010, both bank and nonbank U.S. affiliates will file Form BE–605. In conjunction with this change, BEA will change the title of Form BE–605. BEA will add and delete certain items on the survey form and change the reporting criteria. BEA will also collect identification information for affiliates filing Form BE–605 for the first time, and make changes to the BE–605 form and instructions to bring them into conformity with the recently revised annual and benchmark surveys of foreign direct investment in the United States.

DATES: This final rule will be effective January 8, 2010.

FOR FURTHER INFORMATION CONTACT: David H. Galler, Chief, Direct Investment Division (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; e-mail *david.galler@bea.gov* or phone (202) 606–9835.

SUPPLEMENTARY INFORMATION: In the September 2, 2009, **Federal Register**, 74 FR 45383–45385, BEA published a notice of proposed rulemaking that set forth revised reporting criteria for the BE–605, Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent. No comments on the proposed rule were received. Thus, the proposed rule is adopted without change. This final rule amends 15 CFR 806.15 to set forth the reporting requirements for the BE–605 quarterly survey of foreign direct investment in the United States.

The BE–605 survey is a mandatory quarterly survey of foreign direct investment conducted by BEA under the International Investment and Trade in Services Survey Act (22 U.S.C. 3101–3108). BEA will send BE–605 survey forms to potential respondents each quarter; responses will be due within 30 days after the end of each quarter, except for the final quarter of the fiscal year when reports will be due within 45 days of the end of the quarter.

Description of Changes

BEA is making a number of changes to the BE–605 survey. BEA is discontinuing the use of separate forms for banks. Beginning with the first quarter of 2010, both bank and nonbank U.S. affiliates will file Form BE–605. In conjunction with this change, BEA is changing the title of Form BE–605 to "Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent." Changes to language and instructions are being made to align Form BE–605 with recent changes to the annual and benchmark surveys of foreign direct investment.

BEA is adding items to Form BE–605 to collect additional identification information on U.S. affiliates of foreign parents filing the survey for the first time. (BEA previously collected more extensive identification information on the U.S. business being established or acquired, and on the new foreign owner, through Form BE–13, Initial Report on a Foreign Person's Direct or Indirect Acquisition, Establishment, or Purchase of the Operating Assets, of a Business Enterprise, Including Real Estate, which was recently discontinued.) These additional items include the date the business enterprise became a U.S. affiliate of a foreign parent, and the U.S. affiliate's industry. BEA is adding a question to the survey that asks U.S. affiliates whether they are planning to construct, or are in the process of constructing, a new production establishment.

BEA is discontinuing the collection of information on permanent intercompany debt funding, and interest receipts and payments associated with that funding, between U.S. affiliates that are banks and their foreign parents. This debt funding information is collected by the Treasury International Capital System, and recent changes in international statistical guidelines call for it now to be classified as portfolio investment. BEA will no longer collect data on loan loss reserves for banks, which, along with a number of related items, had been requested on the specialized bank form that will be discontinued. BEA will continue to collect intercompany debt and related interest data for the units of a consolidated U.S. bank affiliate that have insurance, real estate, or leasing activities.

BEA is increasing the exemption level for reporting on Form BE–605 from $30 million to $60 million. The exemption level is stated in terms of the U.S. affiliate's total assets, sales or gross operating revenues, and net income after U.S. income taxes. At the new reporting threshold, BEA expects about 4,000 U.S. affiliates to report each quarter. This number is slightly higher than the number—3,950—estimated at the time of the last clearance of the survey. However, the increase reflects growth in the number of foreign-owned firms, and would be significantly higher in the absence of the increase in the reporting threshold.

Survey Background

The BEA conducts the BE–605 survey under the International Investment and Trade in Services Survey Act ("the Act"). Section 4(a) of the Act provides that, with respect to foreign direct investment in the United States, the President shall, to the extent he deems it necessary and feasible, "conduct a regular data collection program to secure current information on international capital flows and other information related to international investment and trade in services, including (but not limited to) such information as may be necessary for computing and analyzing the United States balance of payments, the employment and taxes of United States parents and affiliates, and the international investment * * * position of the United States."

In section 3 of Executive Order 11961, as amended by Executive Orders 12318 and 12518, the President delegated the responsibility for performing functions under the Act concerning direct investment to the Secretary of Commerce, who has redelegated it to BEA.

The BE–605 quarterly survey is a sample survey that collects data on transactions and positions between foreign-owned U.S. business enterprises and their "affiliated foreign groups" (*i.e.*, their foreign parents and foreign affiliates of their foreign parents). The sample data are used to derive universe estimates in non-benchmark years from similar data reported in the BE–12, Benchmark Survey of Foreign Direct Investment in the United States, which is conducted every five years. The data are used in the preparation of the U.S. international transactions accounts, national income and product accounts, and input-output accounts. The data are needed to measure the size and economic significance of foreign direct investment in the United States, measure changes in such investment, and assess its impact on the U.S. economy.

Executive Order 12866

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

Executive Order 13132

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 13132.

Paperwork Reduction Act

The collection-of-information in this final rule has been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). OMB approved the information collection under control number 0608–0009.

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection-of-information subject to the requirements of the Paperwork Reduction Act unless that collection displays a currently valid OMB control number.

The BE–605 survey is expected to result in the filing of about 4,000 reports each financial quarter. The respondent burden for this collection of information is estimated to vary from one-half hour to three hours per response, with an average of one hour per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. (The burden will vary depending, in part, on the size and ownership structure of the U.S. business enterprise that is being reported.) Because reports are filed 4 times per year, 16,000 responses annually are expected. Thus, the average total annual respondent burden of the survey is estimated at 16,000 hours (4,000 respondents filing 4 times per year multiplied by 1 hour average burden). This estimate is slightly higher than the 15,800 burden hours currently in the OMB inventory for this survey because the increase in burden due to the growth in the number of foreign-owned firms slightly exceeds the reduction in burden resulting from the increase in the reporting threshold.

Written comments regarding the burden-hour estimates or any other aspect of the collection-of-information requirements contained in the final rule should be sent both to the Bureau of Economic Analysis via mail to U.S. Department of Commerce, Bureau of Economic Analysis, Office of the Chief, Direct Investment Division, BE–50, Washington, DC 20230; via e-mail at *David.Galler@bea.gov;* or by FAX at (202) 606–5311, and to the Office of Management and Budget, O.I.R.A., Paperwork Reduction Project 0608–0009, Attention PRA Desk Officer for BEA, via e-mail at *pbugg@omb.eop.gov,* or by FAX at (202) 395–7245.

Regulatory Flexibility Act

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated

here. No comments were received regarding the economic impact of the rule. As a result, no final regulatory flexibility analysis was prepared.

List of Subjects in 15 CFR Part 806

Economic statistics, Foreign investment in the United States, International transactions, Penalties, Reporting and recordkeeping requirements.

Dated: November 16, 2009.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

■ For the reasons set forth in the preamble, BEA amends 15 CFR Part 806 as follows:

PART 806—DIRECT INVESTMENT SURVEYS

■ 1. The authority citation for 15 CFR part 806 continues to read as follows:

Authority: 5 U.S.C. 301; 22 U.S.C. 3101–3108; E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12318 (3 CFR, 1981 Comp., p. 173), and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

■ 2. Section 806.15(h) is revised to read as follows:

§ 806.15 Foreign direct investment in the United States.

* * * * *

(h) *Quarterly report form.* BE–605, Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent: One report is required for each U.S. affiliate exceeding an exemption level of $60 million.

* * * * *

[FR Doc. E9–29312 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0331]

RIN 1625–AA87 and 1625–AA00

Security and Safety Zone; Cruise Ship Protection, Elliott Bay and Pier-91, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is adopting the subject interim rule published in the **Federal Register** August 20, 2009, as a final rule without change. Due to the physical location of Pier 91, Large Passenger Cruise Vessels are required to maneuver near a prominent marina frequented by a large recreational vessel community and near other numerous large commercial fishing vessels located at adjacent piers, posing a high safety and security risk when Large Passenger Cruise Vessels are entering and departing the cruise terminal. Due to the inherent safety and security risks associated with the movement of a cruise ship into or out of this especially tight berth at Pier 91, coupled with the large recreational boating community and commercial traffic in the area, the Coast Guard Captain of the Port Puget Sound finds it necessary to enact these safety and security zones.

DATES: This rule is effective January 8, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0331 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0331 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail LTJG Ian Hanna, Sector Seattle, Waterways Management Division, Coast Guard; telephone 206–217–6045, e-mail *Ian.S.Hanna@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 20, 2009, we published an interim rule with request for comment entitled Security and Safety Zone; Cruise Ship Protection, Elliott Bay and Pier-91, Seattle, Washington in the **Federal Register** (Volume 74, Number 160, Page 42026–42028). We received no comments on the interim rule. No parties requested a public meeting, and no meeting was held. We are adopting the interim rule as final without change.

Background and Purpose

The Coast Guard is establishing these safety and security zones to ensure adequate measures are in place for the safety and security of Large Passenger Cruise Vessels and the boating public. The Coast Guard conducted a safety and security risk assessment of the Cruise Terminal at Pier 91 (at 47°37.58′ N/122°23.0′ W), Seattle Washington, and the surrounding waterways: As a result of this assessment, the Captain of the Port found sufficient cause to require these safety and security zones. These zones are necessary to ensure the safety and security of not only moored Large Passenger Cruise Vessels, but also for Large Passenger Cruise Vessels that are in transit while entering or departing the Pier 91 cruise terminal at the Port of Seattle. Due to the physical location of Pier 91, Large Passenger Cruise Vessels are required to maneuver near a prominent marina and other numerous large fishing vessels located at adjacent piers when entering and departing the cruise terminal. Therefore, in order to protect these vessels, the safety and security zones will be enforced during the arrival and departure of Large Passenger Cruise Vessels and during the presence of moored Large Passenger Cruise Vessels at Pier 91, Seattle, Washington.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. This rule will be enforced to enhance the Security and Safety Zone for the protection of large passenger vessels under 33 CFR 165.1317. The security and safety zone that is in place during the arrival and departure of Large Passenger Cruise Vessels in and out of Pier 91 is short in duration, such that, it should not adversely affect other vessel traffic in the area, and the Captain of the Port Puget Sound may waive any of the requirements of this section for any vessel or class of vessels upon finding that a vessel or class of vessels, operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purpose of port security, safety or environmental safety.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered

whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. The 100 yard security and safety zone around Pier 91 when Large Passenger Cruise Vessels are present, allows a large enough area for pleasure craft to transit the area unhindered. Additionally, the security and safety zone that is in place during the arrival and departure of Large Passenger Cruise Vessels in and out of Pier 91 is short in duration, such that, it should not adversely affect other vessel traffic in the area.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ For the reasons discussed in the preamble, under authority of 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1, the Coast Guard adopts the interim rule amending 33 CFR part 165 that was published at 74 FR 42028 on August 20, 2009, as a final rule without change.

Dated: November 24, 2009.

S.E. Englebert,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. E9–29355 Filed 12–8–09; 8:45 am]

BILLING CODE 9910–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0945; FRL–8793–6]

Clothianidin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of clothianidin in or on multiple commodities which are identified and discussed later in this document. This regulation additionally increases established tolerances in or on cotton, gin byproducts; cotton, undelinted seed and potato, granules/flakes and deletes tolerances in or on several commodities that will be superseded by this action. Valent U.S.A. Corporation, Bayer CropScience and Interregional Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 9, 2009. Objections and requests for hearings must be received on or before February 8, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0945. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7390; e-mail address: *nollen.laura@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0945 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 8, 2010.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0945, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of September 5, 2008 (73 FR 51817) (FRL–8380–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7395) by Valent U.S.A. Corporation, P.O. Box 8025, Walnut Creek, CA 94596. The petition requested that 40 CFR 180.586 be amended by establishing tolerances for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine, in or on almond, hull at 1.5 parts per million (ppm); cotton, seed at 0.25 ppm; cotton, gin trash at 4.5 ppm; cotton, meal at 0.25 ppm; cotton, hull at 0.25 ppm; cotton, refined oil at 0.01 ppm; soybean, seed at 0.03 ppm; soybean, hull at 0.35 ppm; soybean, meal at 0.07 ppm; soybean, oil at 0.01 ppm; tomato, paste at 0.08 ppm; tomato, puree at 0.07 ppm; nut, tree, group 14 at 0.01 ppm;

vegetable, cucurbit, group 9 at 0.05 ppm; and vegetable, fruiting, group 8 at 0.25 ppm. The petition additionally requested to establish tolerances for residues of clothianidin and its metabolite TMG, N-(2-chlorothiazol-5-ylmethyl)-N'-methylguanidine, in or on vegetable, leafy, *brassica*, group 5 at 3.0 ppm; and vegetable, leafy, except *brassica*, group 4 at 3.5 ppm. That notice referenced a summary of the petition prepared by Valent U.S.A. Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. This petition was assigned Docket No. OPP–2008–0646. There were no comments received in response to the notice of filing.

In the **Federal Register** of December 3, 2008 (73 FR 73640) (FRL–8390–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7413) by Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.586 be amended by establishing tolerances for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine and its metabolite TMG, N-(2-chloro-5-thiazolylmethyl)-N-'-methylguanidine, in or on vegetable, root, except sugar beet, subgroup 1B at 0.6 ppm; vegetable, tuberous and corm, subgroup 1C at 0.2 ppm; vegetable, bulb, group 3 at 0.2 ppm; vegetable, leafy greens, except *brassica*, subgroup 4A at 1.1 ppm; and vegetable, *brassica*, leafy, group 5 at 0.35 ppm. The petition additionally requested to establish tolerances for residues of clothianidin in or on vegetable, fruiting, group 8 at 0.01 ppm; vegetable, cucurbit, group 9 at 0.01 ppm; grain, cereal, except rice, group 15 at 0.01 ppm, wheat, forage at 0.35 ppm, wheat, hay at 0.07 ppm and wheat, straw at 0.04 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. This petition was assigned Docket No. OPP–2008–0771. There were no comments received in response to the notice of filing.

In the **Federal Register** of April 13, 2009 (74 FR 16866) (FRL–8396–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E7460) by Interregional Research Project Number 4 (IR-4), 500 College Rd. East, Suite 201 W., Princeton, NJ 08540. The petition requested that 40 CFR 180.586 be amended by establishing tolerances for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine in or on berry, low growing, subgroup 13-07H, except strawberry at 0.01 ppm; peach at 0.70 ppm; and vegetable, tuberous and corm, subgroup 1C at 0.05 ppm. That notice referenced a summary of the petition prepared on behalf of IR-4 by Valent U.S.A. Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. This petition was assigned Docket No. OPP–2008–0945. There were no comments received in response to the notice of filing.

In the **Federal Register** of April 13, 2009 (74 FR 16866) (FRL–8396–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7416) by Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.586 be amended by increasing the tolerance for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine and its metabolite TMG, N-(2-chloro-5-thiazolylmethyl)-N-'-methylguanidine, in or on potato from 0.05 ppm to 0.6 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. This petition was assigned Docket No. OPP–2008–0771. There were no comments received in response to the notice of filing.

In the **Federal Register** of May 6, 2009 (74 FR 20947) (FRL–8412–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F7530) by Valent U.S.A. Corporation, P.O. Box 8025, Walnut Creek, CA 94596. The petition requested that 40 CFR 180.586 be amended by establishing tolerances for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine, in or on fig at 0.05 ppm and pomegranate at 0.2 ppm. That notice referenced a summary of the petition prepared by Valent, U.S.A. Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. This petition was assigned Docket No. OPP–2009–0262. There were no comments received in response to the notice of filing.

Bayer CropScience requested tolerances for residues of clothianidin to support seed treatment uses, whereas Valent U.S.A. Corporation and IR-4 requested tolerances to support foliar applications. Typically, foliar applications will result in higher residues than seed treatment uses. In cases where both use patterns were requested for the use of clothianidin on the same commodity, tolerance levels are being established at the higher level proposed; however, based upon review of the data supporting the petitions, EPA has revised the proposed foliar application tolerance levels for leafy vegetable, except *brassica*, crop group 4; *brassica* leafy vegetable, crop group 5; fruiting vegetable, crop group 8; and cucurbit vegetable, crop group 9. The Agency is also revising tolerances for several other proposed individual and group commodities.

EPA has determined that the proposed tolerance in or on bulb onion group 3 should be established on bulb onion, group 3-07. The Agency has also determined that tolerances are not required for several petitioned-for commodities. EPA is establishing tolerances on several commodities that were not proposed and is deleting several existing tolerances. Finally, the Agency is amending an established tolerance on potato granules/flakes that was not proposed. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for

tolerances for residues of clothianidin on almond hulls at 1.5 ppm; low-growing berry, subgroup 13-07H, except strawberry at 0.01 ppm; cotton, gin byproducts at 4.5 ppm; cotton undelinted seed at 0.20 ppm; fig at 0.05; cereal grain, forage, fodder and straw; group 16, except rice, forage at 0.35 ppm; cereal grain, forage, fodder and straw, group 16, except rice, hay at 0.07 ppm; cereal grain, forage, fodder and straw, group 16, except rice, stover at 0.1 ppm; cereal grain, forage, fodder and straw, group 16, except rice, straw at 0.05 ppm; cereal grain, group 15, except rice at 0.01 ppm; tree nut, group 14 at 0.01 ppm; peach at 0.80 ppm; pomegranate at 0.20 ppm; potato chips at 0.6 ppm; potato, granules/flakes at 1.5 ppm; soybean seed at 0.02 ppm; leafy brassica vegetable, group 5 at 1.9 ppm; bulb vegetable, group 3-07 at 0.45 ppm; cucurbit vegetable, group 9 at 0.06 ppm; fruiting vegetable, group 8 at 0.20 ppm; leafy vegetable except brassica, group 4 at 3.0 ppm; root vegetable except sugar beet, subgroup 1B at 0.8 ppm; and tuberous and corm vegetable, subgroup 1C at 0.3 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

EPA considered the toxicity of clothianidin as well as several metabolites and degradates in conducting this risk assessment. Metabolites/degradates of concern in plants include parent and TMG for leafy and root and tuber vegetables; parent-only for other crops; and parent, TZNG and MNG for rotational crops. For livestock commodities, the metabolites/degradates of concern include: Parent and TZU, TZG, TZNG and ATMG-pyruvate for ruminants; and parent and TZU, TZG, TZNG, and ATG-acetate for poultry. Acute toxicity and genotoxicity data are available for several metabolites/degradates of clothianidin. Given that the points of departure (POD) used for risk assessment are well below the lethal dose LD_{50} levels observed in the acute toxicology studies and that clothianidin and its metabolites/degradates of toxicological concern are similar in structure, EPA is assuming that these compounds are toxicologically equivalent to clothianidin with respect to the endpoints being used for risk assessment.

Clothianidin and its metabolites and degradates have relatively low acute toxicity via oral, dermal and inhalation routes of exposure; however, acute oral administration of clothianidin in mice and the TMG metabolite in rats showed evidence of increased relative toxicity. There is no evidence of dermal sensitization or eye irritation with the exception of the clothianidin-triazan intermediate, which is a dermal sensitizer. The available data indicate that there are no consistent target organs in mammals; however, some effects noted in the liver, hematopoietic system and kidney are similar to effects from other neonicotinoid insecticides.

In subchronic oral studies, the dog seemed to be more sensitive to clothianidin than the rat. In addition to decreases in body weight and body weight gains observed in both animals, dogs also displayed decreased white blood cells, albumin and total protein, as well as some anemia. Long-term dietary administration of clothianidin did not result in a wider spectrum of effects in the dog; in contrast, the chronic feeding studies in rats showed additional effects in the liver, ovaries and kidneys. In the mouse chronic oral study, increases in vocalization and decreases in body weight and body weight gain were noted.

Based on the lack of significant tumor increases in two adequate rodent carcinogenicity studies, EPA has classified clothianidin as "not likely to be carcinogenic to humans." A bone marrow micronucleus assay in mice showed that clothianidin is neither clastogenic nor aneugenic up to a toxic oral dose. Additionally, a study on the livers of Wistar male mice showed no induction of unscheduled DNA synthesis up to the limit dose; therefore, mutagenicity is not of concern.

Clinical signs of neurotoxicity were exhibited in both rats (decreased arousal, motor activity and locomotor activity) and mice (decreased spontaneous motor activity, tremors and deep respirations) in acute neurotoxicity studies following exposure by gavage; however, no indications of neurotoxicity were observed following dietary exposure in the subchronic neurotoxicity study in rats.

There was no evidence of increased quantitative or qualitative susceptibility of rat or rabbit fetuses following *in utero* exposure to clothianidin in developmental studies; however, increased quantitative susceptibility of rat pups was seen in both the reproduction and developmental neurotoxicity studies. In the rat reproduction study, offspring toxicity (decreased body weight gains and absolute thymus weights in pups, delayed sexual maturation and an increase in stillbirths) was observed in the absence of maternal effects. In the developmental neurotoxicity study in rats, offspring effects (decreased body weights, body weight gains, motor activity and acoustic startle response amplitude) were noted at doses lower than those resulting in maternal toxicity.

Decreased absolute and relative thymus and spleen weights were observed in multiple studies; these studies showed possible evidence of effects on the immune system. In addition, juvenile rats in the rat reproduction study appeared to be more susceptible to these effects. However, a guideline immunotoxicity study showed no evidence of clothianidin-mediated immunotoxicity in adult rats and a developmental immunotoxicity study demonstrated no increased susceptibility for offspring with regard to immunotoxicity.

Specific information on the studies received and the nature of the adverse effects caused by clothianidin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document "*Clothianidin*: Human Health Risk Assessment for Proposed Uses on Berries (Group 13-07H), Brassica Vegetables (Group 5), Cotton, Cucurbit Vegetables (Group 9), Fig, Fruiting Vegetables (Group 8), Leafy Green Vegetables (Group 4A), Peach, Pomegranate, Soybean, Tree Nuts (Group 14), and Tuberous and Corm Vegetables (Group 1C)," pages 46–54 in docket ID number EPA–HQ–OPP–2008–0945.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological POD is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the

extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the level of concern (LOC).

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

A summary of the toxicological endpoints for clothianidin used for human risk assessment can be found at *http://www.regulations.gov* in the document "*Clothianidin*: Human Health Risk Assessment for Proposed Uses on Berries (Group 13-07H), Brassica Vegetables (Group 5), Cotton, Cucurbit Vegetables (Group 9), Fig, Fruiting Vegetables (Group 8), Leafy Green Vegetables (Group 4A), Peach, Pomegranate, Soybean, Tree Nuts (Group 14), and Tuberous and Corm Vegetables (Group 1C)," page 23 in docket ID number EPA–HQ–OPP–2008–0945.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to clothianidin, EPA considered exposure under the petitioned-for tolerances as well as all existing clothianidin tolerances in 40 CFR 180.586. EPA assessed dietary exposures from clothianidin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

In estimating acute dietary exposure, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used tolerance-level residues, empirical processing factors and assumed 100 percent crop treated (PCT) for all commodities. Clothianidin is a major metabolite of thiamethoxam, and there are a number of crops for which uses of both clothianidin and thiamethoxam have been registered. The labels for the various end-use products containing these active ingredients prohibit the application of both active ingredients to the same crop during a growing cycle. Due to that restriction and the assumption of 100 PCT, a single value reflecting the greatest clothianidin residue from either active ingredient has been used for crops listed for use with both active ingredients (versus combined estimates from clothianidin and from thiamethoxam). Generally, this assessment uses the established or recommended clothianidin tolerance for crops having tolerances for both compounds (the exception being low-growing berry, subgroup 13-07G, which is based on observed clothianidin residues in thiamethoxam strawberry field trials). For foods with thiamethoxam tolerances but without clothianidin tolerances, maximum residues of clothianidin observed in thiamethoxam field trials have been used in these assessments. These include meats, meat by-products, artichoke, tropical fruits, coffee, hop, mint, rice, and strawberry. The metabolism of clothianidin is complex, with a few major (> 10% of the total radioactive residues) and numerous minor metabolites. Metabolites/degradates of concern in plants include clothianidin and TMG for leafy, root and tuber vegetables; parent-only for other crops; and parent, TZNG and MNG for rotational crops. For livestock commodities, the metabolites of concern include: parent and TZU, TZG, TZNG, and ATMG-pyruvate for ruminants; and parent and TZU, TZG, TZNG, and ATG-acetate for poultry. For leafy vegetables the EPA required analysis for residues of TMG along with parent in field trial samples. Residues of TMG were shown to occur in leafy vegetables at levels approximately tenfold below those of clothianidin. EPA has not included these metabolites in the tolerance expression for plant or animal commodities because the metabolites are only found in certain commodities, including the metabolites would create tolerance harmonization issues with Canada, and monitoring residues of clothianidin based on parent only would be representative of total clothianidin residues and thus adequate for enforcement. Because the metabolites are not included in the tolerance expressions, an adjustment factor of 1.1 has been incorporated into the assessment for leafy vegetables to account for the presence of the metabolite TMG, and an adjustment factor of 1.5 has been incorporated for livestock-derived commodities (milk) to account for the presence of metabolites TZU, TZG, TZNG, ATMG-pyruvate and ATG-acetate. The 1.1 adjustment factor is based on field trial data showing TMG does not exceed 10% of the parent compound residue level in leafy vegetables and the 1.5 factor was based on metabolism data.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assessed chronic dietary exposure using the same residue information and assumptions regarding metabolites/degradates as in the acute exposure analysis.

iii. *Cancer.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, EPA has classified clothianidin as "not likely to be carcinogenic to humans." Therefore, a quantitative exposure assessment to evaluate cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for clothianidin. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of clothianidin for surface water are estimated to be 7.29 parts per billion (ppb) for acute exposures and 1.35 ppb for chronic exposures. For ground water, the EDWC is estimated to be 5.88 ppb.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. The water concentration value of 7.29 ppb was used to assess the contribution to drinking water for the acute dietary assessment. For chronic dietary risk assessment, the water concentration of value 5.88 ppb was used.

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

Clothianidin is currently registered for use on turf. Residential handler exposure is not expected from the currently registered or proposed uses of clothianidin since these products are to be applied by commercial applicators. Adult short- and intermediate-term postapplication exposures were assessed for dermal exposures from commercial applications (via granular push-type spreaders), dermal post-application contact and golfer postapplication contact. For toddlers, short- and intermediate-term postapplication incidental oral (hand-to-mouth and soil ingestion) and dermal risks were assessed for exposure to treated turf.

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

Clothianidin is a member of the neonicotinoid class of pesticides and is a metabolite of another neonicotinoid, thiamethoxam. Structural similarities or common effects do not constitute a common mechanism of toxicity. Evidence is needed to establish that the chemicals operate by the same, or essentially the same sequence of major biochemical events (EPA, 2002). Although clothianidin and thiamethoxam bind selectively to insect nicotinic acetylcholine receptors (nAChR), the specific binding site(s)/receptor(s) for clothianidin, thiamethoxam, and the other neonicotinoids are unknown at this time. Additionally, the commonality of the binding activity itself is uncertain, as preliminary evidence suggests that clothianidin operates by direct competitive inhibition, while thiamethoxam is a non competitive inhibitor. Furthermore, even if future research shows that neonicotinoids share a common binding activity to a specific site on insect nicotinic acetylcholine receptors, there is not necessarily a relationship between this pesticidal action and a mechanism of toxicity in mammals. Structural variations between the insect and mammalian nAChRs produce quantitative differences in the binding affinity of the neonicotinoids towards these receptors, which, in turn, confers the notably greater selective toxicity of this class towards insects, including aphids and leafhoppers, compared to mammals. While the insecticidal action of the neonicotinoids is neurotoxic, the most sensitive regulatory endpoint for clothianidin is based on unrelated effects in mammals, including changes in body and thymus weights, delays in sexual maturation, and still births. Additionally, the most sensitive toxicological effect in mammals differs across the neonicotinoids (e.g., testicular tubular atrophy with thiamethoxam; mineralized particles in thyroid colloid with imidaclopid). Thus, there is currently no evidence to indicate that neonicotinoids share common mechanisms of toxicity, and EPA is not following a cumulative risk approach based on a common mechanism of toxicity for the neonicotinoids. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism released by EPA's Office of Pesticide Programs on EPA's website at *http://www.epa.gov/pesticides/cumulative/.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicology data for clothianidin provide no indication of increased quantitative or qualitative susceptibility, as compared to adults, of rat and rabbit fetuses to *in utero* exposure in developmental studies. However, increased quantitative susceptibility was observed in both the developmental neurotoxicity and rat multi–generation reproduction studies. In the developmental neurotoxicity study, offspring toxicity (decreased body weight gains, motor activity and acoustic startle response) was seen at a lower dose than that which caused maternal toxicity. In the 2–generation rat reproduction study, offspring toxicity (decreased body weight gains, delayed sexual maturation in males, decreased absolute thymus weights in F1 pups of both sexes and an increase in stillbirths in both generations) was seen at a dose lower than that which caused parental toxicity.

3. *Conclusion.* In the final rule published in the **Federal Register** of February 6, 2008 (73 FR 6851) (FRL–8346–9), EPA had previously determined that the FQPA SF for clothianidin should be retained at 10X because EPA had required the submission of a developmental immunotoxicity study to address the combination of evidence of decreased absolute and adjusted organ weights of the thymus and spleen in multiple studies in the clothianidin data base, and evidence showing that juvenile rats in the 2–generation reproduction study appear to be more susceptible to these potential immunotoxic effects. In the absence of a developmental immunotoxicity study EPA concluded that there was sufficient uncertainty regarding immunotoxic effects in the young that the 10X FQPA factor should be retained as a database uncertainty factor. Since that determination, EPA has received and reviewed an acceptable/guideline developmental immunotoxicity study, which demonstrated no treatment-related effects. Taking the results of this study into account as well as the rest of the data on clothianidin, EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF for clothianidin were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for clothianidin is complete. As noted, the prior data gap concerning developmental immunotoxicity has been addressed by the submission of an acceptable developmental immunotoxicity study.

ii. A rat developmental neurotoxicity study is available and shows evidence of increased quantitative susceptibility of offspring. However, EPA considers the degree of concern for the developmental neurotoxicity study to be low for prenatal and postnatal toxicity because the NOAEL and LOAEL were well characterized, and the doses and endpoints selected for risk assessment are protective of the observed susceptibility; therefore, there are no residual concerns regarding effects in the young.

iii. While the rat multi-generation reproduction study showed evidence of increased quantitative susceptibility of offspring compared to adults, the degree of concern is low because the study NOAEL and LOAEL have been selected for risk assessment purposes for relevant exposure routes and durations. In addition, the potential immunotoxic effects observed in the study have been further characterized with the submission of a developmental immunotoxicity study that showed no evidence of susceptibility. As a result, there are no concerns or residual uncertainties for prenatal and postnatal toxicity after establishing toxicity endpoints and traditional UFs to be used in the risk assessment for clothianidin.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on assumptions that were judged to be highly conservative and health-protective for all durations and population subgroups, including tolerance-level residues, adjustment factors from metabolite data, empirical processing factors, and 100 PCT for all commodities. Additionally, EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to clothianidin in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children and adults as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by clothianidin.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to clothianidin will occupy 23% of the aPAD for children 1 to 2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to clothianidin from food and water will utilize 19% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of clothianidin is not expected.

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

Clothianidin is currently registered for use on turf that could result in short- and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short- and intermediate-term residential exposures to clothianidin. Using the exposure assumptions described in this unit for short- and intermediate-term exposures, EPA has concluded the combined short- and intermediate-term food, water, and residential exposures aggregated result in aggregate MOEs of greater than 380 for all population subgroups. As the aggregate MOEs are greater than 100 (the LOC) for all population subgroups, including infants and children, short- and intermediate-term aggregate exposures to clothianidin are not of concern to EPA.

4. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in mice and rats at doses that were judged to be adequate to assess the carcinogenic potential, clothianidin was classified as "not likely to be carcinogenic to humans," and is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS) enforcement methodology is available to enforce the tolerance expression for both plant and animal commodities and has been forwarded to the Food and Drug Administration for inclusion in the Pesticide Analytical Manual (PAM), Volume II. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In order to harmonize with Canadian maximum residue limits (MRLs) on potato tubers at 0.3 ppm; potato chips at 0.6 ppm and potato granules/flakes at 1.5 ppm, EPA has recommended the following tolerances: Vegetable, tuberous and corm, subgroup 1C (which includes potato) at 0.3 ppm; potato, chips at 0.6 ppm; and potato granules/flakes at 1.5 ppm. Additionally, Canada is currently reviewing a petition to establish a tolerance in or on the stone fruit (including peaches) crop group at 0.8 ppm. A tolerance on peach at 0.80 ppm is being recommended by EPA to harmonize with Canada's recommended stone fruit MRL. There are currently no Canadian MRLs established for residues of clothianidin in or on other commodities associated with these petitions. There are currently no Codex or Mexican MRLs established for residues of clothianidin in or on commodities associated with these petitions.

C. Revisions to Petitioned-For Tolerances

EPA has revised the proposed tolerance levels for foliar applications of clothianidin on the following commodities: Leafy vegetable, crop group 4 from 3.5 ppm to 3.0 ppm; *brassica* vegetable, crop group 5 from 3.0 ppm to 1.9 ppm; fruiting vegetable, crop group 8 from 0.25 to 0.20 ppm; and cucurbit vegetable, crop group 9 from 0.05 to 0.06 ppm. EPA has also revised the proposed tolerance levels in or on

soybean, seed from 0.03 ppm to 0.02 ppm; root vegetable, except sugar beet, subgroup 1B from 0.60 ppm to 0.8 ppm; bulb vegetable group 3-07 from 0.2 ppm to 0.45 ppm; and wheat, straw from 0.04 ppm to 0.05 ppm; and has revised the proposed tolerance amendment for cotton, undelinted seed (the preferred commodity definition for cotton, seed) from 0.25 to 0.20. EPA revised the tolerance levels based on analysis of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's Guidance for Setting Pesticide Tolerances Based on Field Trial Data.

The Agency has also revised tolerances in order to harmonize U.S. MRLs with currently established or pending Canadian MRLs for peach from 0.7 ppm to 0.80 ppm; and for tuberous and corm vegetable, group 1C (based on the a seed piece treatment which results in the highest residue) from 0.2 ppm to 0.3 ppm. Additionally, the Agency has established a tolerance in or on potato, chips at 0.6 ppm; and has increased a currently-established tolerance in or on potato, granules/flakes from 0.08 to 1.5 ppm to harmonize with Canadian MRLs on the commodities.

EPA has also determined that individual tolerances are not necessary for several petitioned-for commodities. A request to increase an existing potato tolerance from 0.05 ppm to 0.6 ppm is not necessary because potato is superseded by inclusion in the tuberous and corm subgroup 1C; thus, the existing potato tolerance is being deleted. A proposed tolerance on vegetable, leafy greens, except *brassica*, subgroup 4A at 1.1 ppm is not necessary, as the subgroup tolerance is superseded by inclusion in the leafy vegetable except *brassica*, group 4. Separate tolerances in or on soybean, hulls; soybean, meal; and soybean, oil are not required because adequate soybean processing data indicate that quantifiable residues are unlikely to occur in soybean processed fractions; thus, only a soybean seed tolerance is being established. Separate tolerances in or on cotton, meal; cotton, hulls; and cotton, refined oil are not required because residues were reduced in these commodities; therefore, the existing cotton, undelinted seed (the preferred commodity term for cotton, seed) and cotton, gin byproducts (the preferred commodity term for cotton, gin trash) tolerances are being amended to reflect increased tolerances of 0.20 and 4.5 ppm, respectively. Finally, adequate processing data indicate that separate tolerances in or on tomato, paste at 0.08 ppm and tomato, puree at 0.07 ppm are not necessary; therefore, only a fruiting vegetable group 8 (including tomato) tolerance is required.

EPA has reviewed the available wheat, corn and sorghum data and has determined that sufficient data are available to establish the following group tolerances: Grain, cereal, forage, fodder and straw, group 16, except rice, forage at 0.35 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, hay at 0.07 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, stover at 0.1 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, straw at 0.05 ppm. The registrant petitioned for a crop group tolerance on the Cereal Grains Group (Crop Group 15) but only petitioned for individual tolerances in or on wheat, forage (at 0.35 ppm); wheat, hay (at 0.07 ppm); and wheat, straw (at 0.04); and not tolerances on the crop group covering Forage, Fodder, and Straw of the Cereal Grains (Crop Group 16). However, EPA has determined that tolerances for group 16 are appropriate because the petitioned-for wheat feed item tolerances when considered in conjunction with the existing feed item tolerances for corn and sorghum satisfied the requirements for establishment of Crop Group 16 tolerances. The Crop Group 16 tolerances are being limited like the Crop Group 15 tolerance to exclude rice. Additionally, the following established tolerances are being deleted because they are superseded by inclusion in group 16: corn, field, forage at 0.10 ppm; corn, field, stover at 0.10 ppm; corn, pop, stover at 0.10 ppm; corn, sweet, forage at 0.10 ppm; corn, sweet, stover at 0.10; sorghum, forage and stover at 0.01 ppm; and grain, cereal, forage, fodder and straw, group 16 at 0.02 ppm (a tolerance resulting from indirect/inadvertent residues of clothianidin). Finally, tolerances of clothianidin in or on corn, field grain at 0.01 ppm; corn, pop, grain at 0.01 ppm; corn, sweet, kernel plus cob with husk removed at 0.01 ppm; and sorghum, grain at 0.01 ppm are being deleted because they are being superseded by inclusion in the grain, cereal, group 15.

Additionally, a final rule published in the **Federal Register** of December 7, 2007 (72 FR 69150) (FRL–8343–1) that amended the existing bulb vegetable group 3 by adding several commodities; the updated group was renamed the bulb vegetable group 3-07. This rule, as well as the earlier May 23, 2007 proposed rule (72 FR 28920) (FRL–8126–1) stated that, for existing petitions for which a Notice of Filing had been published, the Agency would attempt to conform these petitions to the rule. Therefore, consistent with this rule, EPA has assessed for and is establishing a tolerance for group 3-07 instead of the proposed bulb vegetable group 3.

Finally, EPA has revised the tolerance expression to clarify (1) that, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of clothianidin not specifically mentioned; and (2) that compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine, in or on almond, hulls at 1.5 ppm; berry, low-growing, subgroup 13-07H, except strawberry at 0.01 ppm; fig at 0.05; grain, cereal, forage, fodder and straw, group 16, except rice, forage at 0.35 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, hay at 0.07 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, stover at 0.1 ppm; grain, cereal, forage, fodder and straw, group 16, except rice, straw at 0.05 ppm; grain, cereal, group 15, except rice at 0.01 ppm; nut, tree, group 14 at 0.01 ppm; peach at 0.80 ppm; pomegranate at 0.20 ppm; potato, chips at 0.6 ppm; soybean, seed at 0.02 ppm; vegetable, brassica, leafy, group 5 at 1.9 ppm; vegetable, bulb, group 3-07 at 0.45 ppm; vegetable, cucurbit, group 9 at 0.06 ppm; vegetable, fruiting, group 8 at 0.20 ppm; vegetable, leafy, except brassica, group 4 at 3.0 ppm; vegetable, root, except sugar beet, subgroup 1B at 0.8 ppm; and vegetable, tuberous and corm, subgroup 1C at 0.3 ppm. Additionally, tolerances are amended for residues of clothianidin in or on cotton, gin byproducts from 0.01 ppm to 4.5 ppm; cotton, undelinted seed from 0.01 ppm to 0.20 ppm; and potato, granules/flakes from 0.08 to 1.5 ppm. This regulation deletes a tolerance in or on potato at 0.05 ppm; corn, field, forage at 0.10 ppm; corn, field, grain at 0.01 ppm; corn, field, stover at 0.10 ppm; corn, pop, grain at 0.01 ppm; corn, pop, stover at 0.10 ppm; corn, sweet, forage at 0.10 ppm; corn, sweet, kernel plus cob with husk removed at 0.01 ppm; corn, sweet, stover at 0.10 ppm; and sorghum, forage, grain, stover at 0.01 ppm. Finally, this regulation deletes a tolerance for indirect/inadvertent residues of clothianidin in or on grain, cereal, forage, fodder and straw, group 16 at 0.02 ppm. Also, the introductory text in 40 CFR 180.586(a), (b) and (d), which includes the tolerance expression, are revised.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 27, 2009.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.586 is revised to read as follows:

§ 180.586 Clothianidin; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide clothianidin, including its metabolites and degradates. Compliance with the tolerance levels specified below is to be determined by measuring only clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine, in or on the following raw agricultural commodities:

Commodity	Parts per million
Almond, hulls	1.5
Beet, sugar, dried pulp	0.03
Beet, sugar, molasses	0.05
Beet, sugar, roots	0.02
Berry, low-growing, subgroup 13-07H, except strawberry	0.01
Canola, seed	0.01
Cotton, gin byproducts	4.5
Cotton, undelinted seed	0.20
Fig	0.05
Fruit, pome	1.0
Grain, cereal, forage, fodder and straw, group 16, except rice, forage	0.35
Grain, cereal, forage, fodder and straw, group 16, except rice, hay	0.07
Grain, cereal, forage, fodder and straw, group 16, except rice, stover	0.1
Grain, cereal, forage, fodder and straw, group 16, except rice, straw	0.05
Grain, cereal, group 15, except rice	0.01
Grape	0.60
Milk	0.01
Nut, tree, group 14	0.01
Peach	0.80
Pomegranate	0.20
Potato, chips	0.6
Potato, granules/flakes	1.5
Soybean, seed	0.02
Vegetable, brassica, leafy, group 5	1.9
Vegetable, bulb, group 3-07	0.45
Vegetable, cucurbit, group 9	0.06
Vegetable, fruiting, group 8	0.20
Vegetable, leafy, except brassica, group 4	3.0
Vegetable, root, except sugar beet, subgroup 1B	0.8
Vegetable, tuberous and corm, subgroup 1C	0.3

(b) *Section 18 emergency exemptions.* Time-limited tolerances are established for the residues of the insecticide clothianidin, including its metabolites and degradates in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. Compliance with the tolerance levels specified below is to be determined by measuring only clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine. These tolerances will expire and are revoked on the dates specified in the following table:

Commodity	Parts per million	Expiration/ revocation date
Beet, sugar, roots	0.02	12/31/09

Commodity	Parts per million	Expiration/ revocation date
Beet, sugar, tops	0.02	12/31/09

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect and inadvertant residues.* Tolerances are established for the indirect or inadvertent residues of the insecticide clothianidin, including its metabolites and degradates. Compliance with the tolerance levels specified below is to be determined by measuring only clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine, in or on the following raw agricultural commodities when present therein as a result of the application of clothianidin to crops listed in paragraph (a) of this section:

Commodity	Parts per million
Animal feed, nongrass, group 18	0.02
Grass, forage, fodder and hay, group 17	0.02
Soybean, forage	0.02
Soybean, hay	0.02

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0769; FRL–8799–6]

Novaluron; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of novaluron in or on bushberry subgroup 13-07B; Brassica, leafy greens, subgroup 5B; turnip, greens; fruit, stone, group 12, except cherry; cherry; and plum, prune, dried. This regulation additionally revises an existing tolerance in or on egg and revises terminology for an existing tolerance. Interregional Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 9, 2009. Objections and requests for hearings must be received on or before February 8, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0769. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number (703) 305–7390; e-mail address: *nollen.laura.@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*. To access the OPPTS Harmonized Test Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/oppts* and select "Test Methods & Guidelines" on the left side navigation menu.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0769 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 8, 2010.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008-0769, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of December 3, 2008 (73 FR 73640) (FRL–8390–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 8E7425 and PP 8E7426) by IR-4, 500 College Road East, Suite 201 W., Princeton, NJ 08540. The petitions requested that 40 CFR 180.598 be amended by establishing tolerances for residues of the insecticide novaluron, *N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy) ethoxy]phenyl]amino]carbonyl]-2,6-difluorobenzamide, in or on bushberry, subgroup 13-07B at 7 parts per million (ppm) (PP 8E7425); fruit, stone, group 12 at 8 ppm (PP 8E7426); Brassica, leafy greens, subgroup 5B at 25 ppm (PP 8E7426); and turnip, greens at 25 ppm (PP 8E7426). PP 8E7426 additionally requested to increase the existing tolerance for residues of novaluron in or on egg from 0.05 ppm to 0.07 ppm; however, the petition number associated with this request was incorrectly reported. The correct petition number for the request to increase the existing egg tolerance is PP 9F7630. The notice referenced summaries of the petitions prepared on behalf of IR-4 by Makhteshim-Agan of North America, Inc., the registrant, which are available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the tolerance on stone fruit and has determined that individual tolerances in or on cherry; and plum, prune, dried are necessary. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of novaluron on bushberry subgroup 13-07B at 7.0 ppm; Brassica, leafy greens, subgroup 5B at 25 ppm; turnip, greens at 25 ppm; fruit, stone, group 12, except cherry at 1.9 ppm; cherry at 8.0 ppm; plum, prune, dried at 2.6 ppm; and egg at 0.07 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Novaluron has low acute toxicity via the oral, dermal and inhalation routes of exposure. It is not an eye or skin irritant and is not a dermal sensitizer. In subchronic and chronic toxicity studies, novaluron primarily produced hematotoxic effects such as methemoglobinemia, decreased hemoglobin, decreased hematocrit, and decreased RBCs (or erythrocytes) associated with increased erythropoiesis. Increased spleen weights and/or hemosiderosis in the spleen were considered to be due to enhanced removal of damaged erythrocytes and not to an immunotoxic effect.

There was no maternal or developmental toxicity seen in the rat and rabbit developmental toxicity studies up to the limit doses. In the 2-generation reproductive toxicity study in rats, both maternal and offspring toxicity were evidenced by enlargement of the spleen. Reproductive toxicity (decreases in epididymal sperm counts and increased age at preputial separation in the F_1 generation) was observed only in males.

Signs of neurotoxicity were seen in the rat acute neurotoxicity study at the limit dose, including clinical signs (piloerection, fast/irregular breathing), functional observation battery (FOB) parameters (head swaying, abnormal gait) and neuropathology (sciatic and tibial nerve degeneration). No signs of neurotoxicity or neuropathology were observed in the subchronic neurotoxicity study in rats or in any other subchronic or chronic toxicity study in rats, mice or dogs. Therefore, there is no concern for neurotoxicity resulting from exposure to novaluron.

There was no evidence of carcinogenic potential in either the rat or mouse carcinogenicity studies and no evidence of mutagenic activity in the submitted mutagenicity studies, including a bacterial (*Salmonella, E. coli*) reverse mutation assay, an *in vitro* mammalian chromosomal aberration assay, an *in vivo* mouse bone-marrow micronucleus assay and a bacterial DNA damage or repair assay. Based on the results of these studies, EPA has classified novaluron as "not likely to be carcinogenic to humans."

Specific information on the studies received and the nature of the adverse effects caused by novaluron as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Novaluron: Human-Health Risk Assessment for Proposed Section 3 Uses on Bushberry Crop Subgroup 13-07B; Brassica, Leafy Greens, Crop Subgroup 5B; Turnip, Greens; and Fruit, Stone, Crop Group 12," pages 28-31 in docket ID number EPA–HQ–OPP–2008–0769.

B. Toxicological Endpoints

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

population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

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

A summary of the toxicological endpoints for novaluron used for human risk assessment can be found at *http://www.regulations.gov* in document "Novaluron: Human-Health Risk Assessment for Proposed Section 3 Uses on Bushberry Crop Subgroup 13-07B; Brassica, Leafy Greens, Crop Subgroup 5B; Turnip, Greens; and Fruit, Stone, Crop Group 12," pages 13-14 in docket ID number EPA–HQ–OPP–2008–0769.

C. Exposure Assessment

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

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for novaluron; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Continuing Surveys of Food Intakes by Individuals (CSFII). As to residue levels in food, EPA incorporated anticipated residues from average field trial residues for pome fruit, sugarcane, bushberries, Brassica leafy greens, stone fruit and greenhouse tomatoes; empirical processing factors for apple juice (translated to pear and stone fruit juice), tomato paste and purée, and dried plums; and DEEM default processing factors for the remaining processed commodities. In estimating dietary exposure from secondary residues in livestock, EPA relied on anticipated residues for meat and milk commodities but used tolerance-level residues for poultry commodities. 100 percent crop treated (PCT) was assumed for all existing and new uses of novaluron.

iii. *Cancer.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, EPA has classified novaluron as "not likely to be carcinogenic to humans." Therefore, a quantitative exposure assessment to evaluate cancer risk is unnecessary.

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

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

The following models were used to assess residues of concern in drinking water: The Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) for parent novaluron in surface water; the First Index Reservoir Screening Tool (FIRST) for chlorophenyl urea and chloroaniline degradates in surface water; and the Screening Concentration in Ground Water (SCI-GROW) model for novaluron, chlorophenyl urea and chloroaniline in ground water. The estimated drinking water concentrations (EDWCs) of novaluron, chlorophenyl urea and chloroaniline for chronic exposures for non-cancer assessments are estimated to be 0.76 parts per billion (ppb), 0.89 ppb and 2.6 ppb, respectively, for surface water and 0.0056 ppb, 0.0045 ppb and 0.0090 ppb, respectively, for ground water.

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

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Novaluron is not registered for any specific use patterns that would result in residential exposure.

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

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

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the

case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA SF. In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

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

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

i. The toxicity database for novaluron is complete except for immunotoxicity testing. Recent changes to 40 CFR part 158 make immunotoxicity testing (OPPTS Test Guideline 870.7800) required for pesticide registration; however, the existing data are sufficient for endpoint selection for exposure/risk assessment scenarios, and for evaluation of the requirements under the FQPA. Although effects were seen in the spleen in two studies, as explained in Unit III.A., EPA has concluded that novaluron does not directly target the immune system and the Agency does not believe that conducting a functional immunotoxicity study will result in a NOAEL lower than the regulatory dose for risk assessment; therefore, an additional database uncertainty factor is not needed to account for potential immunotoxicity.

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

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

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

E. Aggregate Risks and Determination of Safety

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

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

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to novaluron from food and water will utilize 83% of the cPAD for children 1-2 years old, the population group receiving the greatest exposure. There are no residential uses for novaluron.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Novaluron is not registered for any use patterns that would result in residential exposure. Therefore, the short- and intermediate-term aggregate risk is the sum of the risk from exposure to novaluron through food and water and will not be greater than the chronic aggregate risk.

4. *Aggregate cancer risk for U.S. population.* There was no evidence of carcinogenic potential in either the rat or mouse carcinogenicity studies and no evidence of mutagenic activity in the submitted mutagenicity studies; therefore, novaluron is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

No Codex, Canadian or Mexican maximum residue limits (MRLs) have been established for novaluron on bushberries; Brassica, leafy greens; turnip greens; or stone fruit. Canada has reviewed the use of novaluron on Brassica, leafy greens and stone fruit

(including cherry and plum, prune, dried). Canadian and U.S. recommendations have been harmonized and MRLs for Brassica, leafy greens, subgroup 5B at 7.0 ppm; stone fruit, group 12, except cherry at 1.9 ppm; cherry at 8.0 ppm; and plum, prune, dried at 2.6 ppm are expected to be established in Canada.

C. Revisions to Petitioned-For Tolerances

Based on analysis of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's *Guidance for Setting Pesticide Tolerances Based on Field Trial Data*, EPA revised the proposed tolerance on fruit, stone, group 12 (excluding cherry; and plum, prune, dried) from 8.0 ppm to 1.9 ppm and determined that individual tolerances on cherry at 8.0 ppm and plum, prune, dried at 2.6 ppm are necessary. For peaches, fresh plums and cherries (the representative commodities for fruit, stone, group 12) the tolerance spreadsheet recommends tolerances of 1.8 ppm, 1.9 ppm, and 8.0 ppm, respectively. For plum, prune, dried, the tolerance spreadsheet recommends a tolerance of 2.6 ppm. Therefore, tolerances of novaluron in or on fruit, stone, group 12, except cherry at 1.9 ppm; cherry at 8.0 ppm; and plum, prune, dried at 2.6 ppm are appropriate. EPA has also revised the tolerance expression to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of novaluron not specifically mentioned; and

2. That compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of novaluron, *N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide, in or on bushberry subgroup 13-07B at 7.0 ppm; Brassica, leafy greens, subgroup 5B at 25 ppm; turnip, greens at 25 ppm; fruit, stone, group 12, except cherry at 1.9 ppm; cherry at 8.0 ppm; plum, prune, dried at 2.6 ppm; and egg at 0.07 ppm. EPA also revised the commodity definition for vegetables, tuberous and corn, subgroup 1C to vegetable, tuberous and corm, subgroup 1C to reflect the correct commodity definition.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 13, 2009.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.598 is amended by:

i. Revising the introductory text in paragraph (a);

ii. Revising the existing entries for "Egg" and "Vegetables, tuberous and corn, subgroup 1C" in the table in paragraph (a) and alphabetically adding "Brassica, leafy greens, subgroup 5B"; "Bushberry subgroup 13-07B"; "Cherry"; "Fruit, stone, group 12, except cherry"; "Plum, prune, dried"; and "Turnip, greens" to the table in paragraph (a); and

iii. Revising the introductory text in paragraph (b).

The amendments read as follows:

§ 180.598 Novaluron; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide novaluron, including its metabolites and degradates, in or on the following commodities. Compliance with the tolerance levels specified in the following table is to be determined by

measuring only novaluron, (*N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide), in or on the following raw agricultural commodities:

Commodity	Parts per million
* * * * *	
Brassica, leafy greens, subgroup 5B	25
Bushberry subgroup 13-07B	7.0
* * * * *	
Cherry	8.0
* * * * *	
Egg	0.07
* * * * *	
Fruit, stone, group 12, except cherry	1.9
* * * * *	
Plum, prune, dried	2.6
* * * * *	
Turnip, greens	25
Vegetable, tuberous and corm, subgroup 1C	0.05

(b) *Section 18 emergency exemptions.* Time-limited tolerances are established for residues of the insecticide novaluron, including its metabolites and degradates, in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. Compliance with the tolerance levels specified in the following table is to be determined by measuring only novaluron, (*N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide). These tolerances will expire and are revoked on the dates specified in the following table:

* * * * *

[FR Doc. E9–29212 Filed 12–8–09; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL MARITIME COMMISSION

46 CFR Part 535

[Docket No. 09–02]

RIN 3072–AC 35

Repeal of Marine Terminal Agreement Exemption

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission repeals the marine terminal agreements exemption, which exempted such agreements from the Shipping Act's 45-day statutory waiting period, and amends the Commission's regulations to transfer an existing definition of the marine terminal conference agreement to another section. This rule also corrects a typographical error.

DATES: Effective December 10, 2009.

FOR FURTHER INFORMATION CONTACT: Peter J. King, General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1018, Washington, DC 20573–0001, *generalcounsel@fmc.gov*.

SUPPLEMENTARY INFORMATION: By Notice of Proposed Rulemaking (NPR) published in the **Federal Register** on July 2, 2009, 74 FR 31666, the Commission proposed to repeal 46 CFR 535.308, which exempts marine terminal agreements from the 45-day waiting period requirement of the Shipping Act. The NPR addresses the Commission's findings and concerns that agreements filed under section 535.308 could cause anticompetitive consequences that the Commission deemed unlikely when it first adopted the exemption in 1987.

The Commission invited comments on the NPR. The comments period was later extended to September 8, 2009. 74 FR 41831, Aug. 19, 2009.

Comments

Three comments were filed with the Commission. Two comments support repeal of section 535.308 exemption as proposed in the NPR, and one comment opposes the repeal.

The National Customs Brokers and Forwarders Association of America (NCBFAA) is the national trade association representing the interests of freight forwarders, NVOCCs, and customs brokers in the ocean shipping industry. NCBFAA notes that under section 535.308, exempt marine terminal agreements (MTAs) are immunized from the antitrust laws immediately upon filing with the Commission. NCBFAA states that agreements between terminal operators have evolved in their nature from simple landlord-tenant agreements, and that some marine terminal operators have begun using the exempt MTAs to "collectively adopt policies, procedures and regulations" affecting the shipping industry. Due to the exemption, parties adversely affected by exempt MTAs, as well as the Commission itself, are deprived of opportunities to consider the adverse consequences of any exempt MTAs before such agreements become effective. Although NCBFAA does not challenge continued antitrust immunity under the Shipping Act, it believes that MTAs that could have anticompetitive consequences should no longer be exempted from the 45-day waiting period established by the Shipping Act, 46 U.S.C. 40304.

The National Industrial Transportation League (NITL) is a national association that represents approximately 700 member companies that tender goods to carriers for transportation in interstate and international commerce or that arrange or perform transportation services. NITL's membership includes large multinational and national corporations as well as small and medium-sized companies. NITL states that MTAs have an impact on the shipment of its members because many of them are U.S. importers and exporters. NITL notes that agreement of terminal operators have become "more complex and broader in scope." This change, NITL states, has created a legitimate concern as to whether MTAs should be granted antitrust immunity immediately upon filing with the Commission. NITL supports repeal of the exemption for MTAs from the 45-day waiting period.

The Ports of Los Angeles and Long Beach (the Ports) submitted a comment objecting to the elimination of the 45-day waiting period exemption for MTAs. The Ports allege that the Commission's efforts to eliminate the waiting period exemption arise largely out of the efforts to delay and block the implementation of agreements the Ports filed in connection with their environmental programs. The Ports state that the MTA exemption does not impede Commission oversight. The Ports argue that elimination of the section 535.308 exemption will cause them "to interrupt and delay operational matters" to accommodate the 45-day waiting period.

The Ports also argue that the Commission's marine terminal operator agreement rules are unclear and provide no guidance regarding the degree of specificity and detail required for filed agreements. The Ports allege that this confusion stems from the Commission's elimination in Docket No. 03–15 of the exemption for "routine operational and administrative matters," which were previously exempted from filing under 46 CFR 535.407(c) (2003). The Ports assert that, in lieu of the section 535.407(c) exemption, the Commission provided in section 535.408 a list of exemptions that are specific to vessel-operating common carriers and do not address marine terminal operators at all. The Ports claim that repeal of the section 308 exemption will cause long delays for every "trivial" amendment to

any arrangement between marine terminals. The Ports urge that the Commission discontinue the instant rulemaking or revisit the issue of "routine operational and administrative" agreement filing by undertaking a more thorough effort to clarify and update the Commission's agreement rules as applicable to marine terminal operators.

Discussion

After review of the comments and careful consideration, the Commission has determined to adopt the NPR as final, and to repeal the exemption at 46 CFR 535.308.

I. The Shipping Act Requires the Commission To Repeal Section 535.308

Pursuant to section 16 of the Shipping Act, 46 U.S.C. 40103, the Commission exempted MTAs from the Shipping Act's 45-day waiting period requirement after finding that such exemption would not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce, nor result in a substantial reduction in competition within the meaning of Section 16 of the Shipping Act. *Marine Terminal Agreements*, 24 S.R.R. 192, 193–194 (FMC 1987).

More recently, the Commission has found that potentially anticompetitive agreements could be filed with the Commission claiming the exemption under section 535.308. MTAs filed with the Commission have revealed the greater complexity of subject matter and the wider range of operational issues that the marine terminal industry seeks to address in MTAs. MTAs increasingly have the potential to cause the anticompetitive consequences that the Commission deemed unlikely when it first adopted the exemption.

Under the current section 535.308, MTAs become effective upon filing, depriving the Commission of the opportunity to review the agreements during the statutory 45-day waiting period and the opportunity to seek additional information from the agreement parties. The absence of any waiting period requirement for MTAs may frustrate the Commission's function of advance review and analysis of filed agreements to prevent a reduction in competition under section 6 of the Shipping Act. 46 U.S.C. 40304, 41307.

The Ports allege that the Commission's efforts to eliminate the exemption are intended primarily to delay and block the Ports' environmental programs. Contrary to the Ports' allegation, the Shipping Act permits the Commission to continue the exemption from the Act's requirements only "if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." 46 U.S.C. 40103. When the Commission finds that the section 535.308 exemption may lead to substantial reduction in competition or be detrimental to commerce, the Commission is required under the Shipping Act to repeal the exemption.

II. The Current Exemption Under Section 535.308 Frustrates Commission Functions Under the Shipping Act

Under section 6 of the Shipping Act, the Commission may reject a filed agreement that does not meet the requirements of the Act. 46 U.S.C. 40304(b). The Commission may request additional information and documents to make the determination required under the Shipping Act. 46 U.S.C. 40304(d). If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, the Commission may bring a civil action to enjoin the operation of the agreement. 46 U.S.C. 41307(b).

The Ports argue that the section 535.308 exemption does not impede the Commission's oversight for MTAs. This argument overlooks concerns that, under the current section 535.308 exemption, MTAs become effective immediately upon filing with the Commission, depriving the industry and the Commission of any pre-effectiveness review. Under the section 535.308 exemption, the Commission may seek to enjoin potentially anticompetitive MTAs only after the MTAs have become effective, thereby allowing, by a reduction in competition, an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. Congress cautioned that the Commission should not stand idle while awaiting "actual commercial harm," noting that a blanket requirement for such evidence would "undermine the agency's ability to take necessary preventive action." Senate Report 105–61 at 14 (1997).

NCBFAA and NITL have expressed substantially the same concerns as the Commission. NCBFAA states that MTAs should be subject to pre-effectiveness review. NCBFAA points out that "Due to the exemption, any party adversely affected by a proposed MTA is essentially disenfranchised, and is given no opportunity to complain either about the agreement's substance or the fact that competing MTO's [sic] may have collectively established policies that arguably have adverse consequences on competition or transportation costs." NCBFAA's comments of August 13, 2009, at 2. NCBFAA believes that pre-effectiveness review of MTAs by the industry and the Commission is both helpful and essential to maintaining an efficient and competitive shipping industry, especially when the parties are seeking the extraordinary benefit of antitrust immunity.

NITL notes that recent MTA filings with the Commission demonstrate the need for greater scrutiny and public review of such agreements before they are permitted to take effect. NITL states that removal of the existing exemption and reinstitution of the 45-day waiting period would provide the Commission and the shipping public with an opportunity to review and analyze the potential anticompetitive consequences of MTAs before any harm occurs.

Repeal of Section 535.308 Exemption Will Have a Minimal Impact on the Industry

The Ports argue that without the section 535.308 exemption, every "trivial" amendment to any arrangement between marine terminals will be subject to delays. This argument fails to consider the fact that section 535.308 exempts only certain narrowly defined agreements that relate "solely to marine terminal facilities and/or services * * * that completely [set] forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement." By its express terms, marine terminal conference agreements, marine terminal discussion agreements, and marine terminal interconference agreements are excluded from the exemption. Because of the narrow applicability of the exemption, only three agreements have claimed the exemption under the section during the last five years.[1]

While the Ports' concerns do not warrant discontinuance of this rulemaking, the Commission acknowledges that the exemption under section 535.408 primarily addresses carrier agreements. Section 535.408 states that "technical or operational matters of an agreement's affairs established pursuant to express enabling authority in an agreement are considered part of the effective

[1] Most agreements between marine terminals are not the narrowly defined MTAs under section 535.308, but are instead marine terminal operator agreements under section 535.201(b), for which other exemptions will continue to be available. *See, e.g.*, Sections 535.309 and 535.310.

agreement" and thus exempts certain amendments having technical or operational effects from the Shipping Act's filing requirement. 46 CFR 535.408. While not part of Docket No. 09–02, the Commission is open to reviewing this latter section to determine if additional flexibility can be provided for amendments addressing technical or operational matters of marine terminal operator agreements.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Chairman of the Federal Maritime Commission certifies that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The regulated entities that would be affected by the rule are limited to marine terminal operators and ocean common carriers. Pursuant to the guidelines of the Small Business Administration, the Commission has determined that these entities do not qualify as small for the purpose of the Small Business Regulatory Enforcement Fairness Act. The rule would simply require that agreements between marine terminal operators, or between or among marine terminal operators and ocean common carriers, become effective subject to the requirements of section 6 of the Shipping Act of 1984, 46 U.S.C 40304, and Commission agreement rules, 46 CFR Part 535.

This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 535

Administrative practice and procedure, Maritime carriers, Terminal operators, Reporting and recordkeeping requirements.

■ For the reasons set forth above, the Federal Maritime Commission amends 46 CFR Part 535 Subpart C as follows:

PART 535—[AMENDED]

Subpart C—Exemptions

■ 1. The authority citation for Part 535 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40101–40104, 40301–40307, 40501–40503, 40901–40904, 41101–41109, 41301–41302, and 41305–41307.

§ 535.308 [Removed]

■ 2. Remove § 535.308.

■ 3. In § 535.309, revise paragraph (b)(1) to read as follows:

§ 535.309 Marine terminal services agreements—exemption.

* * * * *

(b) * * *

(1) They do not include rates, charges, rules, and regulations that are determined through a marine terminal conference agreement. *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations that provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members; and

* * * * *

■ 4. In § 535.604, revise paragraph (b) to read as follows:

§ 535.604 Waiting period.

* * * * *

(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the later of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the **Federal Register**.

* * * * *

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. E9–29369 Filed 12–8–09; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

RIN 0648–XT20

Notification of U.S. Fish Quotas and an Effort Allocation in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area

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

ACTION: Final rule; notification of U.S. fish quotas and an effort allocation.

SUMMARY: NMFS announces that fish quotas and an effort allocation are available for harvest by U.S. fishermen in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area. This action is necessary to make available to U.S. fishermen a fishing privilege on an equitable basis.

DATES: Effective January 1, 2010, through December 31, 2010. Expressions of interest regarding U.S. fish quota allocations for all species except 3L shrimp will be accepted throughout 2010. Expressions of interest regarding the U.S. 3L shrimp quota allocation, the 3M shrimp effort allocation, and the 3LNO yellowtail flounder to be transferred by Canada will be accepted through December 24, 2009.

ADDRESSES: Expressions of interest regarding the U.S. effort allocation and quota allocations should be made in writing to Patrick E. Moran in the NMFS Office of International Affairs, at 1315 East-West Highway, Silver Spring, MD 20910 (phone: 301–713–2276, fax: 301–713–2313, e-mail: *Pat.Moran@noaa.gov*).

Information relating to NAFO fish quotas, NAFO Conservation and Enforcement Measures, and the High Seas Fishing Compliance Act (HSFCA) Permit is available from Allison McHale, at the NMFS Northeast Regional Office at 55 Great Republic Drive, Gloucester, MA 01930 (phone: 978–281–9103, fax: 978–281–9135, e-mail: *allison.mchale@noaa.gov*) and from NAFO on the World Wide Web at *http://www.nafo.int.*

FOR FURTHER INFORMATION CONTACT: Patrick E. Moran, 301–713–2276.

SUPPLEMENTARY INFORMATION:

Background

NAFO has established and maintains conservation measures in its Regulatory Area that include one effort limitation fishery as well as fisheries with total allowable catches (TACs) and member nation quota allocations. The principal species managed are cod, flounder, redfish, American plaice, halibut, capelin, shrimp, and squid. The United States received fish quota allocations for three NAFO stocks and an effort allocation for one NAFO stock to be fished during 2010. The species, location, and allocation (in metric tons or effort) of these U.S. fishing opportunities, as found in Annexes I.A, I.B, and I.C of the 2009 NAFO Conservation and Enforcement Measures, are as follows:

(1) Redfish	NAFO Division 3M	69 mt
(2) Squid (*Illex*)	NAFO Subareas 3 & 4	453 mt
(3) Shrimp	NAFO Division 3L	334 mt

(4) Shrimp	NAFO Division 3M	1 vessel/50 days

Additionally, the United States may be transferred up to 1,000 mt of 3LNO yellowtail flounder from Canada's quota allocation for express use by U.S. vessels if the United States requests a transfer before January 1 of 2010 or any succeeding year through 2017. If such a request is made, an additional 500 mt of 3LNO yellowtail flounder could be made available on the condition that the United States transfers its shrimp allocation to Canada or through some other arrangement. Participants in this fishery will be restricted to an overall bycatch harvest limit for American plaice equal to 15% of the total yellowtail fishery.

Further, U.S. vessels may be authorized to fish any available portion of the 385 mt allocation of oceanic redfish in NAFO Subarea 2 and Divisions 1F and 3K available to NAFO members that are not also members of the Northeast Atlantic Fisheries Commission. Fishing opportunities may also be authorized for U.S. fishermen in the "Others" category for: Division 3LNO yellowtail flounder (85 mt); Division 3NO white hake (353 mt); Division 3LNO skates (444 mt); Division 3M cod (22 mt), 3LN redfish (21mt), and Division 3O redfish (100 mt). Procedures for obtaining NMFS authorization are specified below.

U.S. Fish Quota Allocations

Expressions of interest to fish for any or all of the 2010 U.S. fish quota allocations, including the up to 1,500 mt of yellowtail flounder to be transferred by Canada under the circumstances described above, and "Others" category allocations in NAFO will be considered from U.S. vessels in possession of, or eligible for, a valid HSFCA permit, which is available from the NMFS Northeast Regional Office (see **ADDRESSES**). All expressions of interest should be directed in writing to Patrick E. Moran (see **ADDRESSES**). Letters of interest from U.S. vessel owners should include the name, registration, and home port of the applicant vessel as required by NAFO in advance of fishing operations. In addition, any available information on intended target species and dates of fishing operations should be included. To ensure equitable access by U.S. vessel owners, NMFS may promulgate regulations designed to choose one or more U.S. applicants from among expressions of interest.

Note that vessels issued valid HSFCA permits under 50 CFR part 300 are exempt from multispecies permit, mesh size, effort-control, and possession limit restrictions, specified in 50 CFR 648.4, 648.80, 648.82 and 648.86, respectively, while transiting the U.S. exclusive economic zone (EEZ) with multispecies on board the vessel, or landing multispecies in U.S. ports that were caught while fishing in the NAFO Regulatory Area, provided:

(1) The vessel operator has a letter of authorization issued by the Regional Administrator on board the vessel;

(2) For the duration of the trip, the vessel fishes, except for transiting purposes, exclusively in the NAFO Regulatory Area and does not harvest fish in, or possess fish harvested in, or from, the U.S. EEZ;

(3) When transiting the U.S. EEZ, all gear is properly stowed in accordance with one of the applicable methods specified in 50 CFR 648.23(b); and

(4) The vessel operator complies with the HSFCA permit and all NAFO conservation and enforcement measures while fishing in the NAFO Regulatory Area.

U.S. 3M Effort Allocation

Expressions of interest in harvesting the U.S. portion of the 2010 NAFO 3M shrimp effort allocation (1 vessel/50 days) will be considered from owners of U.S. vessels in possession of a valid HSFCA permit. All expressions of interest should be directed in writing to Patrick E. Moran (see **ADDRESSES**).

Letters of interest from U.S. vessel owners should include the name, registration and home port of the applicant vessel as required by NAFO in advance of fishing operations. In the event that multiple expressions of interest are made by U.S. vessel owners, NMFS may promulgate regulations designed to choose one U.S. applicant from among expressions of interest.

NAFO Conservation and Management Measures

Relevant NAFO Conservation and Enforcement Measures include, but are not limited to, maintenance of a fishing logbook with NAFO-designated entries; adherence to NAFO hail system requirements; presence of an on-board observer; deployment of a functioning, autonomous vessel monitoring system; and adherence to all relevant minimum size, gear, bycatch, and other requirements. Further details regarding these requirements are available from the NMFS Northeast Regional Office, and can also be found in the current NAFO Conservation and Enforcement Measures on the Internet (see **ADDRESSES**).

Chartering and Transfer of Quota Arrangements

In the event that no adequate expressions of interest in harvesting the U.S. portion of the 2010 NAFO 3L shrimp quota allocation and/or 3M shrimp effort allocation are made on behalf of U.S. vessels, expressions of interest will be considered from U.S. fishing interests intending to make use of vessels of other NAFO Parties through a transfer of quota allocated to the U.S. or under chartering arrangements to fish the 2010 U.S. quota allocation for 3L shrimp and/or the effort allocation for 3M shrimp. Under NAFO rules in effect through 2010, a vessel registered to another NAFO Contracting Party may be chartered to fish the U.S. shrimp quota and effort allocations provided that written consent for the charter is obtained from the vessel's flag state and the U.S. allocation is transferred to that flag state. NAFO Parties must be notified of such a chartering operation through a mail notification process.

A NAFO Contracting Party wishing to enter into a chartering arrangement with the United States must be in full current compliance with the requirements outlined in the NAFO Convention and Conservation and Enforcement Measures including, but not limited to, submission of the following reports to the NAFO Executive Secretary: provisional monthly catches within 30 days following the calendar month in which the catches were made; provisional daily catches of shrimp taken from Division 3L; provisional monthly fishing days in Division 3M within 30 days following the calendar month in which the catches were made; observer reports within 30 days following the completion of a fishing trip; and an annual statement of actions taken in order to comply with the NAFO Convention, and notification to NMFS of any interruption in or the termination of the charter fishing activities. Furthermore, the United States may also consider a Contracting Party's previous compliance with the NAFO bycatch provisions, as outlined in the NAFO Conservation and Enforcement Measures, before entering into a chartering arrangement.

Expressions of interest from U.S. fishing interests intending to make use of vessels from another NAFO Contracting Party under chartering

arrangements should include information required by NAFO regarding the proposed chartering operation, including: the name, registration and flag of the intended vessel; a copy of the charter; the fishing opportunities granted; a letter of consent from the vessel's flag state; the date from which the vessel is authorized to commence fishing on these opportunities; and the duration of the charter (not to exceed six months). More details on NAFO requirements for chartering operations are available from NMFS (see **ADDRESSES**). In addition, expressions of interest for chartering operations should be accompanied by a detailed description of anticipated benefits to the United States. Such benefits might include, but are not limited to, the use of U.S. processing facilities/personnel; the use of U.S. fishing personnel; other specific positive effects on U.S. employment; evidence that fishing by the chartered vessel actually would take place; and documentation of the physical characteristics and economics of the fishery for future use by the U.S. fishing industry.

In the event that multiple expressions of interest are made by U.S. fishing interests proposing the transfer of quota allocated to the U.S. or chartering operations to fish quota allocated to the United States, the information submitted regarding benefits to the United States will be used in making a selection. In the event that applications by U.S. fishing interests proposing the use of chartering operations are considered, all applicants will be made aware of the allocation decision as soon as possible. Once the allocation has been awarded for use in a chartering operation, NMFS will immediately take appropriate steps to notify NAFO and transfer the U.S. 3L shrimp quota allocation and/or the 3M shrimp effort allocation to the appropriate Contracting Party.

After reviewing all requests for allocations submitted, NMFS may decide not to grant any allocations if it is determined that no requests meet the criteria described in this notice. All individuals/companies submitting expressions of interest to NMFS will be contacted if an allocation has been awarded. Please note that if the U.S. portion of any 2010 NAFO quota allocation and/or effort allocation, or the 3LNO yellowtail flounder transferred from Canada is awarded to a U.S. vessel or a specified chartering operation, it may not be transferred without the express, written consent of NMFS.

Dated: December 3, 2009.

Rebecca Lent,

Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. E9–29330 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 040205043–4043–01]

RIN 0648–XS56

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-grouper Fishery of the South Atlantic; Closure of the 2009–2010 Commercial Fishery for Black Sea Bass in the South Atlantic

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the commercial fishery for black sea bass in the portion of the exclusive economic zone (EEZ) of the South Atlantic through 35° 15.19' N. lat., the latitude of Cape Hatteras Light, North Carolina. NMFS has determined that the quota for the commercial fishery for black sea bass will have been reached by December 20, 2009. This closure is necessary to protect the black sea bass resource.

DATES: Closure is effective 12:01 a.m., local time, December 20, 2009, until 12:01 a.m., local time, on June 1, 2010.

FOR FURTHER INFORMATION CONTACT: Catherine Bruger, telephone 727–824–5305, fax 727–824–5308, e-mail *Catherine.Bruger@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. Those regulations set the commercial quota for black sea bass in the South Atlantic at 309,000 lb (140,160 kg) for the current fishing year, June 1, 2009, through May 31, 2010.

Black sea bass are managed throughout their range. In the South Atlantic EEZ, black sea bass are managed by the Council from 35° 15.19' N. lat., the latitude of Cape Hatteras Light, North Carolina, south. From Cape Hatteras Light, North Carolina, through Maine, black sea bass are managed jointly by the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission. Therefore, the closure provisions contained in this notice are applicable to those vessels harvesting or possessing black sea bass from Key West, Florida, through Cape Hatteras Light, North Carolina.

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery for a species or species group when the quota for that species or species group is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. Based on current statistics, NMFS has determined that the available commercial quota of 309,000 lb (140,160 kg) for black sea bass will be reached on or before December 20, 2009. Accordingly, NMFS is closing the commercial fishery for black sea bass in the portion of the South Atlantic EEZ through Cape Hatteras Light, North Carolina, from 12:01 a.m., local time, on December 20, 2009, until 12:01 a.m., local time, on June 1, 2010. The operator of a vessel that is landing black sea bass for sale must have landed and bartered, traded, or sold such black sea bass prior to 12:01 a.m., local time, December 20, 2009, and all sea bass pots must be removed from the EEZ as of that time and date.

During the closure, the applicable bag and possession limits specified in 50 CFR 622.39(d) apply to all harvest or possession of black sea bass in or from the portion of the South Atlantic EEZ through Cape Hatteras Light, North Carolina; and the sale or purchase of black sea bass taken from the EEZ is prohibited. In addition, those bag and possession limits and the prohibition on sale or purchase of black sea bass apply regardless of where the black sea bass were harvested, i.e., in state waters or in the portion of the South Atlantic EEZ through Cape Hatteras Light, North Carolina, on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued. The prohibition on sale or purchase does not apply to sale or purchase of black sea bass that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, December 20, 2009, and were held in cold storage by a dealer or processor.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself has already been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect the fishery since the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment would require time and would potentially result in a harvest well in excess of the established quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30–day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

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

Dated: December 4, 2009.

Emily H. Menashes,

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

[FR Doc. E9–29442 Filed 12–7–09; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 061228342–7068–02]

RIN 0648–XT19

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Rescission of Prohibition on Atlantic Herring Fishing in Management Area 2

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

ACTION: Temporary rule; rescission of prohibition on herring fishing.

SUMMARY: NMFS announces rescission of the prohibition on fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of Atlantic herring in or from Atlantic herring Management Area 2 (Area 2). The rescission of this prohibition is due to the fact that catch data indicate that 95 percent of the total allowable catch (TAC) threshold in Area 2 has not been fully attained. Vessels issued a Federal permit to harvest Atlantic herring may resume fishing for and landing herring in amounts greater than 2,000 lb (907.2 kg) effective 0001 hours, December 10, 2009, until it is determined that the 95–percent quota threshold is projected to be harvested.

DATES: Effective 0001 hours, December 10, 2009, through December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Aja Peters-Mason, Fishery Management Specialist, 978–281–9195.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area TACs. The 2009 TAC allocated to Area 2 (72 FR 17807, April 10, 2007) is 30,000 mt. The initial TAC included a Research Set-aside of 900 mt, which was restored to the fishery when it was not allocated for research (73 FR 74631, December 9, 2008).

The regulations at § 648.201 require the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor the Atlantic herring fishery in each of the four management areas designated in the Atlantic herring Fishery Management Plan (FMP) and, based upon dealer reports, state data, and other available information, to determine when the harvest of Atlantic herring is projected to reach 95 percent of the TAC allocated. When such a determination is made, NMFS is required to prohibit vessels from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 mt) per trip or calendar day through a publication in the **Federal Register**.

NMFS issued a notification in the **Federal Register** on April 14, 2009 (74 FR 17106), projecting that the Atlantic herring quota available in Area 2 had been harvested, based upon information that the area's quota would be reached by April 15, 2009; the prohibition was effective through December 31, 2009

The Regional Administrator has since determined, based upon the latest dealer reports and upon other available information, that there is approximately 1,450 mt of Atlantic herring quota still available in Area 2. Therefore, effective December 10, 2009, vessels issued a Federal permit for the Atlantic herring fishery may fish for, possess, and land in accordance with the possession limits defined for each permit category until it is projected that 95 percent of the TAC threshold has been harvested. Such closure would be announced through notification in the **Federal Register**. Effective December 10, 2009, federally permitted dealers are also advised that they may purchase Atlantic herring landed in Area 2 from federally permitted vessels for the remainder of the 2009 fishing year or until it is determined that 95 percent of the threshold quota is projected to be fully harvested.

Classification

This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action rescinds the prohibition on the Atlantic herring fishery in Management Area 2 until December 31, 2009, under current regulations. The Atlantic herring fishery opened for the 2009 fishing year at 0001 hours on January 1, 2009. The Atlantic herring fleet was prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 mt) per trip or calendar day on April 15, 2009 based on projections that 95 percent of the available Area 2 herring quota had been harvested. Data indicating the Atlantic herring fleet did not harvest the full amount of available quota have only recently become available. If implementation of this rescission is delayed to solicit prior public comment, the remaining quota will not be available for harvest before the end of the 2009 fishing year on December 31. The AA finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the thirty (30) day delayed effectiveness period for the reasons stated above.

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

Dated: December 4, 2009.

Emily H. Menashes,

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

[FR Doc. E9–29334 Filed 12–9–09; 4:15 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 235
Wednesday, December 9, 2009

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

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 124

RIN 3245–AFS3

Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule; notice of extension of comment period.

SUMMARY: On October 28, 2009, the U.S. Small Business Administration (SBA or Agency) proposed changes to its 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs as well as its size regulations. The rule proposes to make a number of changes to the regulations governing the 8(a) BD and SDB programs, and several changes to SBA's size regulations. Some of the changes involve technical issues. Other changes are more substantive and result from SBA's experience in implementing the current regulations. SBA requested comments on the various approaches for the proposed changes in the proposed rulemaking. The proposed rule provided a 60-day comment period closing on December 28, 2009.

SBA is extending the comment period an additional 30 days to January 28, 2010. We are extending the comment period because SBA believes that affected businesses need more time to adequately respond.

DATES: The comment period for the proposed rule published on October 28, 2009 (74 FR 55694), is extended until January 28, 2010.

ADDRESSES: You may submit comments, identified by RIN: 3245–AF53, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, for paper, disk, or CD–ROM submissions:* Joseph Loddo, Associate Administrator, Office of Business Development, 409 Third Street, SW., Mail Code, Washington, DC 20416.
- *Hand Delivery/Courier:* Joseph Loddo, Associate Administrator, Office of Business Development. 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.Regulations.gov,* please submit the information to LeAnn Delaney, Deputy Associate Administrator, Office of Business Development, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to *leann.delaney@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: LeAnn Delaney, Deputy Associate Administrator, Office of Business Development, at (202) 205–5852, or *leann.delaney@sba.gov.*

SUPPLEMENTARY INFORMATION: On October 28, 2009 (74 FR 55694–01), SBA issued a Notice of Proposed Rulemaking (NPRM). In that document, SBA proposed to make a number of changes to the regulations governing the 8(a) BD and SDB programs, and several changes to SBA's size regulations. Some of the changes involve technical issues. Other changes are more substantive and result from SBA's experience in implementing the current regulations. SBA proposes to make a number of changes to the regulations governing the 8(a) BD program and six related changes to the size regulations. SBA requested comments on the various approaches for the proposed changes. Initially, SBA established a sixty (60) day public comment period for its NPRM, with a closing date of December 28, 2009. SBA has decided to extend the comment period due to the significance of the rule.

The Small Business Administration (SBA) hereby provides notice that it is extending the public comment period for its Notice of Proposed Rulemaking by thirty (30) days. Comments must be received no later than January 28, 2010. Given the scope of the proposal and the nature of the issues raised by the comments received to date, SBA believes that affected businesses need more time to review the proposal and prepare their comments. Additionally, SBA will hold a series of public hearings and tribal consultations on this NPRM in certain cities throughout the country, beginning in December 2009, and anticipates receiving comments throughout the public hearing process.

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); and Public Law 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

Dated: December 2, 2009.

Joseph G. Jordan,

Associate Administrator, Government Contracting and Business Development.

[FR Doc. E9–29228 Filed 12–8–09; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1080; Airspace Docket No. 09–AGL–13]

RIN 2120–AA66

Proposed Modification of Jet Routes J–32, J–38, and J–538; Minnesota

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Jet Routes J–32 and J–38 by terminating portions of the routes at the Duluth, MN, VHF omnidirectional range/tactical air navigation (VORTAC) that are no longer needed. This action also would amend the J–538 airway description to align it with the corresponding segment of J–538 contained in Canadian airspace. This action is necessary for the safety and management of instrument flight rules (IFR) operations within the National Airspace System (NAS).

DATES: Comments must be received on or before January 25, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2009–1080 and

Airspace Docket No. 09–AGL–13 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2009–1080 and Airspace Docket No. 09–AGL–13) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2009–1080 and Airspace Docket No. 09–AGL–13." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to eliminate the segments of J–32 and J–38 that extend between the United States/Canadian border and the Duluth, MN, VORTAC. The FAA has determined that these segments of J–32 and J–38 are not required since the Jet Routes, as currently described, terminate or originate at a point in space on the international border and do not meet or connect to any corresponding airways within Canadian airspace; they simply end (J–32) or begin (J–38) at the international border, and not at a fix or navigation facility that pilots can use to file a flight plan to or from. Additionally, the segments of J–32 and J–38 that extend between the United States/Canadian border and the Duluth, MN, VORTAC duplicate Jet Route segments of J–538 and J–533, respectively, which do match with Canadian airways that continue to a fix or navigation facility in Canada that pilots can use to file flight plans.

This action also proposes to amend J–538 for clarity and to ensure the airway segment on the United States side of the international border joins with the airway segment on the Canadian side of the international border. Currently, J–538 is charted to align with the Sioux Narrows, ON, VORTAC and matches with the Canadian J–538 description. However, the FAA's J–538 description aligns the Jet Route with a direct radial between Duluth, MN, VORTAC and the Kenora, ON, Non-Directional Beacon. The proposed J–538 description would reflect the airway's alignment with the Sioux Narrows, ON, VORTAC and would match the Canadian J–538 description and the charted depiction.

Jet Routes are published in paragraph 2004 of FAA Order 7400.9T, dated August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Jet Route listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure of Jet Routes as required to preserve the safe and efficient flow of air traffic.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration

proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, Dated August 27, 2009 and effective September 15, 2009, is amended as follows:

Paragraph 2004 Jet Routes.

* * * * *

J–32 [Modified]

From Oakland, CA, via Sacramento, CA; Mustang, NV; Lovelock, NV; Battle Mountain, NV; Malad City, ID; Boysen Reservoir, WY; Crazy Woman, WY; Dupree, SD; Aberdeen, SD; to Duluth, MN.

* * * * *

J–38 [Modified]

From Duluth, MN; Green Bay, WI; to Peck, MI.

* * * * *

J–538 [Modified]

From Sioux Narrows, ON; Duluth, MN; Dells, WI; to Badger, WI. The airspace within Canada is excluded.

* * * * *

Issued in Washington, DC, on December 2, 2009.

Kenneth L. McElroy,

Acting Manager, Airspace & Rules Group.

[FR Doc. E9–29365 Filed 12–8–09; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0711; FRL–9090–3]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval and limited disapproval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from solid fuel fired boilers, steam generators and process heaters. We are proposing action on a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by January 8, 2010.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2009–0711], by one of the following methods:

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

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

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

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

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

Table of Contents

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVAPCD	4352	Solid Fuel Fired Boilers, Steam Generators and Process Heaters ..	05/18/06	10/05/06

On 10/24/06, EPA determined that the submittal for SJVAPCD Rule 4352 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 4352 into the SIP on February 11,

1999 (64 FR 6803). We published a direct final approval of revisions to this rule, along with a parallel proposal, on May 30, 2007 (72 FR 29886). We received adverse comments and withdrew the direct final approval of Rule 4352 on July 30, 2007 (72 FR 41450). Because we are reproposing today an alternative action on Rule 4352, we are not addressing comments or taking further action on the parallel proposal published on May 30, 2007 (72 FR 29901).

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

NO_X emissions help produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control NO_X emissions. Rule 4352 limits NO_X and carbon monoxide (CO) emissions from solid fuel fired boilers, steam generators and process heaters. SJVAPCD amended the rule to broaden its applicability and to strengthen the emission limits for NO_X. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, NO_X SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each major source of NO_X emissions in nonattainment areas classified as moderate or above (see sections 182(b)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). The SJVAPCD regulates an ozone nonattainment area classified as extreme (1-hour standard) and serious (8-hour standard) (see 40 CFR part 81), so Rule 4352 must satisfy RACT requirements. Rule 4352 must also require the use of advanced control technologies to control NO_X emission from this source category (see section 182(e)(3)).

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

1. "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498, April 16, 1992 (the General Preamble); 57 FR 18070, April 28, 1992 (Appendices).

2. "State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule," 57 FR 55620, November 25, 1992 (the NO_X Supplement).

3. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations," EPA, May 25, 1988 (the Bluebook).

4. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).

5. "Determination of Reasonably Available Control Technology and Best Available Retrofit Control Technology for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters," CARB, July 18, 1991.

6. "Alternative Control Techniques Document—NO_X Emissions from Industrial/Commercial/Institutional (ICI) Boilers," US EPA, 453/R–94–022, March 1994.

7. "Alternative Control Techniques Document—NO_X Emissions from Utility Boilers," U.S. EPA, 453/R–94–023, March 1994.

B. Does the rule meet the evaluation criteria?

SJVAPCD's revisions to Rule 4352 improve the SIP by expanding the rule's applicability provisions and establishing more stringent NO_X emission limits. The rule is largely consistent with CAA requirements and EPA policy regarding enforceability and SIP relaxations. Rule 4352 also requires the use of advanced control technologies to control NO_X emissions from this source category. Rule provisions which do not meet the evaluation criteria are summarized below and discussed further in the TSD.

C. What is the rule deficiency?

The following provision does not satisfy the requirements of section 110 and part D of the Act and prevents full approval of the SIP revision.

1. Section 5.1 of the Rule establishes the emission limits. With the exception of the NO_X emission limit for biomass fuel-fired units, SJVAPCD has not adequately demonstrated that the NO_X emission limits (i.e., NO_X limits for units burning municipal solid waste or other solid fuels, such as coal) satisfy RACT requirements. As explained further in the TSD for this proposed action, EPA's 1994 Alternative Control Techniques Document for NO_X emissions from ICI Boilers contains lower emission ranges for such boilers. Source-specific information from the SJVAPCD also indicate that emission limits lower than those in Rule 4352 are reasonably achievable.

D. EPA Recommendations To Further Improve the Rule

The TSD describes additional rule revisions that we recommend for the next time the local agency modifies the rule.

E. Proposed Action and Public Comment

As authorized in sections 110(k)(3) and 301(a) of the Act, EPA is proposing a limited approval of the submitted rule to improve the SIP. If finalized, this action would incorporate the submitted rule into the SIP, including those provisions identified as deficient. This approval is limited because EPA is simultaneously proposing a limited disapproval of the rule under section 110(k)(3). If this disapproval is finalized, sanctions will be imposed under section 179 of the Act unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the disapproval. These sanctions would be imposed according to 40 CFR 52.31. A final disapproval would also trigger the 2-year clock for the federal implementation plan (FIP) requirement under section 110(c). Note that the submitted rule has been adopted by the SJVAPCD, and EPA's final limited disapproval would not prevent the local agency from enforcing it.

We will accept comments from the public on the proposed limited approval and limited disapproval for the next 30 days.

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

small not-for-profit enterprises, and small governmental jurisdictions.

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

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

D. Unfunded Mandates Reform Act

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

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

E. Executive Order 13132, Federalism

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

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

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

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

I. National Technology Transfer and Advancement Act

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: November 19, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E9–29351 Filed 12–8–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2009–0050; 92220–1113–0000–FY09–C3]

RIN 1018–AW60

Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Bull Trout in the Clackamas River Subbasin, Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in cooperation with the U.S. Forest Service (USFS) and the State of Oregon, propose to establish a nonessential experimental population (NEP) of bull trout (*Salvelinus confluentus*) in the Clackamas River and its tributaries in Clackamas County, Oregon, under section 10(j) of the Endangered Species Act of 1973, as amended (Act). The geographic boundaries of the NEP would include the entire Clackamas River subbasin as well as the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel. The best available data indicate that reintroduction of bull trout to the Clackamas subbasin is biologically feasible and will promote the conservation of the species. We are seeking comments on this proposal and on our draft environmental assessment (EA), prepared pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), which analyzes the potential environmental impacts associated with the proposed reintroduction.

DATES: To ensure that we are able to consider your comments on this proposed rule, they must be received on or before February 8, 2010. We must receive requests for public hearings in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 25, 2010.

Comments on the EA must be received on or before: February 8, 2010.

ADDRESSES: You may submit comments on the proposed rule by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R1–ES–2009–0050.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R1–ES–2009–0050; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on the proposed rule on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (*see* the Public Comments Procedures section below for more information).

You may submit comments on the draft EA by one of the following methods:

- *E-mail to: clackamasbulltroutEA@fws.gov.*
- *U.S. mail or hand-delivery:* Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE 98th Ave., Suite 100, Portland, OR 97266

Please *see* the draft EA for additional information regarding commenting on that document.

FOR FURTHER INFORMATION CONTACT: Chris Allen, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE. 98th Ave., Suite 100, Portland, OR 97266 (telephone 503–231–6179, facsimile 503–231–6195). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

To ensure that any final action resulting from this proposed rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. Comments on the proposed rule that will be most useful are those that are supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

(1) The geographic boundary for the NEP;

(2) The suitability of using Metolius River subbasin bull trout as donor stock; and,

(3) Effects of the reintroduction on other native species and the ecosystem.

Prior to issuing a final rule on this proposed action, we will take into consideration comments and additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. Please note that comments submitted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publically viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver a hardcopy comment that includes personal information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publically available, we will post all hardcopy comments on *http://www.regulations.gov.*

In addition, comments and materials we receive, as well as supporting documentation used in preparing this proposed rule will be available for public inspection in two ways:

(1) You can view them on *http://www.regulations.gov.* In the Search Documents box, enter FWS–R1–ES–2009–0050, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, select the type of documents you want to view under the Document Type heading.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearings

The Act provides for public hearings on this proposed rule, if requested. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by the date shown in the **DATES** section.

Background

Statutory and Regulatory Framework

The 1982 amendments to the Act (16 U.S.C. 1531 *et seq.*) included the addition of section 10(j) which allows for the designation of reintroduced populations of listed species as "experimental populations." Under section 10(j) of the Act and our regulations at 50 CFR 17.81, the Service may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director of the Service in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed).

Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Service must find by regulation that such release will further the conservation of the species. In making such a finding the Service uses the best scientific and commercial data available to consider: (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere; (2) the likelihood that any such experimental population will become established and survive in the foreseeable future; (3) the relative effects that establishment of an experimental population will have on the recovery of the species; and (4) the extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

Furthermore, as set forth in 50 CFR 17.81(c), all regulations designating experimental populations under section 10(j) must provide: (1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s); (2) a finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild; (3) management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and (4) a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

Under 50 CFR 17.81(d), the Service must consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. To the maximum extent practicable, 10(j) rules represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies, and persons holding any interest in land which may be affected by the establishment of an experimental population.

Under 50 CFR 17.81(f), the Secretary may designate critical habitat as defined in section 3(5)(A) of the Act for an essential experimental population. No designation of critical habitat will be made for nonessential populations. In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat will be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.

Any population determined by the Secretary to be an experimental population will be treated as if it were listed as a threatened species for purposes of establishing protective regulations with respect to that population. The protective regulations adopted for an experimental population will contain applicable prohibitions, as appropriate and exceptions for that population.

Any experimental population designated for a listed species (1) determined not to be essential to the survival of that species and (2) not occurring within the National Park System or the National Wildlife Refuge System, will be treated for purposes of section 7 (other than subsection (a)(1) thereof) as a species proposed to be listed under the Act as a threatened species.

Any experimental population designated for a listed species that either (1) has been determined to be essential to the survival of that species, or (2) occurs within the National Park System or the National Wildlife Refuge System as now or hereafter constituted, will be treated for purposes of section 7 of the Act as a threatened species. Notwithstanding the foregoing, any biological opinion prepared pursuant to section 7(b) of the Act and any agency determination made pursuant to section 7(a) of the Act will consider any experimental and nonexperimental populations to constitute a single listed species for the purposes of conducting the analyses under such sections.

Biological Information

The bull trout is a large native char found in the coastal and intermountain west of North America and is one of five species in the genus *Salvelinus* found in the United States (Bond 1992, p. 1). Bull trout have a slightly forked tail; yellow or cream-colored spots on their back; yellow, orange, or pink spots on their side; and no black spots on their dorsal fin. Migratory adults commonly reach 24 inches (61 centimeters) or more (Goetz 1989, pp. 29–30; Pratt 1992, p. 8). The largest known specimen weighed 32 pounds (14.5 kilograms) (Simpson and Wallace 1982, p. 95).

The historical range of bull trout in the coterminous United States extended from the Canadian border south to the Jarbidge River in northern Nevada and from the Pacific Ocean inland to the Clark Fork River in western Montana and the Little Lost River in central Idaho. Genetic analysis has shown that bull trout in the coterminous United States are divided into three major genetically differentiated (*e.g.*, evolutionary) groups or lineages (Spruell *et al.* 2003, p. 21). These lineages are characterized as: (1) "Coastal," including the Deschutes River and all of the Columbia River drainage downstream (including the Willamette and Clackamas rivers), as well as most coastal streams in Washington, Oregon, and British Columbia; (2) "Snake River," which includes the John Day, Umatilla, and Walla Walla rivers in Oregon and Washington, as well as major river basins in central Idaho; and (3) "Upper Columbia River," which includes major river basins in Montana, Washington, and northern Idaho. The existence of a "coastal" evolutionary lineage is further supported by the work of Taylor *et al.* (1999, p. 1162) and a recent range-wide

bull trout genetic analysis by the Service (USFWS 2008, unpublished data).

Bull trout exhibit both resident and migratory life history strategies, although bull trout in the "coastal" lineage are largely migratory. Migratory bull trout spawn in tributary streams where juvenile fish rear for 1 to 4 years before migrating to either a lake (adfluvial form), river (fluvial form) (Fraley and Shepard 1989, pp. 138–9; Goetz 1989, p. 24), or saltwater (anadromous form) to rear as subadults and to live as adults (Cavender 1978, p. 139; McPhail and Baxter 1996, p. 14; Washington Department of Fish and Wildlife (WDFW) *et al.* 1998, p. 2). Bull trout normally reach sexual maturity between age 4 and 7 and may live longer than 12 years. They are iteroparous (spawning more than once in a lifetime). Both consecutive-year and alternate-year spawning have been reported (Fraley and Shepard 1989, p.135). Preferred habitat consists of cold water, complex cover, stable channels, loose and clean gravel; and migratory corridors (Fraley and Shepard 1989, pp. 137–9; Goetz, 1989, pp. 16–25).

The current distribution of bull trout in the lower Columbia River portion of the "coastal" lineage includes populations in the Deschutes, Hood, Lewis, Klickitat, and upper Willamette rivers. Throughout much of its historical range, the decline of bull trout has been attributed to habitat degradation and fragmentation, the blockage of migratory corridors, poor water quality, angler harvest, entrainment (the incidental withdrawal of fish and other aquatic organisms in water diverted out-of-stream for various purposes) into diversion channels and dams, and introduced nonnative species. Specific land and water management activities that may negatively impact bull trout populations and habitat, if not implemented in accordance with best management practices, include the operation of dams and other diversion structures, forest management practices, livestock grazing, agriculture, agricultural diversions, road construction and maintenance, mining, and urban and rural development (Beschta *et al.* 1987, pp. 221–224; Chamberlain *et al.* 1991, pp. 199–200; Furniss *et al.* 1991, pp. 297–302; Meehan and Bjornn 1991, pp. 483–517; Nehlsen *et al.* 1991, p. 16; Craig and Wissmar 1993, p. 18; Frissell 1993, p. 351; McIntosh *et al.* 1994, pp. 47–48; Wissmar *et al.* 1994, p. 28; Montana Bull Trout Scientific Group (MBTSG) 1995a [p. 14], 1995b [p. 10], 1995c [p. 13], 1995d [p. 21], 1995e [p. 13], 1996a [p. 12], 1996b [p. 9], 1996c [p. 12], 1996d [p. 11], 1996e [p. 12], 1996f [p. 10]; Light *et al.* 1996, pp. 9–11; U.S. Department of Agriculture (USDA) and U.S. Department of the Interior (USDI) 1995 [pp. 70–1], 1996 [pp. 106–107, 111], 1997 [pp. 132–154]).

The historical distribution of bull trout in the Clackamas River subbasin likely extended from the lower Clackamas River, upstream to headwater spawning and rearing areas (Shively *et al.* 2007, Ch. 1, pp. 10–12). It is possible that bull trout from the Clackamas River migrated to the upper Willamette River above Willamette Falls or to lower Columbia River tributaries (Zimmerman 1999, p. 17); however, it is unlikely that bull trout historically occupied habitat upstream of waterfall barriers known to impede upstream movement of anadromous salmon and steelhead species in the Clackamas River.

The last documented bull trout observation in the Clackamas River subbasin was in 1963 (Stout 1963, p. 97). Due to geographic distance to extant bull trout populations in other subbasins, natural recolonization of the Clackamas River subbasin is extremely unlikely without human assistance (USFWS 2002, Ch. 5, p. 9). Extirpation was likely caused by many of the same factors that led to the decline in the species across its range, including migration barriers from hydroelectric and diversion dams, direct and incidental harvest in sport and commercial fisheries, targeted eradication through bounty fisheries (currently known as sport reward programs), and habitat and water quality degradation from forest management and agricultural activities not in accordance with best management practices (Shively *et al.* 2007, Ch. 1, pp. 18–22).

Relationship of the Proposed Experimental Population To Recovery Efforts

On November 1, 1999, we published a final rule to list bull trout within the coterminous United States as threatened under the Act (64 FR 58910). This final rule served to consolidate the five separate distinct population segment (DPS) listings into one coterminous U.S. DPS listing. We published a draft recovery plan for the Columbia River, Klamath River, and St. Mary-Belly River segments on November 29, 2002 (67 FR 71439) and the Coastal Puget Sound and Jarbidge River segments on July 1, 2004 (69 FR 39950 and 69 FR 39951, respectively). The draft recovery objectives are:

(1) Maintain current distribution of bull trout within core areas as described in recovery unit chapters and restore distribution where recommended in recovery unit chapters;

(2) Maintain stable or increasing trend in abundance of bull trout;

(3) Restore and maintain suitable habitat conditions for all bull trout life history stages and strategies; and

(4) Conserve genetic diversity and provide opportunity for genetic exchange.

Recovery criteria specific to the Willamette River Recovery Unit (USFWS 2002, Ch. 5 pp. 7–8) follow:

(1) Distribution criteria will be met when bull trout are distributed among five or more local populations in the recovery unit: four in the Upper Willamette River core area and one in the Clackamas River core habitat.

(2) Abundance criteria will be met when an estimated abundance of adult bull trout is from 900 to 1,500 or more individuals in the Willamette River Recovery Unit, distributed in each core area as follows: 600 to 1,000 in the Upper Willamette core area and 300 to 500 in the Clackamas River core habitat.

(3) Trend criteria will be met when adult bull trout exhibit stable or increasing trends in abundance in the Willamette River Recovery Unit, based on a minimum of 10 years of monitoring data.

(4) Connectivity criteria will be met when migratory forms are present in all local populations and when intact migratory corridors among all local populations in core areas provide opportunity for genetic exchange and diversity.

Establishment of an experimental population of bull trout in the Clackamas River will help to achieve distribution in the Clackamas River core habitat (recovery criterion 1 and recovery objective 1) and will increase abundance of adult bull trout in the Willamette River Recovery Unit (recovery criterion 2 and recovery objective 2).

Is the Proposed Experimental Population Essential or Nonessential?

When we establish experimental populations under section 10(j) of the Act we must determine whether such a population is essential to the continued existence of the species in the wild. Although the experimental population will contribute to the recovery of the bull trout in the Willamette basin, it is not essential to the continued existence of the species in the wild. Bull trout populations are broadly distributed, occurring in 121 core areas in 5 western States, and the species' continued existence is dependent upon conserving a number of interacting populations that are well distributed throughout its

range. Conservation of a single, local population not possessing markedly divergent genetic components or adaptive traits and not occurring in a unique or unusual ecological setting or geographical context may contribute to the recovery of the species, but such individual, local populations by themselves are not essential to the species' continued existence. Because the donor stock for the reintroduction will come from a wild population of bull trout, the reintroduced population will not possess markedly divergent genetic components or adaptive traits. Furthermore, the Clackamas River is not a unique or unusual ecological setting or geographical context for bull trout. Bull trout occur in other portions of the Willamette River basin and in other nearby tributaries to the Columbia River. Therefore, as required by 50 CFR 17.81(c)(2), we find that the proposed experimental population is not essential to the continued existence of the species in the wild, and we propose to designate the experimental population in the Clackamas River as a nonessential experimental population (NEP).

Location of Proposed NEP

The NEP area would include the entire Clackamas River subbasin as well as the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel. The Willamette River's confluence with the Columbia River occurs at river mile (RM) 101, near the City of Portland. A secondary channel of the Willamette River, named the Multnomah Channel, branches off the Willamette River approximately 3 river miles (5 river kilometers (km)) upstream from its confluence with the Columbia River. This secondary channel runs approximately 20 river miles (32 river km) along the west side of Sauvie Island before joining the Columbia River at RM 86 near the town of St. Helens. The NEP boundary extends down the Multnomah Channel to its confluence with the Columbia River, as well as the mainstem Willamette River, from Willamette Falls to its confluence with the Columbia River.

Under this proposed rule, the Service would release bull trout into areas of suitable spawning and rearing habitat in the Clackamas River subbasin. The portion of the subbasin currently containing these areas is limited to the mainstem river and its tributaries in the upper headwaters of the subbasin, upstream of the Collawash River confluence. This portion of the subbasin, referred to as the upper Clackamas River subbasin, contains a total of 70.1 river miles (112.8 river km) of suitable spawning and rearing habitat. The amount and characteristics of habitat in the Clackamas River subbasin compare favorably to other river systems in the lower Columbia River with extant bull trout populations (*e.g.*, Lewis, McKenzie, and Deschutes rivers) (Shively *et al.* 2007, Ch. 2, p. 40).

Section 10(j) of the Act requires that an experimental population be geographically separate from wild populations of the same species. The nearest wild bull trout populations to the Clackamas River are located in the following tributaries of the lower Columbia River: The Lewis (RM 84), Hood (RM 165), and Deschutes (RM 200) rivers. Because fluvial populations of bull trout tend to migrate, individual fish from these populations may seasonally occupy the mainstem of the lower Columbia River. Although we have no records of bull trout in the mainstem Willamette River, given our understanding of bull trout ecology in other river systems, it is likely that, historically, bull trout seasonally occupied the mainstem Willamette River. If a reintroduction of bull trout to the Clackamas River is successful, it is possible that a small percentage of adult bull trout will migrate to, and overwinter in, the mainstem Willamette River, between Willamette Falls and its points of confluence with the Columbia River, including Multnomah Channel. Should any bull trout be found in the Willamette River within the NEP boundary, the Service will assume the fish to be part of the reintroduced population, unless the fish is tagged or otherwise known to be from another population. It is unlikely that reintroduced bull trout will migrate outside of the NEP boundary into the Columbia River or upstream of Willamette Falls in the Willamette River due to the significant distance to spawning and rearing habitats in the upper Clackamas River. Bull trout found outside of the NEP boundary but known to be part of the NEP will assume the status of bull trout within the geographic area in which they are found. Although Willamette Falls and the confluence points of the Willamette and Columbia Rivers are not absolute boundaries, the NEP is geographically separate from other wild bull trout populations due to geographic distance.

Likelihood of Population Establishment and Survival

The Service, USFS, Oregon Department of Fish and Wildlife (ODFW), and other major stakeholders established the Clackamas River Bull Trout Working Group (CRBTWG) to assess the feasibility of bull trout reintroductions. In 2007, the CRBTWG completed the Clackamas River Bull Trout Reintroduction Feasibility Assessment (Feasibility Assessment), a scientifically rigorous examination of habitat suitability and projected viability of a reintroduced population. The Feasibility Assessment indicates that there is a reasonable likelihood that reintroduced bull trout will survive and reestablish in the upper portion of the Clackamas River, from North Fork Reservoir to the headwaters. Specifically, the CRBTWG concludes:

(1) There is a high level of confidence that bull trout have been locally extirpated from the Clackamas subbasin;

(2) The causes for their decline have been sufficiently mitigated;

(3) High-quality habitat is available in sufficient amounts;

(4) Nearby donor stocks are unlikely to naturally recolonize;

(5) Suitable donor stocks are available that can withstand extraction of individuals;

(6) Nonnative brook trout presence is restricted to a small portion of the suitable habitat and not a likely threat; and

(7) A diverse and abundant fish assemblage would serve as a sufficient prey base with no obvious threats posed by bull trout to these species (Shively *et al.* 2007, Ch. 5, pp. 3–4).

Based on this assessment, reintroduced bull trout are likely to become established and persist in the Clackamas River subbasin. Copies of the Feasibility Assessment can be found: (1) Online at *http://www.fws.gov/oregonfwo/Species/Data/BullTrout/ReintroductionProject.asp* or *http://www.regulations.gov*, or (2) In person, by appointment, during normal business hours, at the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Addressing Causes of Extirpation

Investigating the causes for decline and extirpation of bull trout in the Clackamas River is necessary to understand whether the threats have been sufficiently curtailed such that reintroduction efforts are likely to be successful. The CRBTWG identifies the primary threats to be hydroelectric dams (passage and screening), forest management (*i.e.*, lack of aquatic habitat protection), and fisheries management (particularly sport fishing upstream of North Fork Dam) (Shively *et al.* 2007, Ch.1, pp. 22–23). The changes in threats since extirpation of bull trout in the Clackamas Basin are explained below in more detail.

Diversion dams present in the late 1800s and early 1900s no longer exist in the lower Clackamas River subbasin on river segments that would impede bull trout migration. Within bull trout historical habitat in the Clackamas River subbasin there are three existing dams owned and operated by Portland General Electric (PGE). Beginning in the late 1990s, PGE began Federal relicensing proceedings for its hydroelectric dams in the Clackamas River subbasin. In their final license application to the Federal Energy Regulatory Commission (FERC) and in an accompanying Settlement Agreement among more than 30 local, State, Federal, and Tribal governments, non-governmental organizations, and other interested stakeholders, PGE proposed to make several upstream and downstream fish passage improvements for the three dams along the mainstem Clackamas River. One improvement, which is already completed, is the reconstruction of the River Mill Dam fish ladder. Other improvements include upgrades to the downstream fish collection facility and bypass at North Fork Dam, construction of a new fish trap and handling facility at the North Fork fishway, and new downstream fish passage facilities at River Mill Dam (Shively *et al.* 2007, Ch.1, p. 23).

The majority of lands in the upper portion of the Clackamas River subbasin are USFS and Bureau of Land Management (BLM) administered public forestlands. These lands are managed in accordance with the Mt. Hood National Forest Land and Resource Management Plan (USFS 1990) or the Salem District BLM Resource Management Plan (USDI 1995), respectively, as amended by the 1994 Northwest Forest Plan (USDA and USDI 1994). The 1994 Northwest Forest Plan established an Aquatic Conservation Strategy (ACS) with protective measures, standards and guidelines, and land allocations to maintain and restore at-risk fish species, including bull trout. The ACS Riparian Reserve land allocation extends a minimum of 300 feet (91.4 meters) on both sides of all fish-bearing streams and prohibits scheduled timber harvest. These plans, along with the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11) that establishes several new wilderness areas in the upper Clackamas River watershed, provide substantial protections for watersheds and aquatic habitats on USFS- and BLM-administered public lands in the upper subbasin. No additional changes or protections regarding forest management activities on public or non-public forest lands are necessary to support a successful reintroduction of bull trout in the Clackamas River subbasin (Shively *et al.* 2007, Ch.1, pp. 124–125).

When the National Marine Fisheries Service (NMFS) listed salmon and steelhead in the Clackamas River under the Act (64 FR 14308, March 24, 1999; 71 FR 834, June 28, 2005; 70 FR 37160, January 5, 2006), fisheries management practices for the portion of the Clackamas River subbasin upstream of North Fork Reservoir changed substantially. For example, stocking of catchable rainbow trout within the Clackamas River has been discontinued altogether along the mainstem and tributaries upstream of North Fork Reservoir, and current sport fishing regulations now require catch and release of all native trout caught in the Clackamas River subbasin. Additionally, angling is restricted to the use of artificial flies and lures upstream of North Fork Reservoir. All waters in the Willamette Zone for the State of Oregon's sport fishing regulations are closed to angling for bull trout. Beginning in 2003, the ODFW eliminated the stocking of nonnative brook trout in lakes with outlets to streams in the upper Clackamas River subbasin that provide suitable bull trout spawning and rearing habitat. With these significant changes in angling regulations, the CRBTWG concludes that this threat for decline has been addressed. No additional changes to angling regulations in the upper portion of the subbasin are necessary to support a successful reintroduction of bull trout (Shively *et al.* 2007, Ch.1, pp. 24).

Donor Stock Assessment and Effects on Donor Populations

A donor stock should be comprised of fish that most closely resemble the bull trout that historically inhabited the Clackamas River (*e.g.*, genotype, phenotype, behavior, and life history expression). However, because little is known about the biology and evolutionary history of bull trout that historically occupied the Clackamas River, and no genetic material is available for analysis, the CRBTWG was limited to an assessment of biological information from other local populations, existing studies of the evolution and biogeography of bull trout, information derived from historical harvest data from the Clackamas River, and recent regional bull trout genetic analyses.

By exploring issues associated with life history strategy, metapopulation dynamics, biogeography, and genetic considerations, the CRBTWG identified bull trout populations in the "coastal" lineage as the best source for a donor population (*see Biological Information* above). Any of the "coastal" lineage bull trout populations are likely to carry the genetic material to preserve and protect the "coastal" lineage regardless of localized and specific adaptations. Although these local adaptations are important, each of the populations is likely to contain the evolutionary potential that is characteristic of the "coastal" evolutionary lineage. However, in a further refinement, the CRBTWG determined that donor populations from lower Columbia River tributaries would be most appropriate due to their geographic proximity to the historical bull trout population in the Clackamas River and because genetic studies indicate these populations are more closely related to one another than to other "coastal" lineage populations (USFWS 2008, unpublished data). The potential lower Columbia River donor populations of bull trout include fish in five river basins: The Willamette River, Hood River, Lewis River, Deschutes River, and Klickitat River basins (Shively *et al.* 2007, Ch. 3, pp. 8–14).

Specific benchmarks have been developed concerning the minimum bull trout population size necessary to maintain genetic variation important for short-term fitness and long-term evolutionary potential. Rieman and Allendorf (2001, pp. 762) concluded that an average of 100 spawning adults each year is required to minimize risks of inbreeding in a bull trout population and that 1,000 spawning adults each year will likely prevent loss of genetic diversity due to genetic drift. This later value of 1,000 spawning adults may also be reached with a collection of local populations among which gene flow occurs. The CRBTWG utilized these general benchmarks in the Feasibility Assessment to assess potential risk to each of the five potential donor stocks in the lower Columbia River from the loss of individuals, recognizing that risk increases as donor populations near 100 spawning adults and diminishes as populations approach 1,000 spawning adults (Shively *et al.* 2007, Ch. 3, pp. 8–14).

When the Feasibility Assessment was developed in December 2007, bull trout from two of the five river basins, the Lewis River and Deschutes River, contained groups of interacting local populations that exceeded 1,000 spawning adults. For the Lewis River basin, this included the combined Pine Creek and Rush Creek populations that occur above Swift Dam. For the Deschutes River basin, this included the three interacting populations present in

the Metolius River subbasin. Since publication of the Feasibility Assessment there have been declines in adult spawner abundance in both the Lewis and Deschutes river bull trout groups, with the Lewis River population dropping significantly in 2007 and 2008, to its current estimated adult spawner abundance of 379 individuals (Doyle 2009, pp. 2–7). Although the Deschutes River (Metolius River subbasin) bull trout population has also decreased over the last 2 years, the CRBTWG considered this population to be the least at risk of the potential donor stocks. Furthermore, per Rieman and Allendorf (2001, pp. 762), the total number of annual spawning adults is sufficiently large enough (approximately 1,000 spawning adults) to protect against the loss of genetic diversity from genetic drift.

The proposed action includes the direct transfer of wild bull trout adults, subadults, juveniles, and fry from the Metolius River subbasin to the Clackamas River. The numbers and life stages of fish transferred each year will be linked strongly to the annual population size of the donor stock, as well as to information derived from monitoring the success of the various life stages in the NEP over the initial few years of the project. An implementation plan, including information about potential release sites, methods, disease screening, and the number of individuals to be released, is appended to our EA and includes additional information on release sites, release timing, monitoring, and suggested management and research.

Management Considerations and Protective Measures

We conclude that the effects of Federal, State, or private actions and activities will not pose a substantial threat to bull trout establishment and persistence in the Clackamas subbasin, because most activities currently occurring in the NEP area are compatible with bull trout recovery and there is no information to suggest that future activities would be incompatible with bull trout recovery. Most of the area containing suitable release sites with high potential for bull trout establishment is managed by the USFS and is protected from major development activities and timber harvest through the following mechanisms: (1) 47 miles (76 km) of the Clackamas River, from its headwaters to the Big Cliff area just upstream of North Fork Reservoir, was designated in 1988 as part of the Federal Wild and Scenic Rivers System (USFS 1993, p. 14); (2) the State of Oregon designated 82 miles (132 km) of the Clackamas River and its tributaries as part of the Oregon Scenic Waterway Program in 1989 (ORS 390.826); (3) the 1994 Northwest Forest Plan established protective measures, standards and guidelines, and land allocations to maintain and restore at-risk fish species, including bull trout; (4) NMFS' listings of salmon and steelhead under the Act caused fisheries management practices (*i.e.,* sport fishing regulations and stocking of catchable rainbow trout) in the Clackamas River subbasin to become significantly more restrictive; and (5) the Federal Omnibus Public Land Management Act of 2009 (Pub. L. 111–11) designated two new wilderness units in the upper Clackamas River watershed at Sisi Butte (3,245 acres) and at Big Bottom (1,264 acres), and the Big Bottom Protection Area (1,581 acre special management unit) that is adjacent to the Big Bottom Wilderness unit.

Aquatic resources in the Clackamas River subbasin are managed by the USFS, the State of Oregon, municipal and county governments, and private landowners. Multiple-use management of these waters will not change as a result of the NEP designation. Current agricultural and recreational activities and other activities by private landowners within and near the NEP area are compatible with bull trout recovery in the Clackamas River subbasin and are not expected to change as a result of the NEP designation. Therefore, we do not believe the reintroduction of bull trout will conflict with existing human activities or hinder public use of the area.

The Service, ODFW, and the USFS, in cooperation with the CRBTWG, will plan and manage the reintroduction of bull trout. In addition, these agencies will carefully collaborate on releases, monitoring, coordination with landowners and land managers, public awareness, and other tasks necessary to ensure successful reintroduction of the species. The CRBTWG is assisting in the development of an Implementation and Monitoring Plan to help guide the reintroduction effort. A few specific management considerations related to the experimental population are addressed below.

(a) *Incidental Take:* Experimental population special rules contain specific prohibitions and exceptions regarding the taking of individual animals. These special rules are compatible with routine human activities in the expected reestablishment area. Section 3(19) of the Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." If we adopt the 10(j) rule as proposed, take of bull trout within the experimental population area would be allowed provided that the take is unintentional, not due to negligent conduct, or is consistent with State fishing regulations that have been coordinated with the Service. We expect levels of incidental take to be low because the reintroduction is compatible with existing activities and practices in the area. As recreational fishing for species other than bull trout is popular within the NEP area, we expect some incidental take of bull trout from this activity but, as long as it is in compliance with ODFW fishing regulations, and Tribal regulations on land managed by the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSROO), such take will not be a violation of the Act.

(b) *Special Handling:* Service and ODFW employees and authorized agents acting on their behalf may handle bull trout for scientific purposes, to relocate bull trout to avoid conflict with human activities, for recovery purposes; to relocate bull trout to other release sites in the Clackamas River, to aid sick or injured bull trout; and to salvage dead bull trout. However, non-Service or other non-authorized personnel will need to acquire permits from the Service and ODFW for these activities. USFS personnel, the primary land managers in the reestablishment area, will be permitted to handle reintroduced bull trout through a modification of their existing 10(a)(1)(A) recovery permit.

(c) *Coordination with Land Owners and Land Managers:* The proposed reintroduction has been discussed with potentially affected State agencies, Tribal entities, local governments, businesses, and landowners within the expected reestablishment area. The land along the expected reestablishment area is owned mainly by USFS although a small portion located in North Fork Reservoir is owned by PGE.

(d) *Public Awareness and Cooperation:* During October and November 2008, in cooperation with ODFW and USFS, we conducted several NEPA scoping meetings on this proposed action. We notified a comprehensive list of stakeholders of the meetings including affected Federal and State agencies, Tribal entities, local governments, landowners, nonprofit organizations (environmental and recreational), and other interested parties. The comments we received are listed in the draft EA, were included in the formulation of alternatives considered in the NEPA process, and will be considered in any final

regulation designating a NEP for reintroduced bull trout.

(e) *Potential impacts to other Federally listed fish species:* In July 2008, the Service sponsored an expert science panel workshop to assess potential impacts of a proposed bull trout reintroduction on Federally listed salmon and steelhead in the Clackamas River. The expert panel also provided information on critical monitoring and management actions to reduce uncertainty and risk to Federally listed salmon and steelhead from a reintroduction of bull trout. The results from this workshop are fully presented in the draft EA, which is available for inspection in person at the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT** section) and online at: *http://www.regulations.gov* or *http://www.fws.gov/oregonfwo/*. Although our analysis indicates a low likelihood for population level impacts to Federally listed salmon and steelhead populations, if the Service and the State determine, in consultation with NMFS, that the reintroduction efforts are not consistent with the recovery of salmon or steelhead, the reintroduction program will be discontinued and bull trout will be removed from the experimental population area. Prior to releasing bull trout into the Clackamas River, the Service will evaluate the potential effects of the release on listed salmon and steelhead and will complete any required interagency cooperation with NMFS pursuant to section 7(a)(2) of the Act.

Monitoring and Evaluation

After the initial release of bull trout, we will monitor their presence, absence, and movement at least annually and document spawning behavior or presence of young-of-year fish. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be primarily conducted through passive integrated transponder (PIT) tags, snorkeling, and radio-telemetry by ODFW employees with the assistance of the Service. Monitoring the status of the donor population will also occur annually. Annual reports that summarize the implementation and monitoring activities that took place during the previous year will be collaboratively developed by the Service and ODFW. We will fully evaluate the reestablishment efforts every 7 years, the life-span of a long-lived bull trout, to determine whether to continue or terminate such efforts.

In addition to monitoring reintroduced bull trout and the donor stock, we also plan to monitor the response of the existing native fish community, particularly Federally listed salmon and steelhead, to the reintroduced bull trout. To facilitate this type of monitoring, the Service, together with other members of the CRBTWG, plan to conduct baseline biological surveys in 2009.

Findings

Based on the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that releasing bull trout into the Clackamas River subbasin will further the conservation of the species but that this population is not essential to the continued existence of the species in the wild.

Peer Review

A final draft of the CRBTWG's Feasibility Assessment was provided to the State of Oregon Independent Multidisciplinary Science Team (IMST) for peer review. The IMST is an impartial scientific review panel charged with advising the State of Oregon on matters of science related to fish recovery, water quality improvements, and enhancing watershed health. The IMST, appointed by the Governor, provides independent, scientific analysis and evaluation of State actions and policies under the Oregon Plan for Salmon and Watersheds (Oregon Plan). The charge of the IMST is to focus on science, maintain its independence, operate by consensus, and report its findings and conclusions in written reports and reviews.

The Service, along with USFS and ODFW, presented a summary of the goals, analyses, and intended use of the Feasibility Assessment at the IMST's October 16, 2006 public meeting. The IMST received a draft of the Feasibility Assessment for review on November 28, 2006. The IMST review of the draft Feasibility Assessment was by an IMST subcommittee including four scientists. The subcommittee held a public meeting on December 13, 2006, to discuss the Feasibility Assessment and to prepare a draft review. The draft review was discussed and unanimously adopted (one member absent from vote) at the January 18, 2007 IMST public meeting. Comments on the draft Feasibility Assessment were provided to the Service, USFS, and ODFW on January 30, 2007. Comments were subsequently posted on the IMST Web site: *http://www.fsl.orst.edu/imst/*, and addressed in the final Feasibility Assessment (Shively *et al.*, 2007, Appendix F).

The IMST peer review of the science in the final Feasibility Assessment, much of which was incorporated into this proposed rule, meets our responsibilities under our policy on peer review, published on July 1, 1994 (59 FR 34270).

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 *et seq.*), whenever a Federal 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 that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

If this proposal is adopted, the area affected by this rule includes the Clackamas River subbasin and the mainstem of the Willamette River, from

Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel, in Oregon. Because NEP designations do not establish substantial new regulation of activities, we do not expect this rule would have any significant effect on recreational, agricultural, or development activities. Although the entire NEP boundary encompasses a large area, the section of the NEP area where we can anticipate the establishment of an experimental population of bull trout is mainly public land owned by the USFS. In addition, NEPs occurring outside the National Refuge System or the National Park System are treated as proposed for listing under the provisions of section 7 (other than section 7(a)(1)). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

The principal activities on private property near the expected reestablishment area in the NEP are agriculture, ranching, and recreation. The presence of bull trout would likely not affect the use of lands for these purposes because there would be no new or additional economic or regulatory restrictions imposed upon States, non-Federal entities, or members of the public due to the presence of bull trout. Therefore, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(1) This rule would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that, if adopted, this rulemaking would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. Small governments would not be affected because the proposed NEP designation would not place additional requirements on any city, county, or other local municipalities.

(2) This rule would not produce a Federal mandate of $100 million or greater in any year (*i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act). This proposed NEP designation for bull trout would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. This rule would allow for the taking of reintroduced bull trout when such take is incidental to an otherwise legal activity, such as recreation (*e.g.*, fishing, boating, wading, swimming), forestry, agriculture, hydroelectric power generation, and other activities that are in accordance with Federal, State, and local laws and regulations. Therefore, we do not believe that establishment of this NEP would conflict with existing or proposed human activities or hinder public use of the Clackamas River or its tributaries.

A takings implication assessment is not required because this rule: (1) Would not effectively compel a property owner to suffer a physical invasion of property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this proposed rule with the affected resource agencies in Oregon. Achieving the recovery goals for this species will contribute to its eventual delisting and return to State management. No intrusion on State policy or administration is expected, roles or responsibilities of Federal or State governments would not change, and fiscal capacity would not be substantially directly affected. The proposed special rule operates to maintain the existing relationship between the State and the Federal Government and is being undertaken in coordination with the State of Oregon. We have cooperated with ODFW in the preparation of this proposed rule. Therefore, this proposed rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal 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. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact of this proposed rule. Based on this analysis and any new information resulting from public comment on the proposed action, we will determine if there are any significant impacts or effects caused by this rule. We have prepared a draft EA on this proposed action and have made it available for public inspection: (1) in person at the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT** section) and (2) online at *http://www.regulations.gov* or *http://www.fws.gov/oregonfwo/*. All appropriate NEPA documents will be finalized before this rule is finalized.

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 229511), Executive Order 13175, and the Department of the Interior Manual Chapter 512 DM 2, we have considered possible effects on Federally recognized Indian Tribes and have determined that 2 percent of the acreage included in the Clackamas River subbasin, including the upper Clackamas and Oak Grove Fork drainage, is owned and managed by the Confederated Tribes of the Warm Springs Reservation (CTWSROO). Furthermore, donor stock for the reintroduction will, in part, originate from a section of the Metolius River located on the CTWSRO. Since 2007, the CTWSRO has been an active participant in the CRBTWG discussions on bull trout recovery in the Clackamas River basin. The Service is continuing to consult, on a government-to-government basis, with the CTWSRO regarding this proposed action.

Energy Supply, Distribution, or Use (E.O. 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Clarity of This Regulation (E.O. 12866)

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this proposed rule are Rebecca Toland and Chris Allen of the Oregon Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for "Trout, bull" under "FISHES" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
FISHES							
Trout, bull	*Salvelinus confluentus.*	*U.S.A. (AK, Pacific NW into CA, ID, NV, MT) Canada (NW Territories).*	*U.S.A., coterminous (lower 48 States), except where listed as an experimental population.*	*T*	*637, 639E, 659, 670*	*17.95(e)*	*17.44(w), 17.44(x)*
Trout, bull	*Salvelinus confluentus.*	U.S.A. (AK, Pacific NW into CA, ID, NV, MT) Canada (NW Territories).	Clackamas River subbasin and the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel.	XN	.....	NA	17.84(v)

3. Amend § 17.84 by adding a new paragraph (v) to read as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(v) Bull Trout (*Salvelinus confluentus*).

(1) *Where are populations of this fish designated as nonessential experimental populations (NEP)?*

(i) The NEP area for the bull trout is within the species' historical range and is defined as follows: the entire Clackamas River subbasin as well as the mainstem Willamette River, from

Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel.

(ii) Bull trout are not currently known to exist in the Clackamas River subbasin or the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel, in Oregon. Should any bull trout be found in the Willamette River within the NEP boundary, the U.S. Fish and Wildlife Service (Service) will assume the fish to be part of the reintroduced population, unless the fish is tagged or otherwise known to be from another population. Given the presence of suitable overwintering and forage habitat in the upper portion of the Clackamas River, as well as the geographic distance from spawning and rearing habitat in the upper Clackamas River to any overwintering and foraging habitat in the lower Clackamas and Willamette rivers, we do not expect the reintroduced fish to become established outside the NEP. Bull trout found outside of the NEP boundary but known to be part of the NEP will assume the status of bull trout within the geographic area in which they are found.

(iii) We do not intend to change the NEP designations to "essential experimental," "threatened," or "endangered" within the NEP area. Additionally, we will not designate critical habitat for the NEP, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) *What take is allowed of this species in the NEP area?*

(i) Bull trout may be taken within the NEP area, provided that such take is:

(A) Not willful, knowing, or due to negligence;

(B) Incidental to and not the purpose of carrying out an otherwise lawful activity, such as recreation (*e.g.*, fishing, boating, wading, trapping, or swimming), agriculture, hydroelectric power generation, and other activities that are in accordance with Federal, State, Tribal, and local laws and regulations; and

(C) If due to fishing, consistent with Oregon Department of Fish and Wildlife (ODFW) fishing regulations that have been coordinated with the Service.

(ii) Any person with a valid permit issued by the Service under § 17.32 and a valid State permit issued by ODFW may take bull trout for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act.

(3) *What take of this species is not allowed in the NEP area?*

(i) Except as expressly allowed in paragraph (v)(2) of this section, all the provisions of § 17.31(a) and (b) apply to the fish identified in paragraph (v)(1) of this section.

(ii) Any manner of take not described under paragraph (v)(2) of this section or Oregon Revised Statute (ORS) 498.002 and Oregon Angling Regulations pursuant to ORS 498.002 is prohibited in the NEP area. Should State statutes or regulations change, take prohibitions will change accordingly. Any changes to State recreational fishing regulations pertaining to the experimental population of bull trout in the Clackamas Basin will be made by the State in collaboration with the Service. We may refer unauthorized take of this species to ODFW law enforcement authorities or Service law enforcement authorities for prosecution.

(iii) You may not possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any of the identified fishes, or parts thereof, that are taken or possessed in a manner not expressly allowed in paragraph (v)(2), or in violation of the applicable State fish and wildlife laws or regulations or the Act.

(iv) You may not attempt to commit, solicit another to commit, or cause to be committed any offense except the take expressly allowed in paragraph (v)(2).

(4) *How will the effectiveness of the reestablishment be monitored?*

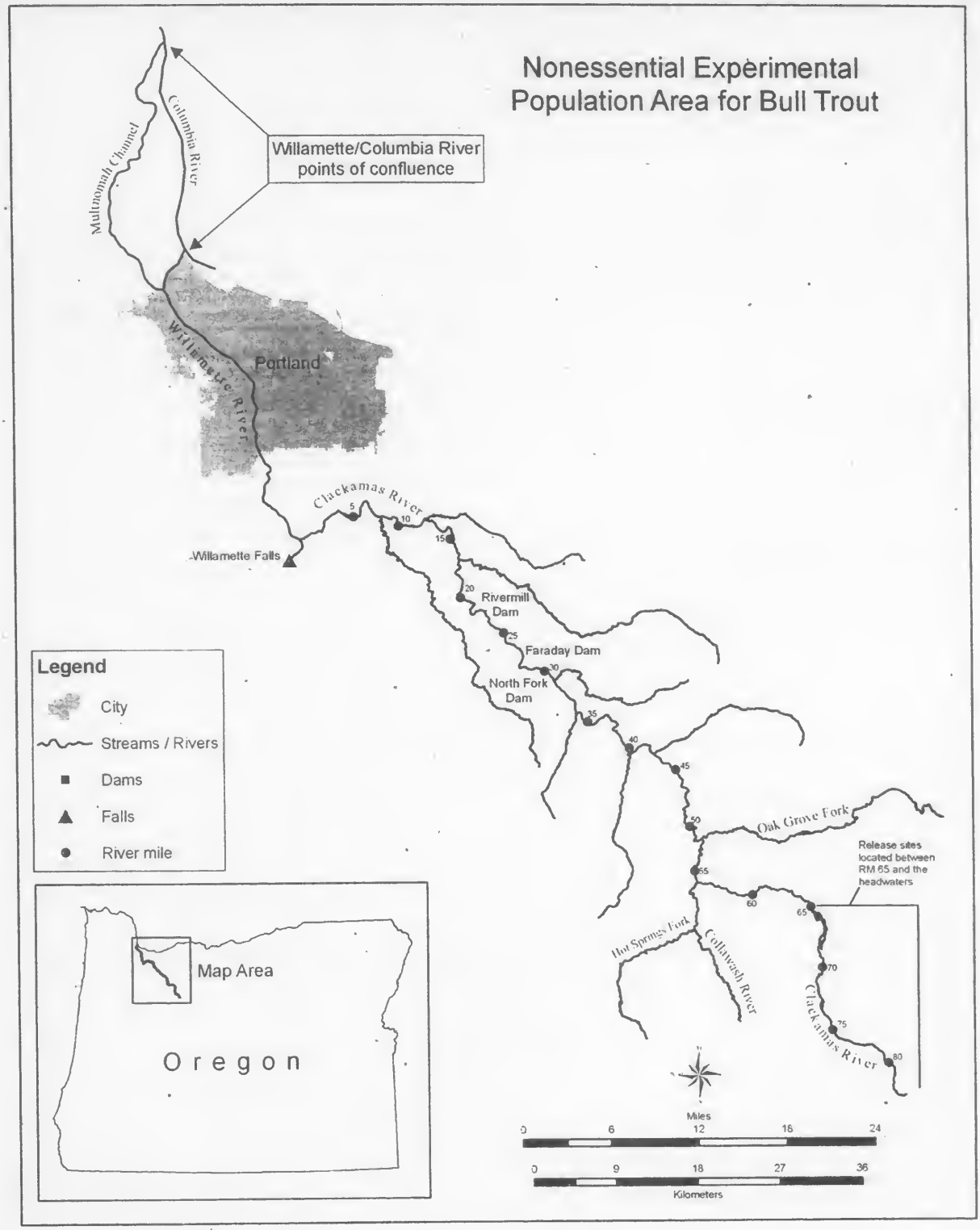
After the initial release of bull trout, we will monitor their presence, absence, and movement at least annually and document any spawning behavior or young-of-year fish that might be present. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be primarily conducted through passive integrated transponder (PIT) tags, snorkeling, and radio telemetry by ODFW employees with assistance from the Service and U.S. Forest Service (USFS). Monitoring of the status of the donor population will also occur annually. Annual reports that summarize the implementation and monitoring activities that took place during the previous year will be collaboratively developed by the Service and ODFW. We will also fully evaluate the reestablishment efforts every 7 years to determine whether to continue or terminate them.

(5) *What safeguards are in place to ensure the protection of Federally listed salmon and steelhead in the NEP area?*

Although bull trout are opportunistic predators and have been known to prey upon juvenile salmon and steelhead, the potential for significant adverse impacts to salmon and steelhead populations is remote. Nevertheless, if the Service and the State determine, in consultation with the National Marine Fisheries Service (NMFS), that the reintroduction efforts are not consistent with the recovery of Federally listed salmon or steelhead, the reintroduction program will be discontinued and bull trout will be removed from the experimental population area.

(6) **Note:** Map of the NEP area for bull trout in Oregon follows:

BILLING CODE 4310–55–P


Nonessential Experimental Population Area for Bull Trout
Willamette/Columbia River points of confluence
Multnomah Channel
Columbia River
Portland
Willamette River
Clackamas River
Willamette Falls
Rivermill Dam
Faraday Dam
North Fork Dam
Oak Grove Fork
Release sites located between RM 65 and the headwaters
Hot Springs Fork
Collawash River
Clackamas River
Legend
City
Streams / Rivers
Dams
Falls
River mile
Map Area
Oregon
Miles
Kilometers

* * * * *

Dated: November 19, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–29020 Filed 12–8–09; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2009–0072]
[92210-1117-0000-B4]

[RIN 1018–AW23]

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*); Proposed Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the designated critical habitat for the Santa Ana sucker (*Catostomus santaanae*). The areas identified in this proposed rule constitute a revision of the areas designated as critical habitat for the Santa Ana sucker on January 4, 2005. In the 2005 final rule, we designated 8,305 ac (3,361 ha) of critical habitat in Los Angeles County. Approximately 9,605 acres (ac) (3,887 hectares (ha)) of habitat in the Santa Ana River (San Bernardino, Riverside, and Orange Counties) and the San Gabriel River and Big Tujunga Creek (Los Angeles County) in southern California fall within the boundaries of the proposed revised critical habitat designation.

DATES: We will consider comments we receive on or before February 8, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 25, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. FWS-R8-ES-2009-0072.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–R8–ES–2009–0072; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431–9440; facsimile (760) 431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) The reasons we should or should not revise the designation of habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh any threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- Areas that provide habitat for the Santa Ana sucker that we did not discuss in this proposed critical habitat rule,
- Areas within the geographical area occupied by the species at the time of listing that contain the physical and biological features essential to the conservation of the species which may require special management considerations or protection, that we should include in the designation and reason(s) why (see **Physical and Biological Features** section below for further discussion.), and
- Areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species and why.

(3) Specific information on our proposed designation of City Creek and the Santa Ana River above Seven Oaks Dam to provide habitat for future reintroduction of the Santa Ana sucker to augment the Santa Ana sucker population in the Santa Ana River. See **Critical Habitat Units** section below.

(4) Specific information on the Santa Ana sucker, habitat conditions, and the presence of physical and biological features essential for the conservation of the species in Subunit 1B below Prado Dam.

(5) Specific information on the sediment contribution from tributaries to the Santa Ana River below Prado Dam (Subunit 1B).

(6) Specific information on the Santa Ana sucker, habitat conditions, and the presence of potential permanent barriers to movement in Big Tujunga Wash (Subunit 3A), particularly between the Big Tujunga Canyon Road Bridge and the Big Tujunga Dam. See **Critical Habitat Units** section below.

(7) Specific information on in-stream gradient (slope) limitations of the species. In this proposed revised rule, we assume that Santa Ana suckers are unable to occupy stream sections where the in-stream slope exceeds 7 degrees. See Primary Constituent Elements (PCEs) section below.

(8) Land-use designations and current or planned activities in the areas proposed as critical habitat, as well as their possible effects on proposed critical habitat.

(9) Comments or information that may assist us in identifying or clarifying the PCEs. See **Primary Constituent Elements** section below for further discussion of PCEs.

(10) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the areas identified as containing the features essential to the species' conservation.

(11) Any probable economic, national-security, or other impacts of designating particular areas as critical habitat, and, in particular, any impacts on small entities (e.g., small businesses or small governments), and the benefits of including or excluding areas that exhibit these impacts.

(12) Whether any specific areas being proposed as critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act. See **Exclusions** section below for further discussion.

(13) The potential exclusion of Subunits 1B and 1C under section 4(b)(2) of the Act based on the benefits to the species provided by implementation of the Santa Ana Sucker Conservation Program and whether the benefits of exclusion of this area outweigh the benefits of including this area as critical habitat, and why. See **Exclusions** section below for further discussion.

(14) Information on any quantifiable economic costs or benefits of the proposed revised designation of critical habitat.

(15) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and

understanding, or to better accommodate public concerns and comments.

Our final determination concerning critical habitat for the Santa Ana sucker will take into consideration all written comments we receive during the comment period, including comments we have requested from peer reviewers, comments we receive during a public hearing should we receive a request for one, and any additional information we receive during the 60–day comment period. Our final determination will also consider all written comments and any additional information we receive during the comment period for the draft economic analysis. All comments will be included in the public record for this rulemaking. On the basis of peer reviewer and public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that some areas may be excluded from the final determination under section 4(b)(2) of the Act based on Secretarial discretion.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If you provide personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*. Please include sufficient information with your comment to allow us to verify any scientific or commercial data you submit.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section).

You may obtain copies of this proposed revised rule by mail from the Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section) or by visiting the *Federal eRulemaking Portal* at *http://www.regulations.gov*.

Background

It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat in this proposed rule. This rule incorporates new information on the distribution of the Santa Ana sucker and its habitat within the Santa Ana River that we did not discuss in the 2005 final critical habitat designation for this species. No new information pertaining to the species' description, life history, or ecology was received following the 2005 final critical habitat designation for this species; summary information relevant to this species critical habitat is provided below. For more information on the Santa Ana sucker, refer to the final listing rule published in the **Federal Register** on April 12, 2000 (65 FR 19686), and the designation and revision of critical habitat for the Santa Ana sucker published in the **Federal Register** on February 26, 2004 (69 FR 8839), and on January 4, 2005 (70 FR 426), respectively.

Species Description

The Santa Ana sucker is a small, short-lived member of the sucker family of fishes (Catostomidae), named so primarily because of the downward orientation and anatomy of their mouth-parts which allow them to suck up small invertebrates, algae, and other organic matter with their fleshy, protrusible lips (Moyle 2002, p. 179). Santa Ana suckers are generally less than 6.3 inch (in) (16 centimeters (cm) in length, are silvery-white below and darker along the back, with irregular dorsal blotches on the sides and faint patterns of pigmentation arranged in lateral stripes, and the membranes connecting the rays of the caudal (tail) fin are pigmented (Moyle 2002, p. 182). Spawning tubercles, or raised growths on sexually mature fish, particularly at the beginning of the breeding season, are present on most parts of the body of breeding males and are heaviest on the anal fin, caudal fin, and lower half of the caudal peduncle. Female suckers grow tubercles on the caudal fin and caudal peduncle (Moyle 2002, pp. 182-183).

Habitat

The Santa Ana sucker occurs in the watersheds draining the San Gabriel and San Bernardino Mountains of southern California. Their historical distribution extended from upper watershed areas to the Pacific Ocean; hence, they are capable of living in habitats as diverse as mountain streams and rivers in alluvial floodplains (Moyle 2002, p. 183; Swift *et al.* 1993, pp. 119–121). Sediment loads are high in the San Gabriel and San Bernardino Mountains (National Research Council 1996, p. 29). The streams that this species inhabits are generally perennial streams with water ranging in depth from a few inches to several feet and with currents ranging from slight to swift (Haglund and Baskin 2003, p. 2). They are also naturally subject to periodic, severe flooding (Moyle 2002, p.183). However, decades of groundwater extraction have lowered subsurface groundwater levels within the historical range of the Santa Ana sucker (California Regional Water Quality Control Board 1995, pp. 1-4 to 1-5). In conjunction with periodic reductions in stream flows during extended periods of drought typical of southern California climate cycles, all streams that support the Santa Ana sucker experience less perennial flow (California Regional Water Quality Control Board 1995, p. 1–4). Flows also fluctuate artificially, either increasing or decreasing in an unnatural manner as a result of dam operations and, in some areas, discharges from wastewater treatment plants.

Santa Ana suckers are most abundant in unpolluted, clear water that is typically less than 72 degrees Fahrenheit (°F) (22 degrees Celsius (°C)) in temperature (Moyle and Yoshiyama 1992, p. 203). Santa Ana suckers appear to tolerate the relatively warmer water temperatures and turbid water conditions that occur in the Santa Ana River (Chadwick and Associates, Inc. 1992, p. 37; Moyle and Yoshiyama 1992, p. 203; Saiki 2000, p. 25). Santa Ana suckers prefer streams that contain coarse substrates, including gravel, cobble, and mixtures of gravel or cobble with sand and a combination of shallow riffle areas and deeper runs and pools (Haglund and Baskin 2003, p. 55; Haglund *et al.* 2001, p. 60). This species also prefers habitat containing in-stream or bank-side riparian vegetation that provides shade/cover; however, vegetation becomes less important where larger, deeper pools and riffles are present (Moyle 2002, p. 183). Open stream reaches with shifting sandy substrates typically lack an accumulation of woody debris and are less suitable for the development of an aquatic invertebrate community (Leidy *et al.* 2001, p. 5-3). Areas of shifting sandy substrates are also less suitable for development of algae, an important food source for suckers (Saiki *et al.* 2007, p. 98).

Tributaries, particularly near their confluence with occupied areas of the mainstem of the river, may also provide important habitat for the Santa Ana sucker (Chadwick and Associates, Inc.

1992, p. 49; Chadwick Ecological Consultants, Inc. 1996, p. 16; Haglund *et al.* 2002, pp. 54–60), providing shallow-water refuge for larvae and fry from larger predatory fish and acting as refuge for juvenile and adult Santa Ana suckers during storms. Additionally, the species may be attracted to tributaries due to the relatively colder water temperatures found there (Swift 2001, p. 26).

Life History

Santa Ana suckers feed on algae, zooplankton (such as diatoms), and detritus that they scrape from the surfaces of rocks and other hard substrates. These food sources constitute approximately 98 percent of their diet, with the remainder consisting of aquatic insect larvae, fish scales, and fish eggs (Greenfield *et al.* 1970, p. 174). While smaller, younger Santa Ana suckers feed primarily on algae, diatoms, and detritus, insects appear to become a more significant part of the diet of larger individuals (Greenfield *et al.* 1970, p. 174).

Santa Ana suckers typically live about 3 years, although, based on size, some may live longer than 4 years (Drake 1988, p. 56). Male and female Santa Ana suckers grow at approximately the same rate (Greenfield *et al.* 1970, p. 174). Spawning typically occurs in the spring, generally beginning in mid-March, peaking in April, and concluding by early July (Moyle 2002, p. 183). However, juveniles less than 1 inch (in) (25 millimeters (mm)) in length have been collected in the Santa Ana River as early as February (Haglund *et al.* 2003, p. 103) and as late as August (Chadwick and Associates, Inc. 1992, pp. 51, 54). In the San Gabriel River, juveniles less than 1 in (25 millimeters (mm)) have been collected in both December (Saiki 2000, p. 54) and August (Tennant 2006, p. 2). These data indicate spawning may be protracted and the timing highly variable, depending on local conditions in each watershed (such as water temperature, stream size, or pattern of seasonal runoff).

Santa Ana suckers become reproductively mature during spring following hatching (Greenfield *et al.* 1970, p. 172). Females deposit eggs in gravel substrate without constructing any type of nest; however, eggs are well-camouflaged in the gravel. The eggs are demesal and adhesive, meaning they adhere to the substrate rather than floating and dispersing on the surface of the water (Greenfield *et al.* 1970, p. 169). Eggs deposited in ambient stream temperatures of 55 °F (13 °C) have been found to hatch larvae approximately 0.3 in (7 mm) in total length within 360 hours (approximately 15 days) of fertilization. When larvae are approximately 0.6 in (16 mm) long, the mouth becomes sub-terminal and the larva transform into fry (Greenfield *et al.* 1970, p. 169).

Fecundity in the Santa Ana suckers is exceptionally high relative to that of other suckers (Moyle 2002, p. 183). Females can lay between 4,400 and 16,000 eggs at a given time with larger females laying greater numbers of eggs than smaller females (Greenfield *et al.* 1970, p. 170). Hence, average overall growth of fish likely affects population fitness. The combination of early sexual maturity, protracted spawning period, and high fecundity allows the Santa Ana sucker to quickly repopulate streams following periodic flood events that can otherwise decimate populations (Greenfield *et al.*1970, pp. 166, 177, 178), provided that there is a refuge available to fish within the stream. Winter flood events may contribute to catastrophic decreases in abundance by transporting Santa Ana suckers downstream to areas with unsuitable habitat. Such floods, when of sufficient magnitude, also disrupt the aquatic invertebrate community, thereby reducing habitat quality for the Santa Ana sucker until stream bed conditions stabilize and the diversity and abundance of this forage source is re-established (Haglund and Baskin 1992, p. 45, 56; Leidy *et al.* 2001, p. 5-3). Conversely, summer droughts may strand Santa Ana suckers in isolated pools where they are exposed to unsuitable water-quality conditions or an increased probability of predation. Both conditions highlight the importance of refuge areas with more stable habitat conditions for the conservation of the Santa Ana sucker.

Geographic Range and Status

As discussed in the final rule (65 FR 19686; April 12, 2000), listing the Santa Ana sucker as threatened, this species' historical range includes the rivers and larger streams emanating from the San Gabriel and San Bernardino Mountains in Ventura, Los Angeles, Orange, Riverside, and San Bernardino Counties. The species is currently known to occur in the Santa Ana River (San Bernardino, Riverside, and Orange Counties) and the San Gabriel River and Big Tujunga Creek (Los Angeles County). However, information about the distribution of the Santa Ana sucker in many tributaries within its historical range is incomplete. For example, Santa Ana suckers were recently found in San Dimas Creek, a tributary to the San Gabriel River that is isolated from remaining occupied habitat in the San Gabriel River by development (Chambers Group 2008, pp. 1–3). See the final listing rule for a detailed discussion of this species' historical range.

A population of the Santa Ana sucker is also found in the Santa Clara River. However, we determined at the time of listing that there was sufficient evidence to conclude that this population of Santa Ana sucker is not native to this river and hence, we did not include the Santa Clara River population in the geographic range of the listed Santa Ana Sucker (65 FR 19686; April 12, 2000). We have no new information that clarifies the status of this species as native or nonnative to this river. A genetic analysis of the populations in all four watersheds (Santa Clara, Santa Ana, San Gabriel, and Los Angeles) would assist in determining the origin of the species in the Santa Clara River; however, this analysis has not been completed at this time.

In addition to a lack of information clarifying the status of this species as native or nonnative, hybrids between the Santa Ana sucker and the Owens sucker have been collected in the lower Santa Clara River in the vicinity of Fillmore and within Sespe Creek (Moyle 2002, p. 182). The Owens sucker (*Catostomus fumeiventris*), which is endemic to the Owens River watershed in southeastern California, has been documented in the Santa Clara River since the 1930s (Hubbs *et al.* 1943, p. 47). This species was apparently introduced to the Santa Clara River through transfers of Owens River water via the Owens Aqueduct (Bell 1978, p. 14). Recently, genetic introgression (which is the backcrossing of hybrid offspring with one of its parent species) has been detected in both Santa Ana and Owens suckers within the Santa Clara River (Ferguson 2009, p.1; Chabot *et al.* 2009, p. 24), indicating that hybridization between these two species has occurred. However, additional research is needed to determine the impact of hybridization on genetically "pure" Santa Ana sucker in the Santa Clara River.

Therefore, given the lack of new information on the status of this species as native or nonnative as well as a lack of information on the impacts of hybridization on genetically "pure" Santa Ana sucker, we continue to adhere to our 2000 decision not to include the Santa Clara River population of the Santa Ana sucker as part of the listed entity. As a consequence, the Santa Clara River area has not been included in this proposed revision to critical habitat.

The current distribution of the listed Santa Ana sucker is delimited by dams

or other impassable structures that preclude further dispersal or migration of fish (Cogswell Reservoir on the West Fork; the "Bridge-of-No-Return" on the North Fork of the San Gabriel River; the Big Tujunga Dam on Big Tujunga Creek; and the La Cadena drop structure in the Santa Ana River). Additionally, decades of water diversion and water withdrawal have permanently altered the natural watershed flows within the Los Angeles and Santa Ana watershed region (California Regional Water Quality Control Board 1995, pp. 1-2 to 1-4). The current distribution is also delimited by dams (Hansen Dam on Big Tujunga Creek, San Gabriel Dam on San Gabriel River, and a series of rubber dams just below Weir Canyon Road on the Santa Ana River) and the permanent loss of suitable downstream habitat areas as a result of urban development (Moyle 2002, p. 184). Altered fluvial processes and impediments to movement fragment much of the current range of the Santa Ana sucker within each watershed. In its remaining habitat, severe restriction of natural water flows causes impacts to populations of the Santa Ana sucker including stranding and reduction in usable habitat areas when tributaries run dry (Moyle 2002, p. 184). See the final listing rule (65 FR 19686; April 12, 2000) and the **Special Management Considerations or Protection** section below for additional discussion of the current threats to the species in areas included in this proposed revised critical habitat designation.

Previous Federal Actions

The Santa Ana sucker was listed as a threatened species on April 12, 2000 (65 FR 19686), in the Santa Ana River, San Gabriel River, and Big Tujunga Creek. A fourth population in the Santa Clara River was not listed because it was presumed to be introduced into that watershed (see **Geographic Range and Status** section above). Pursuant to a settlement agreement with California Trout, Inc., the California-Nevada Chapter of the American Fisheries Society, the Center for Biological Diversity, and the Friends of the River (plaintiffs) [*California Trout, et al.* v. Norton, *et al.* (Case No. 97-3779, N.D. Cal)], we published a proposed and final critical habitat designation in the **Federal Register** on February 26, 2004, that encompassed 21,129 ac (8,551 ha) in the Santa Ana River, San Gabriel River, and Big Tujunga Creek. To give the public an opportunity to comment on the critical habitat designation, including the opportunity for a public hearing, and to enable the Service to complete and circulate for public review an Economic Analysis of the critical habitat designation, we published and solicited comment on the proposed rule (69 FR 8911). Subsequently, we published a notice in the **Federal Register** on August 19, 2004 (69 FR 51416), announcing the reopening of a 30–day comment period on the proposed rule and the holding of a public hearing on September 9, 2004, in Pasadena, California. A final revised critical habitat rule was published in the **Federal Register** on January 4, 2005, designating a total of 8,305 ac (3,361 ha) in the San Gabriel River and Big Tujunga Creek in San Bernardino County. On July 20, 2007 (Service 2007, pp. 1–2), we announced that we would review the January 4, 2005, final critical habitat rule after questions were raised about the integrity of scientific information used and whether the decision made was consistent with the appropriate legal standards. Based on our review of the 2005 final critical habitat designation, we determined it was necessary to revise critical habitat and this rule proposes those revisions.

On November 15, 2007, the parties listed above filed suit against the Service alleging the 2005 final designation of critical habitat violated provisions of the Act and Administrative Procedure Act [(California Trout, Inc., *et al.*, v. United States Fish and Wildlife, *et al.*, Case No. 07–CV–05798 (N.D. Cal.) *transferred* Case No CV 08-4811 (C.D. Cal.)]. The plaintiffs alleged that our January 4, 2005, final revised critical habitat designation for the Santa Ana sucker was insufficient for various reasons and should include the Santa Clara River population. We entered into a stipulated settlement agreement with plaintiffs that was approved by the district court on January 21, 2009. Pursuant to the district court order, we committed to submit a proposed revised critical habitat designation for the Santa Ana sucker to the **Federal Register** by December 1, 2009, and submit a final revised critical habitat designation to the **Federal Register** by December 1, 2010.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) 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:

(a) essential to the conservation of the species and

(b) that may require special management considerations or protection; and

(2) 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.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain physical or biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent

elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed as critical habitat only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by section 9 of the Act and the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, Habitat Conservation Plans (HCPs), or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas occupied at the time of listing that contain the features essential to the conservation of the Santa Ana sucker. We reviewed the approach to the conservation of the Santa Ana sucker provided in the 2004 final critical habitat designation for the Santa Ana sucker (69 FR 8839; February 26, 2004); the 2005 final revised critical habitat designation (70 FR 426; January 4, 2005); information from State, Federal, and local government agencies; and information from academia and private organizations that collected scientific data on the species. Other information we used for this proposed revised critical habitat includes: published and unpublished papers, reports, academic theses, species and habitat surveys; Geographic Information System (GIS) data (such as species occurrence data, habitat data, land use, topography, digital aerial photography, and ownership maps); correspondence to the Service from recognized experts; site visits by Service biologists; and other information as available. Mapping for this proposed revised critical habitat designation was completed using ESRI ArcMap 9.3.1 (ESRI, Inc. 2009).

Physical and Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR § 424.12(b), in determining which areas occupied by the species at the time of listing to propose as critical habitat, we consider those physical and biological features that are essential to the conservation of the species that may require special management considerations or protection. We consider the physical and biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. The PCEs include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derived the PCEs required for the Santa Ana sucker from its biological needs. The areas proposed as revised critical habitat consist of flowing stream habitat, although some portions of this habitat may experience significant reductions in, or an absence of, surface flows during certain portions of the year (such as during summer months) or under certain conditions (such as during severe droughts, when artificial sources of water are temporarily suspended). Some areas that we consider essential to the conservation of the Santa Ana sucker may not experience flows except during major storms events. However, these areas are critical important components of naturally-occurring hydrologic and geologic processes in the historical range of this species. We have attempted to capture the dynamic nature and importance of these processes to the ecological function upon which the Santa Ana sucker depends.

Habitats That Are Representative of the Historic Geographical and Ecological Distribution of the Species

The Santa Ana sucker inhabits flowing streams and has not been collected from reservoirs (Swift 2001, p. 15; Moyle 2002, p. 184). Water depths and velocities, as well as bed substrates, vary over the reaches of these streams creating various habitat features including:

(1) Moderate currents over a uniform, unbroken stream bottom (i.e., runs);

(2) water flowing over gravel and cobble substrates that causes ripples to form on the surface of the water (i.e., riffles); and

(3) deep water areas created by submerged boulders where water is cool and relatively still (i.e., pools). Streams in southern California are subject to periodic, severe flooding that alters channel configuration, in-stream habitat conditions, and vegetation structure (Moyle 2002, p. 183). Hence, as stream conditions change, the characteristics of stream and bank habitats and their suitability for the Santa Ana sucker changes, influencing the distribution of

the fish over time. Therefore, even stream reaches where flows may periodically be interrupted or dewatered become important during periods of high flows to allow Santa Ana suckers to move between other habitat areas necessary for breeding, feeding, and sheltering.

Gravel beds in shallow, but clear, flowing stream reaches are needed for spawning. Shallow areas with sandy substrates and overhanging vegetation are needed to support larvae and fry. Juvenile and adult Santa Ana suckers require deeper pools of water for forage, shelter during storms, and cover.

The Santa Ana sucker prefers cool water temperatures and has been found in waters between 59 and 82 °F (15 and 28 °C) in the Santa Ana River (Swift 2001, p. 18). These cooler water temperatures are only maintained in some areas by the upwelling of cooler groundwater, tributary flows, or shade from overhanging vegetation. Overhanging and in-stream vegetation are also needed for the development of an aquatic invertebrate community to supply food for adult suckers as well as for protective cover, and shade, which reduces water temperature during summer and fall months. Therefore, a complex stream system is needed that: (1) Encompasses sand, gravel, cobble, and rock substrates; (2) harbors diverse bed morphologies found in deep canyons and alluvial floodplains; (3) provides varying water depths and velocities; (4) contains tributaries that provide fish with areas of refuge (refugia) from predators and during floods and that can also provide suitable breeding habitat; and (5) harbors sources of sediment for renewal of substrate in occupied areas. The PCEs and the resulting physical and biological features essential for the conservation of the Santa Ana sucker are derived from studies of this species' habitat, ecology, and life history as described below, in the **Background** section in this proposed rule, in the final listing rule published in the **Federal Register** on April 12, 2000 (65 FR 19686), in the designation of critical habitat published in the **Federal Register** on February 26, 2004 (69 FR 8839), and in the final revised critical habitat published in the **Federal Register** on January 4, 2005 (70 FR 426).

Space for Individual and Population Growth and for Normal Behavior

Santa Ana suckers use various water depths, depending on their life-history stage and activity, and do not occupy all reaches of their habitat at any one time (Saiki 2000, p. 19; Haglund and Baskin 2003, p. 53). Larval- and early-stage juvenile Santa Ana suckers prefer the shallow margins of streams in water of 2 to 4 in (5 to 10 cm) in depth; as fish mature, they move into deeper water. Adults prefer deep pools for feeding and seeking refuge, riffles of varying depths for spawning, and riffles and runs of varying depths for movement between pools (Haglund *et al.* 2003, p. 102). For example, in the Santa Ana River, adult suckers have been found in diverse habitat areas, including shallow runs of less than 4 in (10 cm) in depth, in flowing water up to 5 ft (150 cm) deep (Saiki 2000, p. 19; Swift 2001, p. 66), and in pools 6 to 10 ft (200 to 300 cm) deep (Allen 2004). They have been found in similarly varying water depths in the San Gabriel River (Saiki 2000, p. 48), and Saiki speculates that their capture in these various depths is reflective of their ability to take advantage of a variety of habitat conditions (2000, p. 25). Flows within occupied habitat areas may occasionally become very shallow due to seasonal reductions in flow volumes or be interrupted as a result of dam operations or releases from wastewater treatment plants (such as in the Santa Ana River) in some portions of a stream reach. When stream depth is significantly reduced, deep pools become a critically important refuge for fish.

Surface water flows must be present within the stream, but water velocities where Santa Ana suckers occur can vary from slight to swift (Haglund and Baskin 2003, p. 2). Larvae and fry congregate exclusively in almost-still waters, not moving into swifter currents until they have matured into later juvenile stages (Swift 2001, pp. 17–18). Swift (2001, p. 61) suggests that juvenile fish prefer areas with less water-velocity than do adults because they can expend less energy maintaining their position in the stream. Adult and juvenile Santa Ana suckers in the San Gabriel River have been found in waters with bottom velocities ranging from 0.17 to 0.51 ft per second (0.05 and 0.15 m per second) and mid-column velocities reaching 1.95 ft per second (0.6 m per second) (Haglund and Baskin 2002, pp. 38–39). Haglund and Baskin concluded that there was no evident pattern in the locations the Santa Ana sucker selected relative to water velocity and suggested that suckers preferentially seek out locations that provide the best combination of habitat parameters (Haglund and Baskin 2003, pp. 39 and 53). In the Santa Ana River, Santa Ana suckers have been found in areas with water velocities of up to 2.4 ft per second (0.74 m per second) where wastewater discharges and channelization of the river bed increase water velocity (Saiki 2000, pp. 18–19). In the Santa Ana River, suckers have historically been found at the Imperial Highway Bridge in Orange County (Chadwick and Associates, Inc. 1992, p. 45). However, Saiki (2000, p. 28) failed to detect Santa Ana suckers there in 1999 and believes the numbers of fish found at this site may have declined and become extirpated from the area.

Stream beds containing the mosaic of rock, cobble, and gravel preferred by Santa Ana suckers are most prevalent in the San Gabriel River (Saiki 2000, pp. 18–19). Within the Santa Ana River, shifting sands are the primary substrate constituent upstream of the Prado Basin. Bed substrates containing at least 10 percent gravel, cobble, and rock were documented for a distance of 7 mi (12.3 km) downstream from the Rialto Drain in 1999 and 2000 (Swift 2001, pp. 4, 68–75). Habitat assessments conducted between 2006 and 2008 indicated that these substrates fluctuated from 2.6 to 6.0 mi (4.2 to 9.6 km) downstream of the Rialto Drain (Thompson *et al.* 2009, p. 11).

The distribution of Santa Ana suckers across streams varies depending upon bed conditions and stream depth. Santa Ana suckers within the San Gabriel River are often found mid-channel adjacent to submerged cobble, boulders, or man made structures such as culverts. In the Santa Ana River where the streambed is sandier, they are rarely found mid-channel, but rather adjacent to shoreline areas near rooted vegetation (Saiki 2000, pp. 25, 27). Where preferred habitat conditions are absent, Santa Ana suckers make use of available habitats that provide some of the same functions provided by preferred habitats (Saiki 2000, p. 19).

The distribution of Santa Ana suckers is also likely dependent on in-stream gradient. While several authors have acknowledged that this species cannot access high gradient areas, we are not aware of any research quantifying the maximum slope passable by the Santa Ana sucker. In an attempt to estimate the maximum slope passable by the species, we used GIS to analyze the slopes associated with the Santa Ana sucker occurrence polygons and points in our database for the Santa Ana River, San Gabriel River, and Big Tujunga Creek. Based on our analysis, Santa Ana sucker have not been found in areas where the in-stream slope exceeds 7 degrees. This could be due to the species' inability to swim up these higher gradients and/or due to the lack of suitable habitat in these areas as a result of higher water velocity and a subsequent lack of suitable spawning

and feeding substrates. Also, the probability of encountering vertical barriers (such as waterfalls) increases as the overall slope across a given distance increases; therefore, even if habitat is suitable upstream, it may be inaccessible to the species. However, more extensive analysis is needed to determine the gradient limitations of the species and we are seeking additional information on this topic (see **Public Comments** section above).

A comparative analysis of suckers within the Santa Ana and San Gabriel Rivers revealed that only two cohorts are generally present within the Santa Ana River, compared with three in the San Gabriel River, indicating that few individual suckers live beyond their second year of life in the Santa Ana River (Saiki 2000, p. 13). No investigations have occurred to determine the relative life-span or fecundity of Santa Ana suckers as they relate to habitat conditions. However, overall habitat conditions for Santa Ana suckers are generally better in the San Gabriel River than in the Santa Ana River, which is reflected in the overall greater abundance of fish and better body condition of suckers in the San Gabriel River (Saiki 2000, pp. 18-28).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Suckers are primarily bottom feeders, sucking up algae, small invertebrates, and organic detritus from gravel, cobble, rock, and other hard surfaces (Moyle 2002, p. 179). Forage for adult Santa Ana suckers is also found in pools (Allen 2003, p. 6). Riparian vegetation and emergent aquatic vegetation provide additional sources of detritus and aquatic invertebrates such as insects (Leidy *et al.* 2001, p. 5-2). Insects may provide a high energy source of food for adult Santa Ana suckers (Saiki 2000, p. 23). In a comparative analysis of Santa Ana suckers in the Santa Ana and San Gabriel Rivers, Saiki (2000, pp. 27, 98) found that body condition (length-weight relationship) of suckers in the San Gabriel River was better than that of fish in the Santa Ana River, possibly due to a greater abundance of food resources (including algae and insects) found on the rocky substrate in the San Gabriel River relative to the sandy substrate in the Santa Ana River.

Although the specific tolerances to water-quality variables have not been evaluated for the Santa Ana sucker, water temperature, dissolved oxygen content, and turbidity (such as excessive detritus in the water column or protracted suspension of fine-grained sediments) are all important aspects of water quality that affect the physiology of fish (California Regional Water Quality Control Board 1995, pp. 4-1 to 4-15). This species has been found in waters between 59 and 82 °F (15 and 28 °C) in the Santa Ana River (Swift 2001, p. 18). Swift (2001, p. 34) states that although a lethal limit for water temperature is unknown, water temperatures much above 86 °F (30 °C) likely limit distribution and movement of this species. Santa Ana suckers are generally more abundant in the cooler waters of the San Gabriel River than they are in the warmer waters of the Santa Ana River (Saiki 2000, pp. 27–28). Researchers conclude that in addition to having poor habitat conditions such as sandy substrate and lack of in-stream cover, areas of the Santa Ana River may be devoid of Santa Ana suckers due to higher water temperatures (Chadwick and Associates, Inc. 1992, p. 37).

Adequate dissolved oxygen is necessary for aquatic life and as water warms, its concentration of dissolved oxygen drops, stressing fish (California Regional Water Quality Control Board, Santa Ana Region 1995, p. 4-3). In general, waters occupied by Santa Ana suckers are high in dissolved oxygen (Saiki 2000, pp. 18–19).

Santa Ana suckers are more abundant in clear rather than in turbid (cloudy or hazy) water conditions (Saiki 2000, pp. 28, 52; 2007, p. 95). This is most likely because suspended sediments interrupt light penetration through the water column, reducing algal growth that is the primary forage of the Santa Ana sucker. One measurement of turbidity is Nephelometric Turbidity Units (NTU). Saiki (2007, pp. 95–96) found that Santa Ana suckers were more abundant in the San Gabriel River where turbidity averaged 5.9 NTUs (ranging from 4.3 to 8.2 NTUs), and less abundant in the Santa Ana River where turbidity averaged 29 NTUs (ranging from 10.1 to 83.4 NTUs). However, Santa Ana suckers have been found in the Santa Ana River in an area where turbidity was measured between 85 and 112 NTUs (Baskin and Haglund 2001, p. 6). Therefore, while Santa Ana suckers likely avoid turbid waters when possible, they have been documented in turbid conditions on occasion (Haglund *et al.* 2002, p. 11). Saiki (2000, p. 25) speculates that fish occur under less-than-optimal ambient conditions because they are using whatever habitat is available to them and cites these conditions as a possible reason for reduced abundance of Santa Ana suckers in the Santa Ana River relative to their abundance in the San Gabriel River.

Multiple wastewater treatment plants discharge into the Santa Ana River and its tributaries and account for most of the dry-season flows within the river (California Regional Water Quality Control Board 1995, pp. 1-7). The City of San Bernardino Municipal Water District's Rapid Infiltration and Extraction Facility, Rialto Treatment Plant, and the City of Riverside Regional Water Quality Control Plant all discharge into the Santa Ana River. As a result of rising groundwater, nonpoint source urban runoff, and these wastewater discharges, perennial flows are maintained from the vicinity of the Rialto Drain and downstream. Although these discharges contain contaminants not found in natural runoff, there is no evidence that the concentrations of regulated compounds found in Santa Ana suckers in this river exceed mean concentrations found in freshwater fish in other areas of the United States (Saiki 2000, p. 24).

Cover or Shelter

In-stream emergent and overhanging riparian vegetation along the banks of stream courses provide shade, shelter, and cover for fry, juvenile, and adult Santa Ana suckers. Shading is very important to Santa Ana suckers that inhabit shallow waters because it reduces water temperatures due to high summer ambient temperatures. A complex stream system containing submerged boulders, deep pools, and undercut banks provides cover and shelter for juvenile and adult Santa Ana suckers (Saiki *et al.* 2007, p. 99; Moyle *et al.* 1995, p. 202). Tributaries may provide important shallow-water refugia for larvae and fry from larger, predatory fish and act as refugia for juvenile and adult Santa Ana suckers during storms.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Adult Santa Ana suckers spawn over gravel beds in flowing water (riffles) where the female deposits the eggs in fine gravel substrate. Substrate collected from two spawning locations in tributaries to the Santa Ana River consisted of gravel-sized particles ranging in diameter from 0.04 to 1.6 in (1.0 to 41.5 mm) (Haglund *et al.* 2001, p. 47). The presence of appropriately sized substrate allows for water flow around eggs to prevent sediment from depositing on and smothering the eggs. Eggs deposited on sand or silt are likely to be washed downstream or be smothered. In addition to appropriate substrate, adequate water velocities are necessary to oxygenate eggs. Santa Ana sucker spawning has been reported in streams with bottom velocities of 0.65

and 0.77 ft per second (0.20 and 0.23 m per second) (Haglund *et al.* 2003, p. 63).

Once emerged from the eggs, Santa Ana sucker larvae congregate in shallow, slow-moving waters from 1 to 5.5 in (3 to 14 cm) deep over very soft sand or mud substrate (Haglund *et al.* 2003, p. 11; Haglund *et al.* 2002, pp. 69–71; Swift 2001, p. 17). This type of habitat is usually found along the margins of streams in proximity to emergent vegetation. Fry are found almost exclusively in edgewater habitats over silt or sand in water depths of less than 7 in (17 cm) where there is little measurable flow; Haglund and Baskin (2003, p. 47) speculate this reduces access by larger predatory fish and, because shallow waters are warmer, may increase the growth rates of developing suckers. Juvenile fish move away from edgewater habitats and congregate at the interface of the almost-still waters at the adjacent bank-edge and the main stream flows (Swift 2001, pp. 17–18). By the end of their first summer, juvenile Santa Ana suckers move into deeper water habitats with adults, presumably because they are large enough to compete with adult suckers for forage (Swift 2001, p. 18).

Tributaries may provide essential spawning habitat for the Santa Ana sucker, particularly in the Santa Ana River (Chadwick and Associates, Inc. 1992, p. 49; Chadwick Ecological Consultants, Inc. 1996, p. 16; Haglund *et al.* 2002, pp. 54–60). An abundance of juvenile fish has been recorded in multiple tributaries in the Santa Ana River (such as the Tequesquite Arroyo and the Evans and Anza drains) and, hence, these have been considered possible spawning sites (Chadwick and Associates, Inc. 1992, p. 49). However, Swift (2001, p. 26) concluded that the species may be attracted to tributaries due to the relatively colder water temperatures found there. He stated that most tributaries to the Santa Ana River lack either suitable substrates or water velocities to support successful spawning. Swift (2001, p. 26) considered that only the Rialto Drain and Sunnyslope Creek provided habitat conditions suitable to support spawning. These sites are two of the few remaining areas containing gravel beds, and restoration may be required to maintain substrate conditions over time (Orange County Water District (OCWD) 2009, pp. 6-4 – 6-5).

Primary Constituent Elements for the Santa Ana Sucker

Pursuant to the Act and its implementing regulations, we are required to identify the physical and biological features within the geographical area occupied by the Santa Ana sucker at the time of listing that are essential to the conservation of the species and which may require special management considerations or protection. The physical and biological features are those PCEs laid out in a specific spatial arrangement and quantity determined to be essential to the conservation of the species. We are proposing to designate critical habitat in areas within the geographical area that were occupied by the species at the time of listing that are and continue also currently to be occupied today, and that contain the PCEs in the quantity and spatial arrangement to support life history functions essential for the conservation of the species. We are also proposing to designate areas outside the geographical area occupied by the species at the time of listing that are not occupied but are essential to the conservation of the species. See **Criteria Used To Identify Critical Habitat** section below for a discussion of the species' geographic range.

We believe conservation of the Santa Ana sucker is dependent upon multiple factors, including the conservation and management of areas to maintain "normal" ecological functions where existing populations survive and reproduce. The areas we are proposing as critical habitat provide some or all of the physical or biological features essential for the conservation of this species. Based on the best available information, the primary constituent elements essential for the conservation of the sucker are the following:

(1) A functioning hydrological system within the historical geographic range of the Santa Ana sucker that experiences peaks and ebbs in the water volume (either naturally or regulated) necessary to maintain all life stages of the species, including adults, juveniles, larva, and eggs, in the riverine environment,

(2) Stream channel substrate consisting of a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins necessary to maintain various life stages of the species, including adults, juveniles, larva, and eggs, in the riverine environment;

(3) Water depths greater than 1.2 in (3 cm) and bottom water velocities greater than 0.01 ft per second (0.03 m per second);

(4) Clear or only occasionally turbid water;

(5) Water temperatures less than 86° F (30° C);

(6) In-stream habitat that includes food sources (such as zooplankton, phytoplankton, and aquatic invertebrates), and associated vegetation such as aquatic emergent vegetation and adjacent riparian vegetation to provide: (a) Shading to reduce water temperature when ambient temperatures are high, (b) shelter during periods of high water velocity, and (c) protective cover from predators; and

(7) Areas within perennial stream courses that may be periodically dewatered, but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted.

All occupied units proposed as critical habitat contain the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of this species and support multiple life processes for the Santa Ana sucker.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the physical and biological features within the geographical area occupied by the species at the time of listing that are essential to the conservation of the species may require special management considerations or protection.

All areas included in our proposed revision of critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the Santa Ana sucker. Special management considerations or protection may be required to minimize habitat destruction, degradation, and fragmentation associated with the following threats, among others: water diversion; alteration of stream channels and watersheds; reduction of water quantity associated with urban development and human recreational activities, including swimming, construction and operation of golf courses; and off-highway vehicle (OHV) use. For discussion of the threats to the Santa Ana sucker and its habitat, please see the **Summary of Comments and Recommendations** and **Summary of Factors Affecting the Species** sections of the final listing rule (65 FR 19686; April 12, 2000) and the **Public Comments** and **Critical Habitat Unit Descriptions** sections of the final critical habitat rule (70 FR 439; January 4, 2005). Please also see **Critical Habitat Units** section below for a discussion of the threats in each proposed critical habitat unit.

In addition to the threats to the Santa Ana sucker and its habitat described in the final listing and critical habitat

rules, the physical and biological features essential to the conservation of the Santa Ana sucker may require special management considerations or protection to minimize habitat destruction, degradation, and fragmentation associated with the construction of recreational dams, the operation of recreational residences, and the construction of road crossings and bridges across waterways.

Recreational Dams

People construct artificial dams from boulders, logs, and trash to create pools within these rivers for fishing, swimming, wading, and bathing (Ally 2003, p. 1). The construction of "recreational" dams degrades in-stream and possibly bank habitat, increases turbidity (PCE 4), disrupts sediment transport, and impedes upstream movement of Santa Ana suckers, especially during droughts (Ally 2003, pp. 1–3), thereby fragmenting habitat connectivity within occupied habitat. When dams exist during the spawning season, these in-stream disruptions can bury gravel beds (PCE 2) used for spawning (Ally 2003, p. 1). Recreational dams can also further degrade habitat by slowing water velocities (PCE 3), increasing water temperatures (PCE 5), and encouraging excessive growth of algae (Ally 2003, p. 3).

Recreational Residences

The U.S. Forest Service (USFS) issues special use permits for the operation and maintenance of private recreational residences within the boundaries of the Angeles National Forest along Big Tujunga Creek and the North and West Forks of the San Gabriel River. Improperly functioning septic systems at these residences can degrade water quality conditions by increasing nutrient loads into the water (USFS BA 2007, p. 18) and increasing water turbidity (PCE 4).

Road Crossings and Bridges

Road crossings and bridges constructed across waterways can impact the Santa Ana sucker by creating semi permanent barriers to upstream movement and fragmenting connective corridors between areas of occupied habitat. Bridge footings and pier protections (such as concrete aprons that span the waterway) accelerate water velocities (PCE 3) and, in the absence of sediment in the water (PCE 2), scour sediments from the streambed immediately downstream. With sufficient scouring, the elevation of the downstream bed of the stream may become so low that Santa Ana suckers cannot swim upstream from that point; scouring can also create pools that favor predatory nonnative fish. Culverts constructed under road crossings can act as barriers to movement when a culvert becomes filled in with sediment, reducing the amount of water (PCE 1) and sediment (PCE 2) that could be transported downstream. However, the extent to which these structures constitute permanent or temporary barriers depends on the quantity of water flowing and sediment transport in a given year and over time. For example, sediment-filled culverts that create a barrier to movement one year may be passable in another year if high water flows remove trapped sediments. Road crossings and bridges can also impact the species by altering the hydrology of the system (PCE 1), rerouting water flow into less suitable habitat.

Criteria Used To Identify Critical Habitat

Using the best scientific and commercial data available as required by section 4(b)(1)(A) of the Act, we identified those areas to propose for revised designation as critical habitat that, within the geographical area occupied by the species at the time of listing (see **Geographic Range and Status** section), possess those physical and biological features essential to the conservation of the Santa Ana Sucker and which may require special management considerations or protection. We also considered the area outside the geographical area occupied by the species at the time of listing for any areas that are essential for the conservation of the Santa Ana Sucker.

At the time the Santa Ana sucker was listed in 2000, the geographical area occupied by the species was considered to include the Los Angeles, San Gabriel, and Santa Ana River basins (65 FR 19686; April 12, 2000). Specifically, the listing rule identifies the following areas in each river basin as being within the geographic range occupied by the species: (1) The Santa Ana River basin including the Santa Ana River below Prado Dam, the Santa Ana River above Prado Dam to the City of Riverside, and the following tributaries: Tequesquite Arroyo, Sunnyslope Channel, and Anza Park Drain; (2) the San Gabriel River basin, including the West, North, and East forks of the San Gabriel River and Bear [Canyon] Creek, which is a tributary of the West Fork of the San Gabriel River; and (3) the Los Angeles River basin, including Big Tujunga Creek, between Big Tujunga Dam and Hansen Dam, and Haines Creek.

For the purposes of this proposed revised critical habitat designation for the Santa Ana sucker, the geographical area occupied by the species at the time of listing is defined to include those areas specifically identified in the listing rule (65 FR 19686; April 12, 2000), as well as the following additional areas not specifically identified in the listing rule but documented to be occupied at the time of listing and documented to be currently occupied: (1) In the Santa Ana River system: Rialto Drain; and (2) in the San Gabriel River system: Big Mermaids Canyon Creek, West Fork of Bear Creek, Bichota Canyon Creek, Cattle Canyon Creek, and Cow Canyon Creek. The following areas were not specifically identified in the listing rule and are not currently occupied, and therefore, are considered outside the geographical area occupied by the species at the time of listing: The upper Santa Ana River, including City and Mill Creeks and the Santa Ana River (above Tippecanoe Road in San Bernardino County to above Seven Oaks Dam), and the following three tributaries to Big Tujunga Creek: Gold Canyon, Delta Canyon, and Stone Canyon Creeks.

As required by section 4(b)(2) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of the Santa Ana sucker that are those physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species (see the **Physical and Biological Features** section). The **Methods** section summarizes our methodology used for this proposed revised critical habitat. We are proposing to include all areas within the geographical area occupied by the listed Santa Ana sucker at the time of listing following Criteria 1 through 3 below. These areas are all currently occupied. We are also proposing to include areas that were not within the geographical area occupied by the species at the time of listing and are not currently occupied but that are essential to the conservation of the species following Criteria 4 through 8 below. This proposed revised rule is an effort to update our 2005 final designation of critical habitat for the Santa Ana sucker with the best available data. In some areas that were analyzed in 2005, we have new information that led us to either add or remove areas from this proposal to revise critical habitat.

For areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following steps:

(1) We mapped historical and current digital occurrence data for the Santa Ana sucker in the form of polygons and points on the digital aerial photography using ArcMap 9.3.1 (ESRI 2009). Areas between occupancy polygons or points were assumed to be occupied if there were no significant in-stream barriers (such as dams, culverts, or drop structures) preventing further movement between occupied stream sections. We utilized imagery acquired in Spring 2008 at 1-ft (0.33 m) resolution for the Santa Ana River Unit in Riverside County and imagery acquired in January 2006 at 1-ft (0.33 m) resolution for the San Gabriel and Big Tujunga units provided by the U.S. Geological Survey; and we utilized imagery acquired in Spring 2005 at 3.25 ft (1 m) resolution provided by the National Aerial Imagery Program (NAIP) for the Santa Ana River Unit in Orange County. The resolution of the imagery allowed us to discern the likelihood of an in-stream barrier.

We recognize that the historical and recent collection records for this species are incomplete. River segments or small tributaries not included in this proposed designation may harbor small limited populations of the Santa Ana sucker or may become occupied in the future.

(2) Using aerial imagery, we delineated the lateral extent (width) of the proposed revised critical habitat associated with occupied areas to include areas that provide sufficient riverine and associated floodplain area for breeding, feeding, and sheltering of adult and juvenile Santa Ana suckers and for the habitat needs of larval stages fishes. Given the dynamic nature of these streams and the seasonal variation of the quantity of flow and the location of stream channels in any given year, we delineated the lateral extent of the proposed revised critical habitat to encompass the entire floodplain up to the lower edge of upland riparian vegetation or to the edge of a permanent barrier (such as a levee). Areas within the lateral extent contribute to the PCEs since they contain: (a) A functioning hydrological system characterized by peaks and ebbs in the water volume (PCE 1); (b) complex channels (such as alluvial fans and braided channels) and a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins (PCE 2); and (c) adjacent riparian vegetation (PCE 6).

The presence of PCEs may be seasonally variable and sporadic in distribution because of the dynamic nature of these streams and seasonal variation of flows in these streams throughout the year. Areas that may be seasonally lacking in PCEs and contain marginal habitat were included if they were contiguous with areas containing one or more of the PCEs and contribute to the hydrologic and geologic processes essential to the ecological function of the system. These areas are essential to maintain connectivity (PCE 7) within populations, allow for species movement throughout the course of a given year, and allow for population expansion.

(3) Using aerial imagery, we delineated the upstream and downstream extents of the proposed revised critical habitat associated with areas within the geographical area occupied at the time of listing from the nearest occurrence polygon or point to either the point of a natural or manmade barrier or to the point where the in-stream gradient exceeds a 7 degree slope, either of which would prevent further movement of the Santa Ana sucker.

While several authors have acknowledged that this species cannot access high gradient areas, we are not aware of any research quantifying the maximum slope passable by the Santa Ana sucker. Therefore, in an attempt to estimate the maximum slope passable by the species, we used GIS to analyze the slopes associated with the Santa Ana sucker occurrence polygons and points in our database for the Santa Ana River, San Gabriel River, and Big Tujunga Creek. Based on our analysis, Santa Ana sucker have not been found in areas where the in-stream slope exceeds 7 degrees. In the absence of existing research on this subject, we made the assumption that a slope of 7 degrees constitutes the maximum in-stream gradient passable by the Santa Ana sucker and applied this assumption when delineating the upstream extent of the proposed revised critical habitat in the San Gabriel River system (Big Mermaids Canyon Creek, Bear Canyon Creek, West Fork of Bear Creek, Bichota Canyon Creek, Cattle Canyon Creek, and Cow Canyon Creek).

As discussed in the **Physical and Biological Features** section above, the absence of the species in these high gradient areas could be due to the species' inability to swim up these higher gradients and/or due to the lack of suitable habitat in these areas as a result of higher water velocity and a subsequent lack of suitable spawning and feeding substrates. Therefore, we assume these high gradient (greater than 7 degrees) areas do not contain the features essential to the conservation of the species.

(4) For areas outside the geographical area occupied by the species at the time it was listed, we evaluated stream reaches to determine if additional occupied or unoccupied areas are essential to the conservation of this species and should be included in the proposed revised designation. We determined that certain areas outside the geographical area occupied by the species at the time it was listed are essential to the conservation of the species because they provide storm waters (PCE 1) necessary to transport sediments to maintain preferred substrate conditions (PCE 2) in occupied portions of the species' range or to provide habitat for potential reintroduction of the Santa Ana sucker.

(a) For the San Gabriel River, we determined that the areas within the geographical area occupied by the species at the time of listing and currently occupied are adequate for the conservation of the species based on our current understanding of the species' requirements. However, as discussed in the **Critical Habitat** section above, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species and that for this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

(b) In the Santa Ana River, we determined that the following areas outside the geographical area occupied by the species at the time of listing are essential for the conservation of the species: Mill Creek, City Creek, and the Santa Ana River above Seven Oaks Dam. Mill Creek has never been documented as being occupied by the Santa Ana sucker. City Creek and the Santa Ana River above Seven Oaks Dam are not currently occupied, but were historically occupied based on a 1982 California Natural Diversity Database record and a 1940 Museum of Zoology Fish Collection database record, respectively.

We determined that Mill and City Creeks are essential to the conservation of the species because these creeks provide greater quantities, relative to other creeks in the river system, of stream and storm waters (PCE 1) necessary to transport sediments necessary to maintain preferred substrate (PCE 2) conditions in occupied portions in the Santa Ana River. Using aerial imagery, we determined that Mill and City Creeks have large, unimpeded watersheds, relative to the other tributaries flowing into the upper Santa Ana River, based on the following morphological characteristics: (a) A wide floodplain area; (b) the presence of complex channels (such as braided

channels); and (c) a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins (PCE 2). Given the extent to which the hydrology and the habitat of the occupied section of the Santa Ana River have been altered and degraded due to the construction and operation of flood control structures (such as Prado and Seven Oaks Dams) and operation of water treatment facilities, maintenance of City and Mill Creeks as pathways to transport water (PCE 1) and sediments necessary to maintain preferred substrates (PCE 2) to the Santa Ana River is essential to the conservation of the species.

City Creek, along with the Santa Ana River above Seven Oaks Dam, also contains features essential to the conservation of the species (PCEs 1, 2, and 6) and we determined that both areas are essential to the conservation of the species to provide habitat for potential reintroduction of the Santa Ana sucker (see **Critical Habitat Units** section below for additional discussion).

(c) In Big Tujunga Creek, we determined that the following unoccupied areas outside the geographical area occupied by the species at the time of listing are essential for the conservation of the species — Gold Canyon, Delta Canyon, and Stone Canyon Creeks —because these areas provide greater quantities, relative to other creeks in the river system, of stream and storm waters (PCE 1) necessary to transport sediments necessary to maintain preferred substrate (PCE 2) conditions in occupied portions in Big Tujunga Creek. Using aerial imagery, we determined that Gold Canyon, Delta Canyon, and Stone Canyon Creeks have large, unimpeded watersheds, relative to the other tributaries flowing into Big Tujunga Creek, based on the following morphological characteristics: (a) A wide floodplain area; (b) the presence of complex channels (such as braided channels); and (c) a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins (PCE 2). Given the extent to which the hydrology and the habitat of the occupied section of Big Tujunga Creek have been altered and degraded due to the construction and operation of flood control structures (such as Big Tujunga and Hansen Dams, maintenance of Gold Canyon, Delta Canyon, and Stone Canyon Creeks as pathways to transport water (PCE 1) and sediments necessary to maintain preferred substrates (PCE 2) in Big Tujunga Creek is essential to the conservation of the species.

While we are not aware of any surveys for the Santa Ana sucker conducted in these creeks, based on our calculation of maximum slope (see Criterion 3 above), it appears that the slope of Delta Canyon and Stone Canyon Creeks from near their confluence with Big Tujunga Creek is likely too steep to be passable by the Santa Ana sucker. The slope of Gold Canyon Creek from approximately 0.49 mi (0.8 km) from its confluence with Big Tujunga Creek also appears to be too steep to be passable by the Santa Ana sucker.

(5) Using aerial imagery, we delineated the lateral extent of proposed revised critical habitat in City Creek and the Santa Ana River above Seven Oaks Dam as described under Criterion 2 above to encompass the entire floodplain up to the lower edge of upland riparian vegetation or to the edge of a permanent barrier (such as a levee) to provide sufficient riverine and associated floodplain areas for breeding, feeding, and sheltering of adult, larval, and juvenile Santa Ana suckers that may be reintroduced into these areas in the future.

(6) Using aerial imagery, we delineated the lateral extent of proposed revised critical habitat in Mill, Gold Canyon, Delta Canyon, and Stone Canyon Creeks, to include areas containing: (a) A wide floodplain area; (b) complex channels (such as alluvial fans and braided channels); and (c) a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins (PCE 2) needed to provide stream and storm waters (PCE 1) necessary to transport sediments to maintain preferred substrate conditions (PCE 2) in the downstream occupied portions of the Santa Ana River and Big Tujunga Creek, respectively.

(7) We delineated the upstream limits of proposed revised critical habitat in Mill, Gold Canyon, Delta Canyon, and Stone Canyon Creeks by identifying the upstream origin of sediment transport in these tributaries to provide stream and storm waters (PCE 1) necessary to transport sediments to maintain preferred substrate conditions (PCE 2) in the downstream occupied portions of the Santa Ana River and Big Tujunga Creek, respectively. Using aerial imagery, we determined the origin of sediment transport in each creek to be the upstream area where complex channels (such as alluvial and braided channels) containing a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins (PCE 2) are visible.

(8) We delineated the upstream and downstream extents of the proposed revised critical habitat in historically occupied areas of City Creek and the Santa Ana River above Seven Oaks Dam using the same methodology as described under Criterion 3 above by extending the boundary from the nearest occurrence polygon or point to either the point of a natural or manmade barrier or to the point where the in-stream gradient exceeds a 7 degree slope, both preventing further movement of the Santa Ana sucker.

When determining the critical habitat boundaries within this proposed revised rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures, because such lands lack essential features for the Santa Ana sucker. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of all such developed lands. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this proposed revised critical habitat are excluded by text in this proposed revised rule. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no destruction or adverse modification unless the specific action may affect adjacent critical habitat.

Summary of Changes From Previously Designated Critical Habitat

The areas identified in this proposed rule constitute a revision of the areas designated as critical habitat for the Santa Ana sucker on January 4, 2005 (70 FR 426). In the 2005 final rule, we designated 8,305 ac (3,361 ha) of critical habitat in Units 2 and 3 in Los Angeles County. In the 2005 final rule, we removed all of Subunit 1A (Northern Prado Basin; 3,535 ac (1,431 ha)) and Subunit 1B (Santa Ana Wash; 8,174 ac (3,308 ha)) in San Bernardino County from the critical habitat designation (see below for additional discussion), and excluded the remainder of Unit 1 (15,414 ac (6,238 ha)) in San Bernardino, Riverside, and Orange Counties under Section 4(b)(2) of the Act. In this proposed revised rule, we propose to designate a total of 9,605 ac (3,887 ha) in San Bernardino, Riverside, Orange, and Los Angeles Counties, as critical habitat for the Santa Ana sucker. Of this total, the Secretary is considering exercising his discretion under Section 4(b)(2) of the Act to

exclude 5,472 ac (2,214 ha) in Subunits 1B and 1C (the areas roughly corresponding to that portion of Unit 1 excluded under Section 4(b)(2) in the 2005 final rule) in San Bernardino, Riverside, and Orange Counties. We also propose to designate 1,900 ac (768 ha) in Subunit 1A [this area corresponds roughly to the area identified as Subunit 1B (Santa Ana Wash) in the 2005 final rule and determined to be "nonessential" and removed from critical habitat in the final rule]. Table 1 below outlines the changes in areas in each unit or subunit between the 2005 final critical habitat rule and this proposed revised critical habitat rule.

TABLE 1. A COMPARISON OF THE AREAS [IN ACRES (AC) (HECTARES (HA))] IDENTIFIED AS CONTAINING FEATURES ESSENTIAL TO THE CONSERVATION OF THE SANTA ANA SUCKER IN THE 2005 FINAL CRITICAL HABITAT (FCH) DESIGNATION AND THIS 2009 PROPOSED REVISED CRITICAL HABITAT (PRCH) DESIGNATION. (VALUES IN THIS TABLE MAY NOT SUM DUE TO ROUNDING.)

County	2005 FCH		2009 PRCH		Difference (2009 PRCH minus 2005 FCH)
	Unit/Subunit	Area containing essential features	Unit/Subunit	Area containing essential features	
San Bernardino	Subunit 1A: 3,535 ac (1,431 ha) determined to be nonessential and removed from 2005 designation.	0 ac (0 ha)	Not proposed	0 ac (0 ha)	0 ac (0 ha)
	Subunit 1B: 8,174 ac (3,308 ha) determined to be nonessential and removed from final 2005 designation.	0 ac (0 ha)	Subunit 1A	1,900 ac (768 ha)	1,900 ac (768 ha)
San Bernardino and Riverside	Unit 1: excluded under section 4(b)(2) of the Act.	15,414 ac (6,238 ha)	Subunit 1B	4,705 ac (1,903 ha)	-9,942ac (-4,023ha)
Riverside and Orange			Subunit 1C	767 ac (311 ha)	
Los Angeles	Unit 2	5,765 ac (2,333 ha)	Unit 2	1,000 ac (405 ha)	- 4,765 ac (-1,928 ha)
	Unit 3	2,540 ac (1,028 ha)	Subunit 3a	1,189 ac (481 ha)	-1,307 ac (529 ha)
			Subunit 3b	44 ac (18 ha)	
Totals	———	31,893 ac[3] (12,907 ha)	———	9,605 ac (3,887 ha)	-14,114 ac (-5,712 ha)

As described below, some areas designated in the 2005 final rule are not being proposed as critical habitat in this proposed revised rule. Also, some areas are being proposed as critical habitat that were omitted from the 2005 final rule because we have subsequently concluded that these areas are essential to the conservation of the species. These changes resulted in an overall addition of 1,300 acres in this proposed revised rule from the 2005 final designation but a reduction of approximately 14,114 ac (5,712 ha) from the number of acres identified as essential in the 2005 final rule. These differences primarily resulted from the following changes to all of the units included in this proposed revised rule, as well as unit-specific revisions discussed below.

(1) Enhanced resolution of aerial imagery allowed us to improve our mapping methodology to more accurately define the critical habitat boundaries and to better represent those areas that possess the physical and biological features essential to the conservation of the species. In the 2005 final rule, we used a 100-meter grid to delineate critical habitat. In this proposed revised rule, we delineated areas that contain the PCEs using current aerial imagery (see **Criteria Used To Identify Critical Habitat** section of this proposed revised rule). This revised mapping method resulted in a significant overall decrease in the areas deemed essential and included in the proposed revised critical habitat boundaries. However, even with more refined mapping methods, we acknowledge the possibility that, due to mapping, data, and resource constraints, there may be some undeveloped areas mapped as critical habitat that do not contain the PCEs.

(2) We revised the criteria used to identify critical habitat in the Santa Ana River, the San Gabriel River, and Big Tujunga Creek. The revised criteria allowed us to more precisely delineate the upstream boundaries of areas determined to contain the physical and biological features essential to the conservation of the species. We described the criteria and methods we used to identify and delineate the areas that we are proposing as critical habitat in more detail than we did in the 2005 critical habitat designation to ensure

that the public better understands why the areas are being proposed as critical habitat (see **Criteria Used To Identify Critical Habitat** section of this proposed revised rule for a detailed discussion).

(3) We reevaluated areas included in the 2005 final critical habitat designation to determine if those areas contain the physical and biological features essential to the conservation of the Santa Ana sucker or are otherwise essential to the conservation of the species. As a result, some areas designated as Santa Ana sucker critical habitat in 2005 have been removed from this proposed revised rule (as described below) because they do not contain the physical and biological features required by the Santa Ana sucker and are not otherwise essential to the species' conservation.

Major revisions in each unit include the following:

Unit 1: Santa Ana River (San Bernardino, Riverside, and Orange Counties)

(1) In the 2005 critical habitat rule, we excluded all of Unit 1 (15,414 ac (6,238 ha)) from final critical habitat under section 4(b)(2) of the Act. In this revised proposed rule, we are proposing to designate a total of 5,472 ac (2,214 ha) as critical habitat in Subunits 1B and 1C. Subunits 1B and 1C correspond roughly to Unit 1 in the 2005 final rule. The 9,942-ac (4,023-ha) difference between the area identified as Unit 1 in the 2005 final rule and Subunits 1B and 1C in this proposed revised rule is primarily due to the following revisions:

(a) In the 2005 critical habitat rule, numerous tributaries and channels that drain into the Santa Ana River were included in Unit 1., which was excluded in that rule. In this revised proposed rule, we removed from Subunits 1B and 1C (the area roughly corresponding roughly to Unit 1 in the 2005 final rule) the following tributaries and channels (because these areas do not contain the physical and biological features essential to the conservation of the species (from North to South).

- 1.2 mi (1.9 km) urban drainage through Lake Evans;
- 1.3 mi (2.1 km) urban drainage through Hole Lake;
- 0.9 mi (1.4 km) urban drainage (north side of the Santa Ana River (SAR), east of Pedley);
- 2.3 mi (3.7 km) urban drainage (north side of SAR, west of Pedley);
- 1.0 mi (1.5 km) urban drainage up Lucretia Avenue;
- 0.3 mi (0.47 km) urban drainage up Norco Rd. near California Rehabilitation Center;
- 2.1 mi (3.4 km) of Temescal Wash north of Corona Municipal Airport;
- 0.9 mi (1.5 km) urban drainage north of Temescal Wash; and
- 1.0 mi (1.7 km) urban drainage south of Corona Municipal Airport.

(b) In the 2005 final critical habitat rule, the Prado Basin where Chino and Temescal Creeks and the Santa Ana River converge was included in Unit 1, which was excluded in that final rule. In this revised proposed rule, we removed 4,476 ac (1,811 ha) of the Prado Basin where Chino and Temescal Creeks and the Santa Ana River converge because these areas do not contain the physical and biological features essential to the conservation of the species.

(2) In the 2005 final rule, we removed all of Subunit 1B (Santa Ana Wash; 8,174 ac (3,308 ha)) from critical habitat because we determined this area to be "nonessential." We have revisited that determination and conclude that portions of the area identified as Subunit 1B in the 2005 rule are essential for the conservation of the Santa Ana sucker. Creeks and rivers in Subunit 1B provide stream and storm waters (PCE 1) required to transport sediments that are necessary to maintain preferred substrate (PCE 2) conditions in occupied portions in the Santa Ana River. These waters are critical to maintaining habitat for populations of Santa Ana sucker in the Santa Ana River, one of only three geographical areas where the listed entity survives. Protecting existing habitat on which the Santa Ana River populations depend is essential for the recovery of this species. Based on our reevaluation of this area, we are proposing to designate 1,626 ac (658 ha) in City and Mill Creeks and the Santa Ana River (below Seven Oaks Dam) as part of Subunit 1A, which composes a portion of Subunit 1B in the 2005 final rule.

Some portions of the Santa Ana Wash area identified as part of Subunit 1B in the 2005 rule do not contain the physical and biological features essential to the conservation of the species, and we have not included them as part of proposed Subunit 1A. Also, as part of Subunit 1A of this proposed revised rule, we are proposing to designate a 273-ac (110-ha) area of the Santa Ana River above the Seven Oaks Dam. This area has not been included in any previous proposed or final critical habitat designations for the Santa Ana sucker (see **Critical Habitat Units, Subunit 1A: Upper Santa Ana River** section of this proposed revised rule for a detailed discussion).

Unit 2: San Gabriel River (San Bernardino County)

(1) In the 2005 critical habitat rule, we designated 5,765 ac (2,333 ha) as critical habitat in Unit 2. In this proposed revised rule, we are proposing to designate 1,000 ac (405 ha) as critical habitat in Unit 2 (area corresponds roughly to Unit 2 in the 2005 final rule). The 4,765-ac (1,928-ha) reduction in Unit 2 from the 2005 final rule is primarily due to the following revisions:

(a) In this proposed revised rule, we removed the upstream sections of the following creeks/rivers, designated in the 2005 final rule, because based on our calculations, the slope of these upstream sections exceeds 7 degrees and, therefore, we determined these areas do not contain the physical and biological features essential to the conservation of the species (see Criterion 3 in the **Criteria Used To Identify Critical Habitat** section above for a detailed discussion of our slope calculations and assumptions):

- 2.9 mi (4.60 km) of Big Mermaids Canyon Creek;
- 0.5 mi (0.77 km) of Bear Canyon Creek;
- 0.4 mi (0.60 km) of West Fork of Bear Creek;
- 1.6 mi (2.61 km) of North Fork of the San Gabriel River;
- 0.1 mi (0.19 km) of Bichota Canyon Creek;
- 1.9 mi (3.07 km) of Cattle Canyon Creek; and
- 0.3 mi (0.42 km) of Cow Canyon Creek.

While these unoccupied upstream areas do provide pathways to transport water (PCE 1) and sediments necessary to maintain preferred substrates (PCE 2), we determined that the areas within the geographical area occupied by the species in the San Gabriel River at the time of listing and currently occupied are adequate for the conservation of the species in this portion of its range (see **Criteria Used To Identify Critical Habitat** above).

(b) In this proposed revised rule, we removed the entire extent of Shoemaker Canyon Creek [0.99 mi (1.59 km)], designated in the 2005 final rule, because, based on our calculations, the slope of this creek exceeds 7 degrees and therefore, we determined this area does not contain the physical and biological features essential to the conservation of the species (see Criterion 3 in the **Criteria Used To Identify Critical Habitat** section above for a detailed discussion of our slope calculations and assumptions).

(c) In this proposed revised rule, we removed the entire extent of Burro

Canyon Creek [0.74 mi (1.19 km)], designated in the 2005 final rule, because habitat in this creek has been degraded due the operation of a mine upstream and does not contain the physical and biological features essential to the conservation of the species.

(2) We are proposing to extend the upstream boundary of the East Fork of the San Gabriel River approximately 0.85 mi (1.37 km) from the upstream end of an occurrence polygon to the point near the Bridge-of-No-Return. In the 2005 final rule, we acknowledged that this upstream area is essential to the conservation of the Santa Ana sucker, but since the area had not been proposed as critical habitat or delineated on the map or the legal description for this unit, it could not be included in the final rule (70 FR 428).

Unit 3: Big Tujunga Creek (San Bernardino County)

(1) In the 2005 critical habitat rule, we designated 2,540 ac (1,028 ha) as critical habitat in Unit 3. In this 2009 proposed revised rule, we are proposing to designate 1,233 ac (499 ha) as critical habitat in two subunits, Subunits 3A and 3B, which correspond roughly to Unit 3 in the 2005 final rule. Subunit 3A contains the mainstem of Big Tujunga Creek from Hansen Dam to Big Tujunga Dam, and Subunit 3B contains three unoccupied tributaries to Big Tujunga Creek: Gold Canyon, Delta Canyon, and Stone Canyon Creeks. The 1,307-ac (529-ha) reduction in Unit 3 from the 2005 final rule is primarily due to the following revisions:

(a) In this proposed revised rule, we removed a 0.26 mi (0.42 km) upstream section of Delta Canyon Creek (Subunit 3B) and a 0.13 mi (0.21 km) upstream section of Stone Canyon Creek (Subunit 3B), both designated in the 2005 final rule, because these areas appear to be above the origin of sediment transport in these creeks and not essential to the conservation of the species (see Criterion 7 in the **Criteria Used To Identify Critical Habitat** section above for a discussion of origin of sediment transport).

(b) We are proposing to designate additional portions of Gold Canyon Creek (Subunit 3B) by extending the upstream boundary of the creek by approximately 0.29 mi (0.47 km) from the 2005 final critical habitat boundary to capture the upstream origin of sediment transport for this creek, an area we determined is essential to the conservation of the species (see Criterion 7 in the **Criteria Used To Identify Critical Habitat** section above for a discussion of origin of sediment transport).

(c) We propose to designate approximately 160 ac (65 ha) of the privately owned Angeles National Golf Club in Subunit 3A. We are proposing to designate only the alluvial floodplain and multiple low-flow channels that traverse the golf course. However, due to the scale of the habitat areas containing the PCEs within the golf course and the current GIS mapping techniques, we are unable to map precisely only those areas containing the physical and biological features essential to the conservation of the species. Therefore, the entire golf course is mapped as proposed critical habitat. However, permanent structures and facilities associated with the golf course (such as the buildings, and fairways and greens outside of the floodplain) do not contain the PCEs and are therefore not considered critical habitat.

The majority of this area was not included in the 2005 final critical habitat designation. However, this area includes the alluvial floodplain and multiple low-flow channels that traverse the golf course, which lies between the confluence of Big Tujunga and Haines Creeks. Stream and storm waters from Big Tujunga Creek transport sediments necessary to maintain preferred substrate conditions (PCE 2) within Haines Creek. These waters flow through the golf course on an irregular basis (i.e., in 2 of the 5 years since the course was opened). Both creeks discharge into occupied habitat downstream, including a conserved habitat area, which supports the Santa Ana sucker and two other native fishes. Therefore, we believe this area contains the features essential to the conservation of the species because it provides for sediment transport (PCE 2) into the downstream conserved habitat area.

Proposed Revised Critical Habitat Designation

We are proposing three units as critical habitat for the Santa Ana sucker. The critical habitat areas we describe below constitute our best assessment at this time of areas that meet the definition of critical habitat for the Santa Ana sucker. Table 2 identifies the approximate area of each proposed critical habitat unit by land ownership. These units, if finalized, will replace the current critical habitat designation for the Santa Ana sucker in 50 CFR 17.96(a). The critical habitat areas we describe below constitute our best assessment of (1) areas determined to be within the geographical area occupied by the species at the time of listing and currently occupied that contain the physical and biological features which may require special management considerations or protection and (2) areas that are not within the geographical area occupied by the species at the time of listing and are not currently occupied but that are essential to the conservation of the species (please see **Criteria Used To Identify Critical Habitat** section above for a discussion of geographical area).

TABLE 2. AREA ESTIMATES (ACRES (AC) AND HECTARES (HA)) AND LAND OWNERSHIP FOR THE SANTA ANA SUCKER PROPOSED REVISED CRITICAL HABITAT. VALUES IN THIS TABLE MAY NOT SUM DUE TO ROUNDING.

Unit	County	Ownership			Total Area
		Federal	State or Local Government	Private	
Unit 1: Santa Ana River					
Subunit 1A: Upper Santa Ana River	San Bernardino	273 ac (110 ha)	95 ac (38 ha)	1,532 ac (620 ha)	1,900 ac (768 ha)
Subunit 1B: Santa Ana River	San Bernardino and Riverside	13 ac (5 ha)	2,390 ac (967 ha)	2,301 ac (931 ha)	4,704 ac[1] (1,903 ha)
Subunit 1C: Lower Santa Ana River	Riverside and Orange	0 ac (0 ha)	56 ac (23 ha)	711 ac (288 ha)	767 ac[1] (311 ha)

TABLE 2. AREA ESTIMATES (ACRES (AC) AND HECTARES (HA)) AND LAND OWNERSHIP FOR THE SANTA ANA SUCKER PROPOSED REVISED CRITICAL HABITAT. VALUES IN THIS TABLE MAY NOT SUM DUE TO ROUNDING.—Continued

Unit	County	Ownership			Total Area
		Federal	State or Local Government	Private	
	Unit 1 Totals	286 ac (116 ha)	2,541 ac (1,028 ha)	4,544 ac (1,839 ha)	7,372 ac (2,982 ha)
Unit 2: San Gabriel River	Los Angeles	917 ac (371 ha)	0 ac (0 ha)	83 ac (34 ha)	1,000 ac (405 ha)
Unit 3: Big Tujunga Creek					
Subunit 3A	Los Angeles	242 ac (98 ha)	0 ac (0 ha)	947 ac (383 ha)	1,189 ac (481 ha)
Subunit 3B	Los Angeles	44 ac (18 ha)	0 ac (0 ha)	0 ac (0 ha)	44 ac (18 ha)
	Unit 3 Totals	286 ac (116 ha)	0 ac (0 ha)	947 ac (383 ha)	1,233 ac (499 ha)
	Total	1,489 ac (603 ha)	2,541 ac (1,028 ha)	5,573 ac (2,255 ha)	9,605 ac (3,887 ha)

Critical Habitat Units

Presented below are brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Santa Ana sucker.

Unit 1: Santa Ana River

Unit 1 is located in San Bernardino, Riverside, and Orange Counties and consists of three subunits totaling 7,372 ac (2,893 ha) of Federal (U.S. Army Corps of Engineers and USFS), local government, and private land (Table 2).

Subunit 1A: Upper Santa Ana River

Subunit 1A is located near the Cities of Highland, Mentone, and Redlands in San Bernardino County, California. This subunit includes two separate areas: One includes 7 mi (12 km) of City Creek (measured from its confluence with the Santa Ana River), 12 mi (19 km) of Mill Creek (measured from its confluence with the Santa Ana River), and 10 mi (17 km) of the Santa Ana River from below the Seven Oaks Dam to near Tippecanoe Avenue. The other area of this subunit includes 7 mi (12 km) of the Santa Ana River above Seven Oaks Dam (measured from the Seven Oaks Dam). The lower portion of the Santa Ana River below its confluence with City and Mill Creeks is adjacent to urban development, while the upstream portions of City and Mill Creeks and the Santa Ana River above Seven Oaks Dam are in the San Bernardino National Forest. Lands in this subunit are under Federal (USFS and Bureau of Land Management (BLM)) (273 ac (110 ha)), State/Local (95 ac (38 ha)), and private (1,532 ac (619 ha)) ownership (Table 2).

Subunit 1A is not within the geographical area of the species occupied at the time of listing and is not currently occupied. However, while City Creek and the Santa Ana River above Seven Oaks Dam are not currently occupied, these areas were historically occupied based on a 1982 California Natural Diversity Database record and a 1940 Museum of Zoology Fish Collection database record, respectively, and provide suitable habitat conditions for the Santa Ana sucker. Mill Creek is not known to be historically or currently occupied and does not provide suitable habitat conditions for the Santa Ana sucker. We determined that Mill and City Creeks are essential to the conservation of the species because these creeks provide greater quantities of stream and storm waters (PCE 1) relative to other creeks in the river system, necessary to transport sediments necessary to maintain preferred substrate (PCE 2) conditions in occupied portions in the Santa Ana River.

Although areas of the upper Santa River and its associated tributaries generally dry during the summer, portions of the upper Santa Ana River system have a higher gradient and a greater percentage of gravel and cobble substrate than the occupied areas that are downstream (Baskin, pers. comm. 2004). Suckers spawn over gravel substrates, where their eggs can adhere to gravel before hatching into larvae. Winter flows from upstream areas annually replenish this substrate and clean sand from it (Baskin, pers. comm. 2004; Haglund, pers. comm. 2004; NOAA 2003). Additionally, suckers feed by scraping algae, insects, and detritus from gravel and cobble. Therefore, the upstream source of spawning and feeding substrates (gravel and cobble) are essential to the reproductive ability and development of the sucker in the downstream occupied reaches (Baskin, pers. comm. 2004; Haglund, pers. comm. 2004). City and Mill Creeks are particularly essential to the conservation of the species since the Seven Oaks Dam has reduced the transfer of sediment and altered the natural flow in the downstream, occupied areas of the Santa Ana River.

We also determined that City Creek and the Santa Ana River above Seven Oaks Dam contain features essential to the conservation of the species (PCEs 1, 2, and 6) and are essential to the conservation of the species to provide habitat for future reintroduction of the species. Given its small population size and restricted range, the Santa Ana sucker is at high risk of extirpation from stochastic events, such as disease or fatal water contamination levels, especially in the Santa Ana River. Maintaining areas of suitable habitat on the Santa Ana River and City Creek into which Santa Ana suckers could be reintroduced is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. While currently not occupied, both City Creek and the Santa Ana River above Seven Oaks Dam were historically occupied. The upper reaches of City Creek are considered to be high quality habitat (OCWD 2009) and the upper reaches of

both City Creek and the Santa Ana River above Seven Oaks Dam are within the San Bernardino National Forest and therefore likely provide habitat that is superior, with fewer severe threats, to that in the occupied sections downstream in the Santa Ana River. Given the barriers to fish movement that exist downstream of these reintroduction areas, maintenance of populations in City Creek and the Santa Ana River above Seven Oaks Dam would likely require active management to transport individuals back to these areas in the event they are flushed downstream during a flood event.

Subunit 1B: Santa Ana River

Subunit 1B is located near the cities of Colton and Rialto in San Bernardino County and the cities of Riverside, Norco, and Corona in Riverside County, California. This subunit includes roughly 22.4 mi (36.0 km) of the mainstem of the Santa Ana River from near Tippecanoe Avenue in San Bernardino County to the Prado Dam and Flood Control Basin in Riverside County. This subunit also includes sections of the following tributaries (distances are measured from the mainstem of the Santa Ana River): 1,647 ft (502 m) of the Rialto Drain and 2,413 ft (736 m) Sunnyslope Creek. Lands within this subunit are under Federal (Department of Defense - U.S. Army Corps of Engineers) ((13 ac (5 ha)), State/Local (2,390 ac (967 ha)), and private (2,300 ac (932 ha)) ownership (Table 2). The Secretary is considering exercising his discretion to exclude all lands in this subunit from the final designation under section 4(b)(2) of the Act (see **Exclusions** section for discussion).

All areas within this subunit are within the geographical area occupied by the species at the time of listing, are currently occupied, and contain features essential for the conservation of the species. Recent surveys have found Santa Ana suckers at various locations in the mainstem of the Santa Ana River between the Rialto Drain and the Prado Dam (Baskin *et al.*, 2005, pp. 1-2; Swift 2009, pp. 1–3). Santa Ana suckers also occupy the Rialto Drain and Sunnyslope Creek at least during portions of the year (Chadwick Ecological Consultants, Inc. 1996, p. 9; Swift 2000, p. 8; Swift 2001, p. 45). At this time, the low-flow channel of the Santa Ana River has moved away from its confluence with Sunnyslope Creek. In the absence of flows, accumulated sediments and vegetation are preventing access to this creek by Santa Ana suckers (OCWD 2009, pp. 5–31). However, a connection between the mainstem and Sunnyslope Channel would likely be reestablished following a high flow event. Santa Ana suckers were found upstream of the Rialto Drain in the vicinity of the La Cadena Bridge drop-structure during spring-time flow releases from the Seven Oaks Dam in 2005 (Baskin *et al.* 2005, p. 1). Rialto Drain and Sunnyslope Creek are the only tributaries to the Santa Ana sucker in this subunit where Santa Ana sucker spawning has been documented. However, the distribution of fry and juvenile fish observed in various locations within the mainstem implies that spawning areas other than the Rialto Drain and Sunnyslope Creek likely exist within the Santa Ana River.

In the mainstem of the Santa Ana River, dry-season flows are dependent primarily upon discharges from tertiary wastewater treatment plants and upwelling of ground water within the Unit (California Regional Water Quality Control Board 1995, pp. 1-4 through 1-8; Chadwick and Associates, Inc. 1992, p. 20), while storm-season flows are regulated by the upstream Seven Oaks Dam. The discharge of treated wastewater effluent maintains stream volume and velocity within the mainstem and the Rialto Drain to maintain habitat patches that support the riverine environment (PCE 1) necessary for the Santa Ana sucker. The discharge of treated wastewater effluent along with the upwelling of groundwater also lowers ambient water temperature to some extent in portions of the Santa Ana River (Chadwick and Associates, Inc. 1992, p. 26) (PCE 5), and rising water in the Riverside Narrows feeds several small tributaries to the Santa Ana River, including the Sunnyslope Creek (California Regional Water Quality Control Board 1995, pp. 1-4 through 1-8; Swift 2000, p. 6) (PCE 1). Rialto Drain and Sunnyslope Creek contain gravel and cobble substrate, with some sand accumulation along channel edges, deep pools, and a riparian overstory (PCEs 2 and 6). Therefore, these areas provide areas for spawning and rearing of fry and juvenile fish (PCE 1) and shallow-water refuge for Santa Ana suckers during storms and during periods of high ambient temperatures (PCE 6). Almost all other tributaries to the Santa Ana River in this subunit have been channelized, and while these tributaries continue to provide some water and storm water flows to the mainstem, the majority of this water is untreated drainage from surrounding urban areas. Also, with the exception of their confluence with the mainstem, it appears these other tributaries to the Santa Ana River no longer provide suitable habitat for the species.

In addition to reduced water quality and altered hydrology, habitat within this subunit has been impacted by the construction of several bridges spanning the Santa Ana River and grade-control structures that fragment habitat for the Santa Ana sucker. Therefore, the physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats associated with water diversion, alteration of stream channels and watersheds, and reduction of water quantity and quality associated with urban development. Please see **Special Management Considerations or Protection** for discussion of the threats to the Santa Ana sucker habitat.

Subunit 1C: Lower Santa Ana River

Subunit 1C is located near the City of Corona in Riverside County and the cities of Anaheim and Yorba Linda in Orange County, California. This subunit includes 10.7 mi (17.2 km) of the Santa Ana River mainstem from below the Prado Dam outlet in Riverside County to 0.6 mi (1.03 km) downstream of the State Route 90 (Imperial Highway) Bridge in Orange County. While tributaries to the Santa Ana River in this subunit likely provide water and storm water flows necessary to maintain preferred substrate conditions in occupied portions of the river that may be essential to the conservation of the species, we do not currently have information on the extent of their contribution and therefore are not proposing any tributaries to the Santa Ana River in Subunit 1C as critical habitat. However, we are seeking additional information on the sediment contribution from tributaries to the lower Santa Ana River in Subunit 1C (see **Public Comments** section above). Lands within this subunit are under State/Local (56 ac (23 ha)) and private (711 ac (288 ha)) ownership (Table 2). The Secretary is considering exercising his discretion to exclude all lands in this subunit under section 4(b)(2) of the Act from the final designation (see **Exclusions** section for discussion).

All areas in Subunit 1C are within the geographic area occupied by the species at the time of listing, are currently occupied, and contain the features essential for the conservation of the species. This species has been found in the vicinity of the Gypsum Canyon Bridge, Weir Canyon drop structure, and the Imperial Highway overpass (Baskin and Haglund 2001, pp.1-5; Chadwick Ecological Consultants, Inc. 1996, p. 9;

Swift 2000, pp. 15-20). More recently suckers were collected just below Prado Dam (SMEA 2008, p 1).

Upstream water flows to Subunit 1C are primarily maintained by releases from Prado Dam, a structure that has altered the hydrology of the system, resulting in fluctuating water (PCE 1) and sediment (PCE 2) releases. The numerous tributaries flowing into the Santa Ana River below Prado Dam appear to contribute little dry-season flow. Releases from Prado Dam maintain perennial stream flow in the Santa Ana River which in turn maintains well-defined banks supporting native riparian vegetation (PCE 6) and deep pools (PCE 2). However, since the velocity is typically high, water released below the dam is often turbid. During storms, water containing fine sediments passes over or through a dam, and because sediments remain suspended within the reservoir pool for several months, downstream turbidity can be increased (PCE 4) (Ally 2004a, p. 36). Releases of turbid water could also degrade downstream foraging and spawning habitat if areas become covered by fine silts. The operation of Prado Dam also traps larger sediments therefore decreasing the deposition of gravel and cobble needed to maintain spawning and foraging habitat below the dam.

In addition to reduced water quality and altered hydrology, habitat within this subunit has been impacted by the construction of several bridges spanning the Santa Ana River. Therefore, the physical and biological features essential to the conservation of the species in this subunit may require species management considerations or protection to address threats from water diversion, alteration of stream channels and watersheds, and reduction of water quantity and quality associated with urban development. Please see the **Special Management Considerations or Protection** section of this proposed rule for discussion of the threats to the Santa Ana sucker habitat.

Unit 2: San Gabriel River

Unit 2 consists of the West, North, and East Forks of the San Gabriel River upstream of the San Gabriel Reservoir, in Los Angeles County, California. This unit includes 9.3 mi (14.9 km) of the West Fork downstream of Cogswell Dam to the San Gabriel Reservoir, 3.2 mi (5.2 km) of the North Fork upstream from the confluence with the West Fork, and 10.4 mi (16.7 km) of the East Fork downstream of the Bridge-of-No-Return to the San Gabriel Reservoir. This unit also includes sections of the following tributaries (distances are measured from the mainstem of the fork): 0.3 mi (0.5 km) of Big Mermaids Canyon Creek and 3.3 mi (5.3 km) Bear Canyon Creek, both tributaries of the West Fork; 0.2 mi (0.2 km) of the West Fork of Bear Canyon Creek, a tributary of Bear Canyon Creek; 1.5 mi (2.4 km) of Bichota Canyon Creek, a tributary of the North Fork; 3.8 mi (6.2 km) of Cattle Canyon Creek, a tributary of the East Fork; and 0.6 mi (0.9 km) of Cow Canyon Creek, a tributary of Cattle Canyon Creek. Lands within this unit are entirely within the Angeles National Forest and are under Federal (USFS) (917 ac (371 ha)) and private (83 ac (34 ha)) ownership (Table 2).

All areas in Unit 2 are within the geographical area occupied by the species at the time of listing, are currently occupied, and contain the features essential to the conservation of the species. In addition to surveys discussed in the listing rule (65 FR 19686; April 12, 2000) and in the previous designation of critical habitat for the Santa Ana sucker (70 FR 426; January 4, 2005), additional surveys have documented Santa Ana suckers in the West, North, and East Forks of the San Gabriel River and the following tributaries: Big Mermaids Canyon, Bear Canyon, Bichota Canyon, Cattle Canyon, and Cow Canyon Creeks (Ally 2004b, pp. 8–9, 14–15, 22, 24–25, 28; Ally 2004c, pp. 9–10, 13–14, 16–17; Haglund and Baskin 1992, p. 32; O'Brien 2009a, pp. 2-3; Tennant 2004, pp. 5–8; Tennant 2006, p. 3). The West, North, and East Forks of the San Gabriel River have one of the most intact native freshwater fish faunas in Southern California (Haglund and Baskin 2003, p. 7), have good water quality, and appear to support the highest abundance of Santa Ana suckers within the species' range.

This is the only unit that, overall, has a sediment transport and hydrological regime existing in a natural state (relative to the other two proposed critical habitat units). This unit supports a population of the Santa Ana sucker occurring within a relatively intact watershed that provides good water quality, supply, and sediment transport. This is the only extant population of Santa Ana suckers that is not chronically exposed to urban runoff or tertiary-treated wastewater discharges, and that has a regulated water supply (with the exception of the West Fork of the San Gabriel River).

Natural water flow in the North and East forks, and the tributaries included in this unit, is unimpeded by large-scale dams. However, water flows in the West Fork of the San Gabriel River are affected by Cogswell Dam, a structure that has altered the hydrology of the system, resulting in fluctuating water (PCE 1) and sediment (PCE 2) releases. During its operational life, the Cogswell Reservoir has accumulated a large volume of sediment behind the dam that affects the quality of water released both through operations and unavoidable, uncontrolled leakage (Ally 2004a, p. 1). During the summer months, the only flow into the West Fork of the San Gabriel River is the result of leakage from the dam, and because flow velocities are low, sediments do not travel far downstream (Ally 2004a, p. 36). During storms, water containing fine sediments passes over or through the dam, and because sediments remain suspended within the reservoir pool for several months, downstream turbidity can be increased over turbidity associated with natural conditions (PCE 4) (Ally 2004a, p. 36). Accidental high water releases (with heavy sediment loads) from Cogswell Reservoir have devastated the West Fork of the San Gabriel River several times in the past (Haglund and Baskin 1992, p. 57; Moyle 2002, p. 184; Moyle *et al.* 1995, p. 203; Moyle and Yoshiyama 1992, p. 204). Such rapid increases in flow volume and velocity may disrupt Santa Ana sucker spawning and flush juvenile Santa Ana suckers into areas with unsuitable habitat.

Along with impacts associated with the operation of Cogswell Dam, habitat within this unit has also been impacted by recreational activities, including OHV use and the construction of artificial recreational dams. Authorized OHV activity occurs in the USFS's San Gabriel Canyon OHV Area at the junction of the East, North, and West Forks. The use of the river as an OHV recreational area may result in adverse effects to the Santa Ana sucker by increasing turbidity (PCE 4); disrupting the physical structure of habitat for spawning, resting, and feeding (PCE 2); and introducing pollutants (such as oil and gas) into streams (PCE 4) (65 FR 19686; April 12, 2000).

To minimize impacts to the Santa Ana sucker from OHV use, the USFS has implemented protection measures (such as establishing designated stream crossings and limiting the number of stream crossings in the OHV area) (US FWS 2005, p. 8). The construction of "recreational" dams degrades in-stream and possibly bank habitat, increases turbidity (PCE 4), and disrupts sediment transport. Over 500 recreational dams were found in 2001 and 2002 within a 7.1 mi (11.4 km) reach of the East Fork of the San Gabriel River (Ally 2001, p. 2.; Ally 2003, pp. 1–2). Recreational dams also reappear on a frequent basis in the San Gabriel Canyon OHV Area in

the North Fork of this river as well (USFS 2008, p. 6). Therefore, the physical and biological features essential to the conservation of the species in this unit may require species management considerations or protection to address threats associated with water diversion, alteration of stream channels and watersheds, and human recreational activities. Please see **Special Management Considerations or Protection** section of this proposed rule for discussion of the threats to the Santa Ana sucker habitat.

Unit 3: Big Tujunga Creek

Unit 3 includes a total of 1,233 ac (499 ha) of land and consists of two subunits located in Los Angeles County, California. Lands within this unit are under Federal (USFS) (286 ac (116 ha)) and private (946 ac (384 ha)) ownership (Table 2).

Subunit 3A: Big Tujunga and Haines Creeks

Subunit 3A includes an approximately 13 mi (21 km) stretch of Big Tujunga Creek (a tributary of the Los Angeles River) between the Big Tujunga Dam and Reservoir and Hansen Dam and Flood Control Basin. This subunit also includes Haines Creek, a small stream within the floodplain of Big Tujunga Creek. The 1,189 ac (481 ha) of land within this subunit is under Federal (USFS) (242 ac (98 ha)) and private (946 ac (384 ha)) ownership (Table 2).

All areas of Subunit 3A are within the geographical area occupied by the species at the time of listing, are currently occupied, and contain the features essential to the conservation of the species. In addition to surveys cited in the listing rule (65 FR 19686; April 12, 2000) and in the previous designation of critical habitat for the Santa Ana sucker (70 FR 426; January 4, 2005), additional surveys have documented Santa Ana suckers in Big Tujunga Creek between Delta Flats and Vogel Flats (Hagund and Baskin 2001, pp. 2-4; O'Brien 2009b, p. 2), and in the Big Tujunga Wash Mitigation Bank, including Haines Creek (Chambers Group 2004, pp. 6-3, 6-4). Some speculation exists that Big Tujunga Creek between the Big Tujunga Dam and Big Tujunga Canyon Road Bridge may no longer be occupied by this species. Swift (2002, p. 3) speculates that streambed characteristics in three places upstream of Big Tujunga Canyon Road Bridge may prevent upstream movement or make movement possible only during rare high flow events. We currently consider this area occupied because Santa Ana suckers have been documented near and downstream of the Big Tujunga Canyon Road Bridge and because we do not have evidence of the existence of barriers permanently precluding upstream movement to the dam. Additionally, the upstream sections of Big Tujunga Creek are also important for providing stream and storm waters necessary to transport sediments to maintain preferred substrate conditions (PCE 2) for the Santa Ana sucker in occupied areas downstream. We seek additional information on the occurrence of the Santa Ana sucker, habitat conditions, and the presence of potential permanent barriers to movement between the Big Tujunga Canyon Road Bridge and the Big Tujunga Dam (see **Public Comments** section above).

A section of Haines Creek upstream of the Foothill Bridge traverses the Angeles National Golf Course. This 160 ac (65 ha), privately owned golf course lies between the confluence of Big Tujunga and Haines Creeks and includes the alluvial floodplain and multiple low-flow channels that traverse the golf course. Flow from the Big Tujunga Creek travels through the golf course into Haines Creek on an irregular basis (2 of the 5 years since the course has been open) and likely provides the only source of stream and storm waters necessary to transport sediments to maintain preferred substrate conditions (PCE 2) to Haines Creek and downstream to the Big Tujunga Wash Mitigation Bank (Swift 2009, p.1). Therefore, the alluvial floodplain and multiple low-flow channels that traverse the golf course are essential to the conservation of the species because they provide the primary (and potentially sole) source of stream and storm waters downstream into the Big Tujunga Wash Mitigation Bank that supports the Santa Ana sucker (see **Summary of Changes From Previously Designated Critical Habitat** section above for more discussion of the proposed revised designation on the Angeles National Golf Course).

The upstream portion of this subunit is within the Angeles National Forest and is therefore not exposed to the effects of urbanization. However, the downstream portion of Big Tujunga Creek between the Oro Vista Bridge and Hansen Dam is adjacent to existing urban development south of the creek, which has altered water flows transporting sediment (PCE 2) into the Big Tujunga Creek. Several tributaries (including the upper portion of Haines Creek) that flow into Big Tujunga Creek through the communities of Sunland and Tujunga have been channelized through urbanized areas for flood control purposes. This channelization has eliminated habitat for the Santa Ana sucker, altered the hydrologic regime (PCE 1), and reduced the transport of sediments needed to maintain channel substrate conditions (PCE 2) in the occupied sections of Big Tujunga Creek.

Habitat in Subunit 3A has been altered due to the operation of the Big Tujunga Dam upstream and Hansen Dam downstream. All flows in the occupied reaches of Big Tujunga Creek are moderated by the operation of Big Tujunga Dam, which has eliminated flows along most of the creek during late summer and autumn of dry years (Palavido *et al.* 2008, p. 8), thereby reducing not only the amount of water (PCE 1) entering the system but also the amount of sediment (PCE 2) being transported downstream. During these dry periods, the Santa Ana sucker is restricted to an approximate 1 mi (1.6 km) section of the creek (Palavido *et al.* 2008, p. 8). At times, the creek can be reduced to a series of standing pools with only a trickle of flow between them (Swift 2002, p. 1), further isolating suckers (PCE 1). The operation of Big Tujunga Dam is the subject of an ongoing consultation between the Service and the USFS under section 7 of the Act. To minimize impacts to the species, a strategy is being developed with the objective of maintaining and enhancing Santa Ana sucker habitat within the lower Big Tujunga Creek (Mendez 2005, p. 1).

Habitat within this subunit has also been impacted by the construction of several bridges (such as the Foothill, Interstate-210, and Oro Vista bridges). The habitat within both Big Tujunga Creek and Haines Creek as they flow under the Foothill and Interstate-210 bridges is often temporarily fragmented (PCE 7) (Swift 2006a, p. 2). Hence, sufficient water and sediment transport are needed to maintain the stream channel substrate conditions required by the Santa Ana sucker in this area (PCEs 1, 2, and 7). The physical and biological features essential to the conservation of the species in this unit may require species management considerations or protection to address threats associated with water diversion, and alteration of stream channels and watersheds and human recreational activities. Please see **Special Management Considerations or Protection** section of this proposed rule for discussion of the threats to Santa Ana sucker habitat.

Subunit 3B: Gold, Delta, and Stone Canyon Creeks

Subunit 3B consists of three tributaries to Big Tujunga Creek

(measured from their confluence with the mainstem): a 1.89 mi (3.04 km) section of Gold Canyon Creek, a 0.79 mi (1.27 km) section of Delta Canyon Creek, and a 0.67 mi (1.08 km) section of Stone Canyon Creek. The 44 ac (18 ha) of land within this subunit is entirely within the Angeles National Forest and is entirely under Federal (USFS) ownership (Table 2).

These three tributaries are not within the geographical range of the species occupied at the time of listing and are not currently occupied. While we are not aware of any surveys for the Santa Ana sucker conducted in Gold Canyon, Delta Canyon, or Stone Canyon Creeks, it appears that the slope of Delta Canyon and Stone Canyon Creeks from near their confluence with Big Tujunga Creek is too steep to be passable by the Santa Ana sucker. The slope of Gold Canyon Creek from approximately 0.49 mi (0.8 km) from its confluence with Big Tujunga Creek also appears to be too steep to be passable by the Santa Ana sucker. Please see **Criteria Used To Identify Critical Habitat** section of this proposed revised rule for a discussion of how we determined the slope within these creeks.

These creeks are essential to the conservation of the species because they provide and transport sediment (PCE 2) and convey stream flows and flood waters (PCE 1) necessary to maintain habitat conditions for the downstream occupied areas of Big Tujunga Creek. The areas of these creeks at their confluence with Big Tujunga Creek also provide protective areas for juvenile Santa Ana suckers during high flow events, during periods of high ambient temperatures, and from predators (PCEs 1 and 6).

These tributaries are particularly essential to the conservation of the species given the extent to which the hydrology and the habitat of the downstream occupied section of Big Tujunga Creek has been altered and degraded due to the construction and operation of Big Tujunga Dam.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuit Courts of Appeal have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. U.S. Fish and Wildlife Service *et al.*, 245 F.3d 434, 442F (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species. Section 7(a)(2) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) of the Act through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

An exception to the concurrence process referred to in (1) above occurs in consultations involving National Fire Plan projects. In 2004, USFS and BLM reached agreements with the Service to streamline a portion of the section 7 consultation process (BLM-ACA 2004, pp. 1–8; FS-ACA 2004, pp. 1–8). The agreements allow USFS and BLM the opportunity to make "not likely to adversely affect" determinations for projects implementing the National Fire Plan. Such projects include prescribed fire, mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. The USFS and BLM will insure staff is properly trained, and both agencies will submit monitoring reports to the Service to determine if the procedures are being implemented properly and effects to endangered species and their habitats are being properly evaluated. As a result, we do not believe the alternative consultation processes being implemented as a result of the National Fire Plan will differ significantly from those consultations being conducted by the Service.

If we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "reasonable and prudent alternatives" at 50 CFR § 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a

reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR § 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected, and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the Santa Ana Sucker or its designated critical habitat will require section 7(a)(2) consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit under section 10 of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the physical and biological features to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the Santa Ana sucker.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may adversely affect critical habitat and therefore should result in consultation for the Santa Ana sucker include, but are not limited to, the following:

(1) Actions that would alter the hydrology to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, impoundment, channelization, water diversion, removal of water from waterways, construction, licensing, relicensing, and operation of dams or other water impoundments.

(2) Actions that would significantly alter water quality to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, release of excess nutrients or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (nonpoint).

(3) Actions that would significantly increase sediment deposition within the stream channel to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing; road construction; timber harvest; off-road vehicle use; residential, commercial, and industrial development; and other watershed and floodplain disturbances.

(4) Actions that would significantly alter channel morphology or geometry to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining and other removal of substrate, and destruction of riparian vegetation.

(5) Actions that would introduce, spread, or augment nonnative aquatic species into critical habitat to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, stocking for sport, biological control, or other purposes; aquaculture; and construction and operation of canals.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any

particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we make this determination, then we can exclude the area only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; and implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

In the case of the Santa Ana sucker, the benefits of critical habitat include public awareness of the Santa Ana sucker and the features and specific areas essential to its conservation and in cases where a Federal nexus exists, increased habitat protection for the Santa Ana sucker due to the protection from adverse modification or destruction of critical habitat. In practice, a Federal nexus exists primarily on Federal lands or for projects undertaken or requiring authorization by a Federal agency.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a conservation plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Conservation Plans—Exclusions Under Section 4(b)(2) of the Act

The benefits of excluding lands covered by conservation plans from critical habitat designation include relieving non-Federal parties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs and conservation plans take years to develop, and upon completion, are consistent with recovery objectives for listed species that are covered within the plan area. Many conservation plans also provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine conservation (Wilcove and Chen 1998; p. 1407; Crouse *et al.* 2002; p. 720; James 2002, p. 271). Building partnerships and promoting voluntary cooperation of landowners and other non-Federal parties are essential to understanding the status of species on non-Federal lands, and are necessary to implement recovery actions such as reintroduction listed species, habitat restoration, and habitat protections.

Many landowners and other non-Federal parties derive satisfaction from contributing to endangered species recovery. We promote those private sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal parties (safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we encouraged non-Federal landowners and other parties to enter into conservation agreements, based on a view that we can achieve greater species conservation through such partnerships than we can through regulatory methods (61 FR 63854, December 2, 1996).

Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of conservation planning. In fact, designating critical habitat in areas covered by an HCP or other conservation plan could result in the loss of some species' benefits if participants abandon the planning process, in part because of the strength of the perceived additional regulatory compliance that such a designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as an additional Federal regulatory burden sufficient to discourage continued participation in developing plans targeting listed species' conservation.

A related benefit of excluding lands covered by approved HCPs or conservation plans from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise.

We also note that all Federal actions that may affect listed species, including those covered by an Federally-approved conservation plan require consultation under section 7(a)(2) of the Act, which would include a review of the effects of all activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3), even without the critical habitat designation.

The information provided in the previous section applies to the following discussions of the specific area the Secretary is considering for exclusion under section (4)(b)(2) of the Act. The Secretary is considering exercising his discretion to exclude lands covered by the Santa Ana Sucker Conservation Program from the final designation of critical habitat for the Santa Ana Sucker. Portions of the proposed critical habitat warrant consideration for exclusion from the proposed designation under section 4(b)(2) of the Act based on the partnerships, management, and protection afforded by this program. In this proposed revised rule, we are seeking input from the public as to

whether or not the Secretary should exclude this area from the final revised critical habitat designation. (Please see the **Public Comments** section of this proposed rule for instructions on how to submit comments). Below is a brief description of the Santa Ana Sucker Conservation Program and the lands proposed as critical habitat that are addressed by this program.

Santa Ana Sucker Conservation Program

We are considering exclusion of all lands in Subunit 1B (4,704 ac (1,903 ha)) and Subunit 1C (767 ac (311 ha)) under the Santa Ana Sucker Conservation Program (SAS Conservation Program) from the final revised critical habitat designation under section 4(b)(2) of the Act. The SAS Conservation Program encompasses the Santa Ana River and the lower reaches of its tributaries extending generally from Tippecanoe Avenue in San Bernardino County to Chapman Avenue in Orange County; a distance of approximately 31 mi (48.3 km) in San Bernardino, Riverside, and Orange Counties [Subunits 1B and 1C] (Santa Ana Watershed Project Authority 2008, pp. 13–18). The SAS Conservation Program was developed over a 10–year period, and is the result of a multiagency partnership of Federal, State, and local government agencies, and the private sector that encourages a riverwide approach to conservation of the Santa Ana sucker.

This SAS Conservation Program partnership is intended to: (1) increase the knowledge base to implement recovery strategies for the sucker in the Santa Ana River; (2) ensure that each participating agency minimizes, to the extent possible, effects to the sucker and its habitat from routine activities that occur within their jurisdiction in the Santa Ana River; and (3) develop restoration techniques for degraded habitat. Partners in the SAS Conservation Program, called the Santa Ana Sucker Conservation Team (Team), include the U.S. Army Corps of Engineers (ACOE), the Service, CDFG, the State Regional Water Quality Control Board (Santa Ana Region), the Santa Ana Watershed Project Authority, and the following participating agencies (Participants): San Bernardino County Flood Control District, City of San Bernardino Municipal Water Department, Riverside County Flood Control and Water Conservation District, Riverside County Transportation Department, City of Riverside Regional Water Quality Control Plant, Orange County Water District, Orange County Resources and Development Management Department, and Orange County Sanitation District.

Actions undertaken by the Riverside County Transportation Department and facilities and parcels under the jurisdiction of the Riverside County Flood Control and Water Conservation District and the City of Riverside Regional Water Quality Control Plant occur within the areas addressed by the Program. These areas also include a small amount of Public-Quasi-Public (PQP) lands within the Western Riverside County Multiple-Species Habitat Conservation Plan (Western Riverside County MSHCP) Planning Area. Riverside County participation in the SAS Conservation Program preceded the development of the MSHCP. Actions undertaken by these Participants are not considered Covered Activities in the Western Riverside County MSHCP and incidental take authorization for the Santa Ana sucker that could occur on these PQP lands is explicitly excluded under the Western Riverside County MSHCP. Therefore, although this proposed exclusion includes some PQP lands within the Western Riverside County MSHCP Planning Area, we are not proposing to exclude these PQP lands based upon participation in the MSHCP. Instead, we are considering exclusion of these PQP lands under the SAS Conservation Program.

The SAS Conservation Program is intended to conserve the Santa Ana sucker and protect its habitat through:

(1) implementation of a systematic approach to conducting routine operations and facilities maintenance within the program area;

(2) education and outreach;

(3) conducting annual surveys within the program area to monitor the status of the sucker and conducting a quantitative assessment of habitat conditions within the program area;

(4) conducting surveys for sucker prior to undertaking routine operations and maintenance;

(5) funding research actions to increase understanding of sucker biology; and

(6) developing and implementing habitat restoration activities that benefit the Santa Ana sucker.

The SAS Conservation Program is administered by the Santa Ana Watershed Project Authority. Activities undertaken by participants are subject to the regulatory authority of the ACOE under the Clean Water Act, 33 USC § 1251 *et seq.*, as amended (1987). The Clean Water Act section 404 application submitted by the agencies participating in the SAS Conservation Program for operation and maintenance activities proposed in the Santa Ana River and for implementation of the SAS Conservation Program is under review by the ACOE and will also be the subject of a future Section 7 consultation between ACOE and the Service. We will issue a biological opinion on the application prior to a decision by the ACOE.

While waiting for approvals and permits, the participants (local stakeholders on the team) have implemented several actions under the SAS Conservation Program, including funding the following:

(1) A comparative study on fish health and water quality within the Santa Ana and San Gabriel Rivers (Saiki 2000);

(2) a study of sucker distribution, movement, spawning, and impacts from nonnative predators within the Santa Ana River (Swift 2001);

(3) a study of wastewater treatment facility operational discharge regimes on the Santa Ana sucker (Allen 2003); and

(4) a video to educate staff and contractors working for participating agencies about the sucker and its conservation.

Since 2000, the participants have also funded annual demographic monitoring of the Santa Ana sucker at three locations within the Santa Ana River; and, more-recently, have conducted an annual assessment of habitat conditions within the Santa Ana River. The participants also recently completed an assessment of streams within the historical range of the Santa Ana sucker and other native fishes within and outside of the program area to identify areas for possible restoration and are now focusing efforts on developing a habitat restoration program to include restoration of the mainstem of the Santa Ana River and its tributaries both within and outside of the program area (OCWD 2009, p. 1-1). In 2009, the participants proposed two habitat restoration projects in the Santa Ana River to restore habitat for the Santa Ana sucker and are waiting for required approvals from State and Federal regulatory agencies.

The Santa Ana sucker is threatened primarily by loss of habitat types necessary to support all life-stages; lower water quality and turbidity as a result of excess nutrient loads and in-stream ground disturbances; crushing from recreational OHV use; and the effects of predation by nonnative fish within the program area (Santa Ana Watershed Project Authority 2008; OCWD 2009, p. 89). Implementation of the SAS Conservation Program is intended to remove and reduce threats to this species and the features essential to its conservation by:

(1) ensuring that routine maintenance and operational procedures are conducted in a manner that eliminates or reduces impacts to the Santa Ana sucker;

(2) establishing vehicle crossings in the river that will not only reduce impacts from in-stream vehicles by SAS Conservation Program participants, but will also direct recreational OHV use towards less-sensitive areas;

(3) ensuring that wastewater treatment facilities' operational parameters maintain surface flows for the Santa Ana sucker; and

(4) conducting habitat restoration and predator removal. As outlined above, we believe that habitat restoration and management of Santa Ana sucker habitat in the Santa Ana River system under the SAS Conservation Program will contribute to conservation and ultimate recovery of this species.

In summary, we believe that the proactive management strategies and research and restoration activities, including current activities and those proposed for future implementation, under the SAS Conservation Program will benefit this species and help to conserve and enhance the physical and biological features essential to its conservation on public and private lands under the jurisdiction of the SAS Conservation Program. Therefore, the Secretary is considering exercising his discretion under section 4(b)(2) of the Act to exclude of all Santa Ana sucker habitat in Subunit 1B (4,705 ac (1,904 ha)) and Subunit 1C (767 ac (310 ha)) from the final revised critical habitat designation because of the conservation benefits afforded to the Santa Ana sucker habitat under the SAS Conservation Program.

The 2000 final listing rule for the Santa Ana sucker identified the following primary threats to the Santa Ana sucker: potential habitat destruction, natural and human-induced changes in stream flows, urban development and related land-use practices, intensive recreation, introduction of nonnative competitors and predators, and demographics associated with small population sizes. The implementation of the SAS Conservation Program would help to address these threats through a coordinated regional planning effort that incorporates specific research and conservation measures. for the Santa Ana sucker and its habitat. We will analyze the benefits of inclusion and exclusion of this area from critical habitat under section 4(b)(2) of the Act. We encourage any public comment in relation to our consideration of the areas in Unit 1 for inclusion or exclusion (see **Public Comments** section above).

Economic Analysis

In compliance with section 4(b)(2) of the Act, we are preparing a new analysis of the economic impacts of this proposed revision to critical habitat for the Santa Ana Sucker, to evaluate the potential economic impact of the proposed revised designation. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, at Docket No. **FWS–R8–ES–2009–0072**, or by contacting the Carlsbad Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of the final revised designation, we will consider economic impacts, public comments, and other new information. We will also consider areas, including those identified for potential exclusion, which may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR § 424.19.

An analysis of the economic impacts for the previous proposed critical habitat designation was conducted and made available to the public for 10 days beginning on October 1, 2004 (69 FR 58876). We published another notice in the **Federal Register** on October 25, 2004 (69 FR 62238), reopening a 30–day comment period on the draft economic analysis and the proposed designation. That economic analysis was finalized for the final rule to designate critical habitat for the Santa Ana sucker published in the **Federal Register** on January 4, 2005 (70 FR 426).

The analysis determined that the costs associated with critical habitat for the Santa Ana sucker, across the entire area considered for designation (across designated and excluded areas), were primarily a result of the potential effect of critical habitat on transportation (49 percent of the annual costs and overall prospective costs), and to a lesser extent water supply, flood control activities, and residential and commercial development. The economic analysis determined that retrospective costs (costs since listing, 1999-2004) total $4.2 million, with transportation comprising $3.4 million of these costs. The remainder of retrospective costs was split among OHV recreation, flood control agencies, and Federal agencies. Total prospective costs of the 2004 proposed rule (costs for the 20–year period 2004-2024) were $30.5 million assuming a 3 percent discount rate and $21.8 million with a 7 percent discount rate. Based on the 2004 economic analysis, we concluded that the designation of critical habitat for the Santa Ana sucker, as proposed in 2004, would not result in significant small business impacts. This analysis is presented in the notice of availability for the economic analysis published in the **Federal Register** on October 1, 2004 (69 FR 58876).

The prior draft economic analysis included costs coextensive costs with the listing of the species, in other words costs attributable to the listing of the species as well as costs attributable to the designation of critical habitat. The new analysis will analyze the specific costs attributable to designating all areas proposed in this proposed revised rule as critical habitat.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are soliciting the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed revised designation of critical habitat. We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing by the date shown under **DATES**. Send your request to Jim Bartel, Field Supervisor of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review – Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(2) Whether the rule will create inconsistencies with other Federal agencies' actions;

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; and

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must 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. SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

An analysis of the economic impacts for our previous proposed critical habitat designation was conducted and made available to the public on October 1, 2004 (69 FR 58876) and October 25, 2004 (69 FR 62238). This economic analysis was finalized for the final rule to designate critical habitat for the Santa Ana sucker as published in the **Federal Register** on January 4, 2005 (70 FR 426). The costs associated with critical habitat for the Santa Ana sucker, across the entire area considered for designation (across designated and excluded areas), were primarily a result of the potential effect of critical habitat on transportation, and to a lesser extent water supply, flood control activities, and residential and commercial development. Total prospective costs of all conservation actions related to Santa Ana Sucker within the areas in the 2004 proposed rule (costs for the 20–year period 2004-2024) were $30.5 million assuming a 3 percent discount rate and $21.8 million with a 7 percent discount rate. Based on the 2004 economic analysis, we concluded that the designation of critical habitat for the Santa Ana sucker, as proposed in 2004, would not result in significant small business impacts. This analysis is presented in the notice of availability for the economic analysis as published in the **Federal Register** on October 1, 2004 (69 FR 58876).

While we do not believe our revised designation, as proposed, will result in a significant impact on a substantial number of small business entities based on the previous designation, we are initiating a new analysis to more thoroughly evaluate potential economic impacts of this revision to critical habitat. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. The draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce its availability in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(1) 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 [T]ribal 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 [T]ribal 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; AFDC 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. While non-Federal entities that receive Federal funding, assistance, or permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, 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 onto State governments.

(2) Based in part on an analysis conducted for the previous designation of critical habitat and extrapolated to

this designation, we do not expect this rule to significantly or uniquely affect small governments. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required. However, as we conduct our economic analysis for the revised rule, we will further evaluate this issue and revise this assessment if appropriate.

Takings – Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Santa Ana sucker in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the Santa Ana sucker does not pose significant takings implications for lands within or affected by the designation.

Federalism – Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in California. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform – Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), it has been determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed to revise critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features within the designated areas to assist the public in understanding the habitat needs of the Santa Ana sucker.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful.

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), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we have a responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation of the species, nor are there any unoccupied tribal lands that are essential for the conservation of the Santa Ana sucker. Therefore, critical habitat for the Santa Ana sucker is not being proposed on tribal lands. We will continue to coordinate with Tribal governments as applicable during the designation process.

Energy Supply, Distribution, or Use – Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Significantly Affect Energy Supply, Distribution, or Use) 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. Based on an analysis conducted for the previous designation of critical habitat and extrapolated to this designation, along with a further analysis of the additional areas included

in this revision, we determined that this proposed rule to designate critical habitat for the Santa Ana sucker is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and we will review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rulemaking is available on *http://wwww.regulations.gov* and upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Author(s)

The primary author of this notice is the staff from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95(e), revise the entry for "Santa Ana sucker (*Catostomus santaanae*)" to read as follows:

§ 17.95 *Critical habitat—fish and wildlife.*

* * * * *

(e) *Fishes.*

* * * * *

Santa Ana sucker (*Catostomus santaanae*)

(1) Critical habitat units are depicted for Los Angeles, Orange, Riverside, and San Bernardino Counties, California, on the maps below.

(2) Within these areas, the physical and biological features for the Santa Ana sucker are as follows:

(i) A functioning hydrological system within the historical geographic range of the Santa Ana sucker that experiences peaks and ebbs in the water volume (either naturally or regulated) necessary to maintain all life stages of the species in the riverine environment, including breeding site selection, resting, larval development, and protection in cool-water refuges (i.e., tributaries);

(ii) Stream channel substrate consisting of a mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins;

(iii) Water depths greater than 3 cm (1.2 in) and bottom water velocities greater than 0.03 m per second (0.01 ft per second);

(iv) Clear or only occasionally turbid water;

(v) Water temperatures less than 30 °C (86 °F); and

(vi) In-stream habitat that includes food sources (such as zooplankton, phytoplankton, and aquatic invertebrates), and associated vegetation such as aquatic emergent vegetation and adjacent riparian vegetation to: (A) reduce water temperature when ambient temperatures are high; (B) provide shelter; and (C) provide protective cover from predators; and

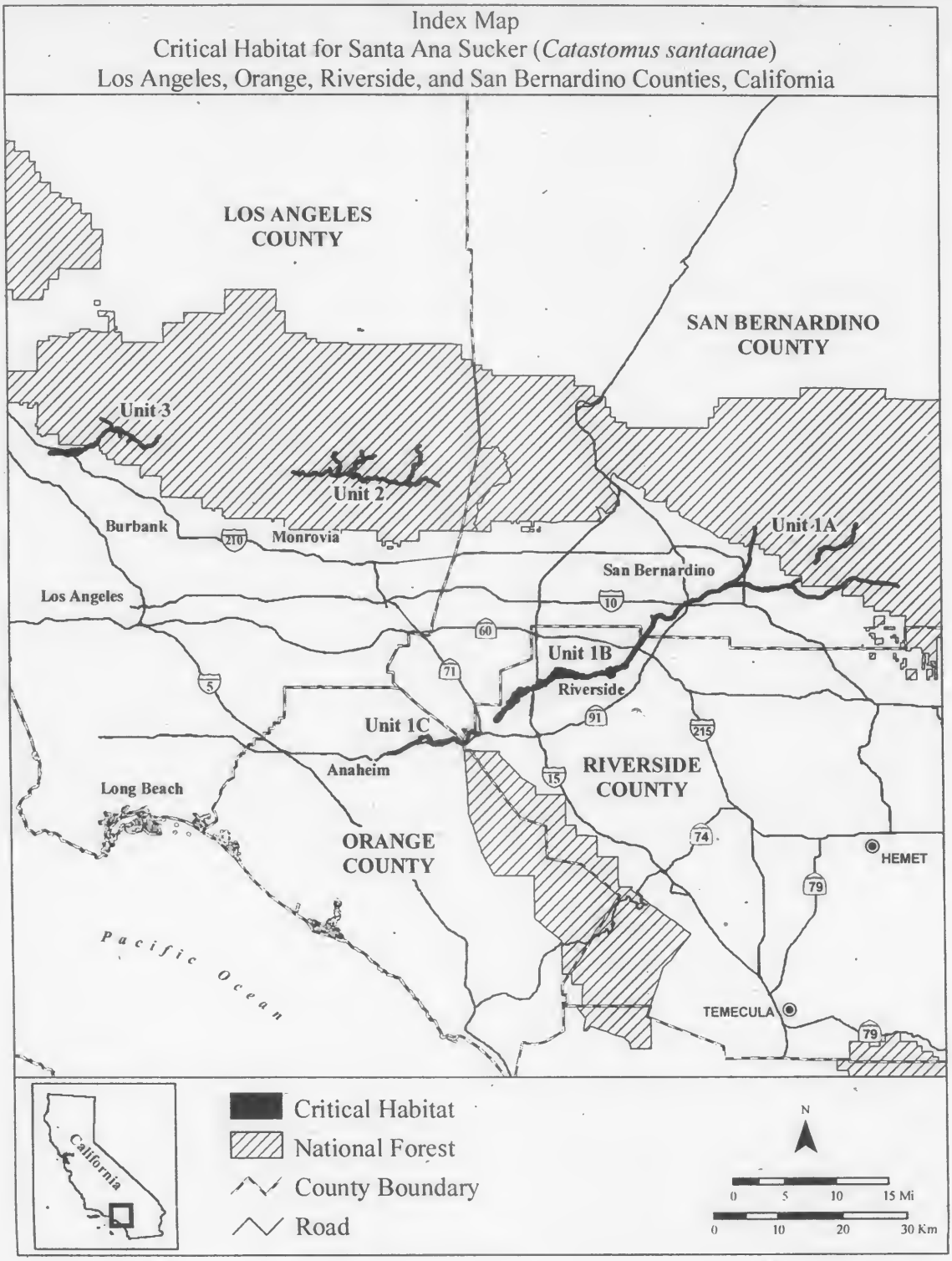
(vii) Areas within perennial stream courses that may be periodically dewatered, but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted.

(3) Critical habitat does not include manmade structures existing on the effective date of this rule and not containing one of more of the physical and biological features, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) *Critical habitat map units.* Data layers defining map units were created using a base of U.S. Geological Survey 7.5' quadrangle maps. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 11, North American Datum (NAD) 1983 coordinates.

(5) *Note:* Index map of critical habitat units for the Santa Ana sucker (*Catostomus santaanae*) follows:

BILLING CODE 4310–55–S

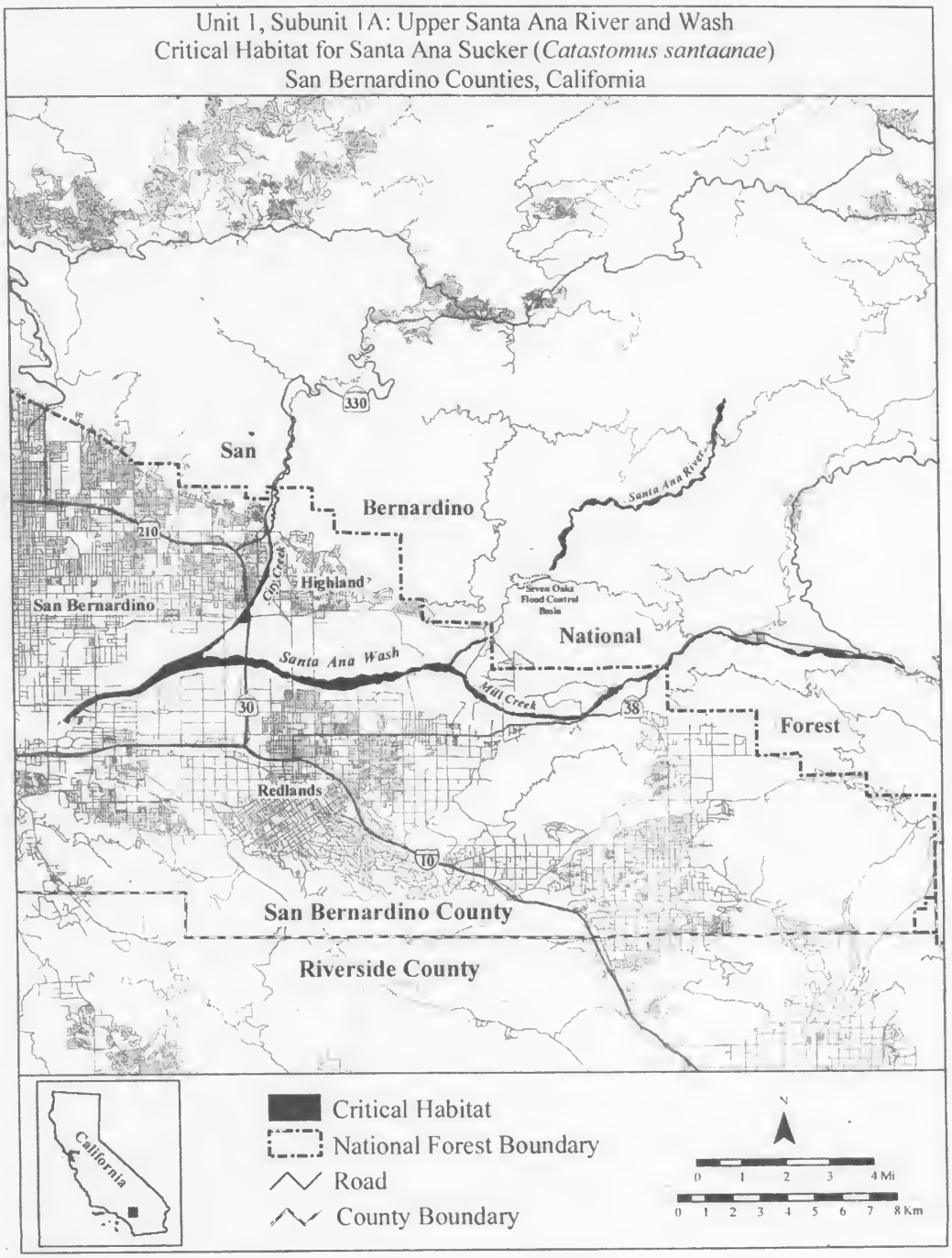

Index Map
Critical Habitat for Santa Ana Sucker (*Catastomus santaanae*)
Los Angeles, Orange, Riverside, and San Bernardino Counties, California
LOS ANGELES COUNTY
SAN BERNARDINO COUNTY
Unit 3
Unit 2
Unit 1A
Burbank
Monrovia
San Bernardino
Los Angeles
Unit 1B
Riverside
Unit 1C
Anaheim
RIVERSIDE COUNTY
Long Beach
ORANGE COUNTY
HEMET
Pacific Ocean
TEMECULA
210
10
60
71
5
91
215
15
74
79
Critical Habitat
National Forest
County Boundary
Road
California
N
0 5 10 15 Mi
0 10 20 30 Km

(6) Unit 1: Santa Ana River, Orange, Riverside, and San Bernardino Counties, California.

(i) Subunit 1A: Upper Santa Ana River and Wash, San Bernardino County.

(A) [Reserved for textual description of Subunit 1A.]

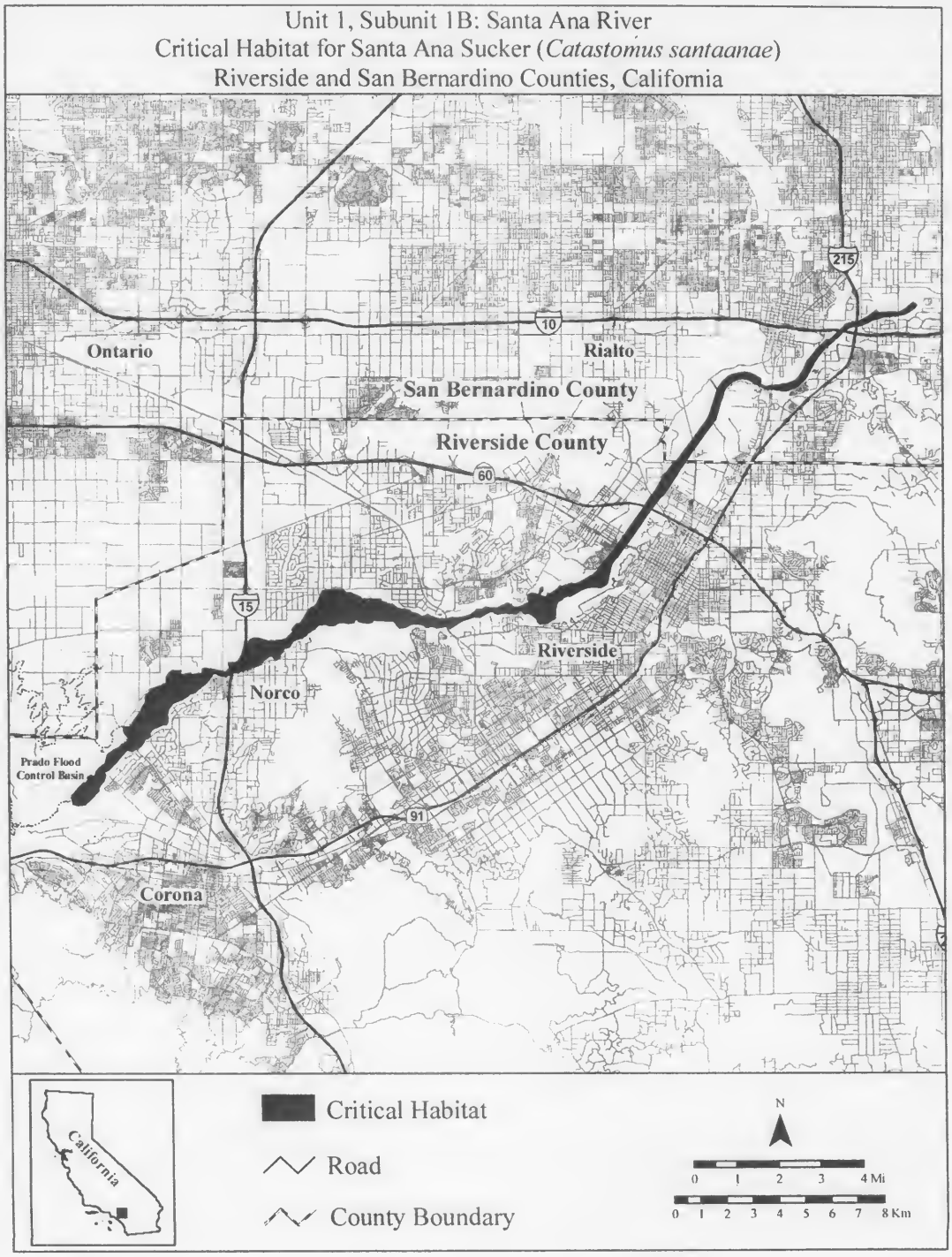
(B) Map of Subunit 1A (Upper Santa Ana River and Wash) follows:



(ii) Subunit 1B: Santa Ana River, Riverside and San Bernardino Counties.

(A) [Reserved for textual description of Subunit 1B.]

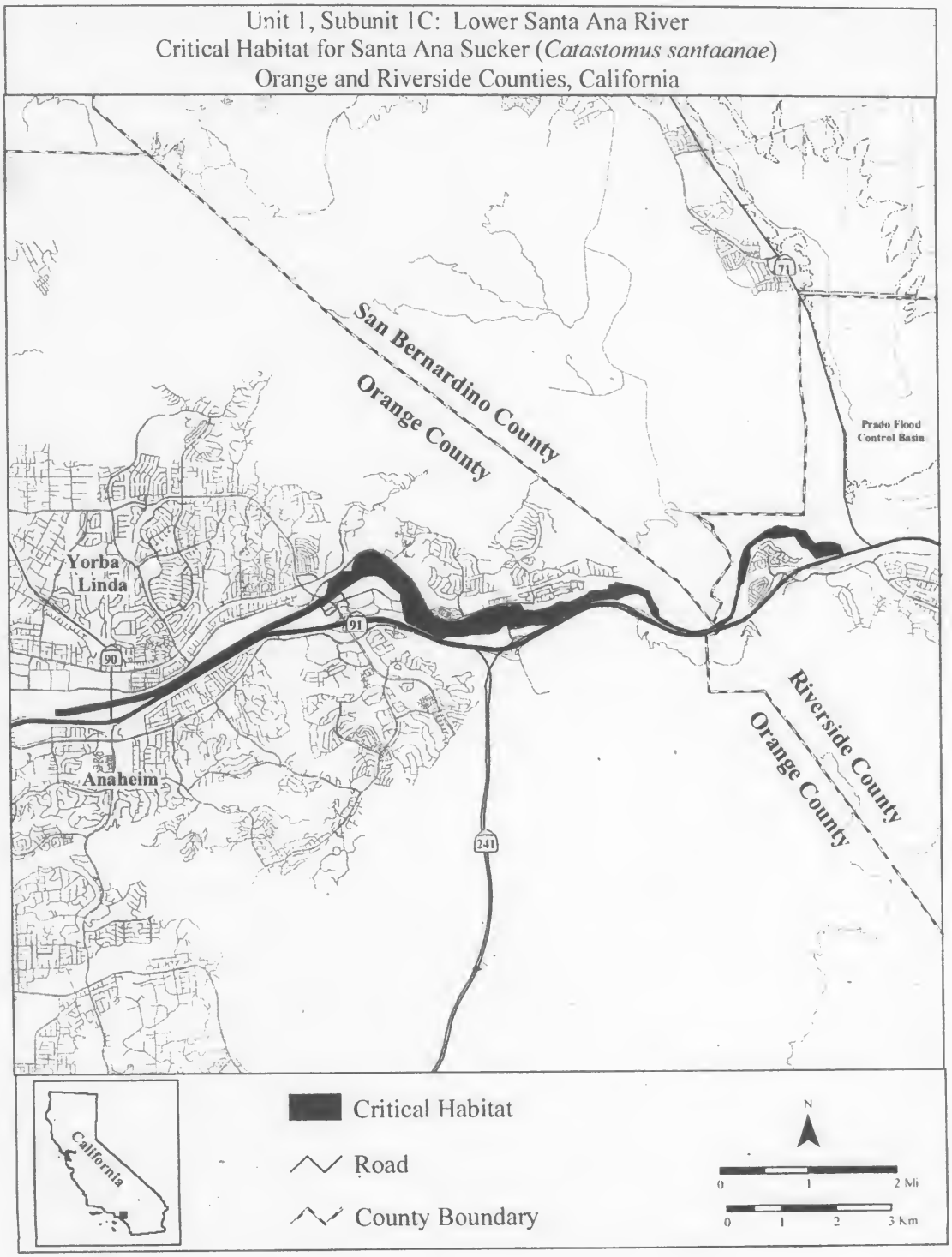
(B) Map of Subunit 1B: (Santa Ana River) follows:



(iii) Subunit 1C: Lower Santa Ana River, Orange and Riverside Counties.

(A) [Reserved for textual description of Subunit 1C.]

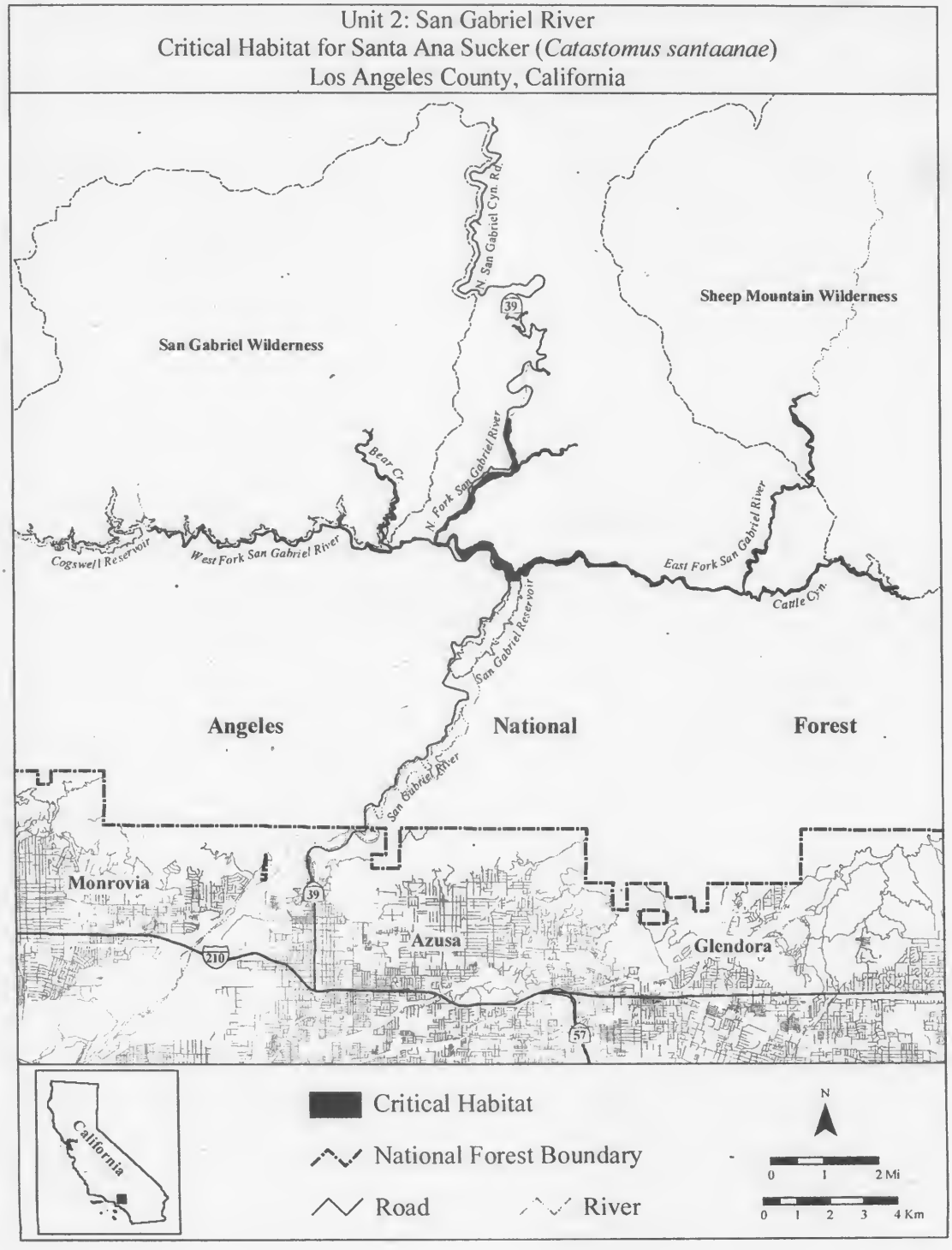
(B) Map of Subunit 1C (Lower Santa Ana River) follows:



(7) Unit 2: San Gabriel River, Los Angeles County, California.

(i) [Reserved for textual description of Unit 2.]

(ii) Map of Unit 2 (San Gabriel River) follows:



(8) Unit 3: Big Tujunga Wash, Los Angeles County, California.

(i) Subunit 3A: Big Tujunga Wash.

(A) [Reserved for textual description of Subunit 3A.]

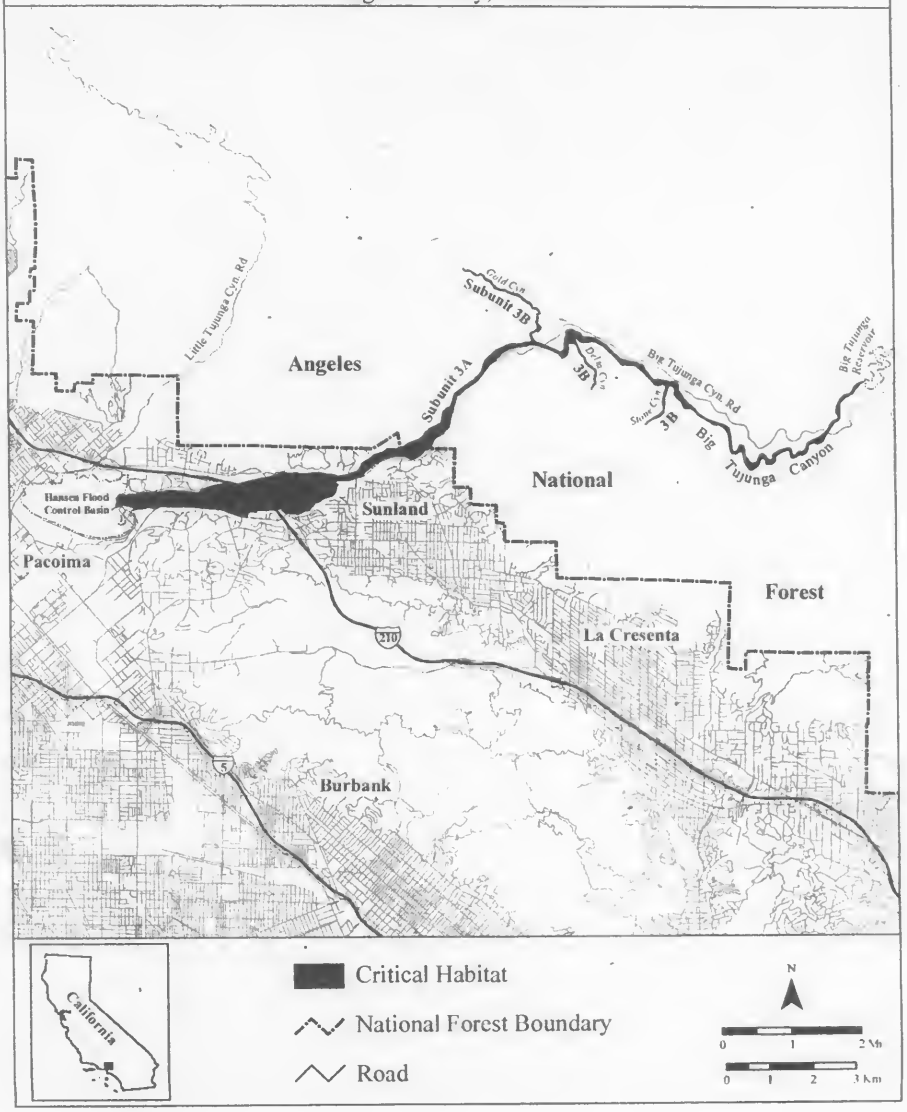
(B) Map of Subunit 3A (Big Tujunga Wash) appears in paragraph (8)(ii)(B) of this entry.

(ii) Subunit 3B: Gold Canyon, Delta Canyon, and Stone Canyon Creeks.

(A) [Reserved for textual description of Subunit 3B.]

(B) Map of Unit 3 (Big Tujunga Wash) follows:

Unit 3, Subunits 3A and 3B: Big Tujunga Wash
Critical Habitat for Santa Ana Sucker (*Catastomus santaanae*)
Los Angeles County, California



* * * * *

Dated: November 21, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–29024 Filed 12–8–09; 8:45 am]

BILLING CODE 4310–55–C

Notices

Federal Register
Vol. 74, No. 235
Wednesday, December 9, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Designation for the West Sacramento, CA; Frankfort, IN; Indianapolis, IN; and Virginia Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of the following organizations to provide official services under the United States Grain Standards Act, as amended (USGSA): California Agri Inspection Company, Ltd. (California Agri); Frankfort Grain Inspection, Inc. (Frankfort); Indianapolis Grain Inspection & Weighing Service, Inc. (Indianapolis); and Virginia Department of Agriculture and Consumer Services (Virginia).

DATES: *Effective Date:* January 1, 2010.

ADDRESSES: William A. Ashley, Acting Branch Chief, Review Branch, Compliance Division, GIPSA, USDA, STOP 3604, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604

FOR FURTHER INFORMATION CONTACT: William A. Ashley, 202–720–8262 or *William.A.Ashley@usda.gov.*

READ APPLICATIONS: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

SUPPLEMENTARY INFORMATION: In the June 1, 2009, **Federal Register** (74 FR 26199), GIPSA requested applications for designation to provide official services in the geographic areas presently serviced by the agencies named above. Applications were due by July 1, 2009.

California Agri, Frankfort, Indianapolis, and Virginia were the sole applicants for designations to provide official services in these areas. As a result, GIPSA did not ask for additional comments.

GIPSA evaluated all available information regarding the designation criteria in section 7(f)(l) of the USGSA (7 U.S.C. 79(f)) and determined that California Agri, Frankfort, Indianapolis, and Virginia are able to provide official services in the geographic areas specified in the June 1, 2009, **Federal Register** for which they applied. These designation actions to provide official services in the specified areas are effective January 1, 2010, and terminate on December 31, 2012.

Interested persons may obtain official services by calling the telephone numbers listed below:

Official agency	Headquarters location and telephone	Designation start	Designation end
California Agri	West Sacramento, CA (916–374–9700), Additional Locations: Corcoran and Stockton, CA.	1/1/2010	12/31/2012
Frankfort	Frankfort, IN (765–258–3624)	1/1/2010	12/31/2012
Indianapolis	Indianapolis, IN (317–899–2337)	1/1/2010	12/31/2012
Virginia	Richmond, VA (804–786–0480), Additional Location: Chesapeake, VA	1/1/2010	12/31/2012

Section 7(f)(1) of the USGSA authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)(1)).

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary; however, designations may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Authority: 7 U.S.C. 71—87k.

J. Dudley Butler,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E9–29346 Filed 12–8–09; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2008-0094]

Pioneer Hi-Bred International, Inc.; Determination of Nonregulated Status for Corn Genetically Engineered for Tolerance to Glyphosate and Acetolactate Synthase-Inhibiting Herbicides

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that a corn line developed by Pioneer Hi-Bred International, designated as transformation event 98140, which has been genetically engineered for tolerance to glyphosate and acetolactate synthase-inhibiting herbicides, is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by the Pioneer Hi-Bred International in its petition for a determination of nonregulated status, our analysis of other scientific data, and comments received from the public in response to a previous notice announcing the availability of the petition for nonregulated status and its associated environmental assessment. This notice also announces the availability of our written determination and finding of no significant impact.

EFFECTIVE DATE: December 9, 2009.

ADDRESSES: You may read the petition, final environmental assessment, determination, finding of no significant impact, comments we received on our previous notice, and our responses to those comments in our reading room. The reading room is located in room

1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming. To view these documents on the Internet, go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0094*).

Other Information: Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

FOR FURTHER INFORMATION CONTACT: Dr. Michael Watson, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737-1236; (301) 734-0846, email: *michael.t.watson@aphis.usda.gov*. To obtain copies of the petition or the environmental assessment, contact Mrs. Cindy Eck at (301) 734-0667, email: *cynthia.a.eck@aphis.usda.gov*. The petition and the environmental assessment are also available on the Internet at (*http://www.aphis.usda.gov/brs/aphisdocs/07_15201p.pdf*) and (*http://www.aphis.usda.gov/brs/aphisdocs/07_15201p_ea.pdf*).

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests," regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered "regulated articles."

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

On June 1, 2007, APHIS received a petition seeking a determination of nonregulated status (APHIS Petition Number 07-152-01p) from Pioneer Hi-Bred International, Inc., of Johnston, IA (Pioneer), for corn (*Zea mays* L.) designated as transformation event 98140, which has been genetically engineered for tolerance to glyphosate and acetolactate synthase (ALS)-inhibiting herbicides, stating that corn line 98140 is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, the 98140 corn line has been genetically engineered to express modified glyphosate acetyltransferase (GAT4621) and modified maize acetolactate synthase (ZM-HRA) proteins. The GAT4621 protein, encoded by the *gat4621* gene, confers tolerance to glyphosate-containing herbicides by acetylating glyphosate and thus rendering it non-phytotoxic. The ZM-HRA protein, encoded by the *zm-hra* gene, confers tolerance to the ALS-inhibiting class of herbicides (e.g., sulfonylureas and imidazolinones). Expression of the *zm-hra* gene is controlled by the maize ALS (acetolactate synthase) promoter. ALS is the enzyme required for the production of essential branched-chain amino acids such as valine, leucine, and isoleucine. The *gat4621* gene is based on the sequences of three *gat* genes from *Bacillus licheniformis*, a common soil bacterium. Expression of the *gat4621* gene is driven by the corn ubiquitin promoter (*ubi*ZM1). The *zm-hra* gene was made by isolating the herbicide sensitive maize *ALS* gene and introducing two specific changes known to confer herbicide tolerance to tobacco ALS.

The genetic insert also contains the terminator sequence from *Solanum tuberosum* (potato) and two sequences from two prevalent plant pests, cauliflower mosaic virus (enhancer) and *Agrobacterium tumefaciens* (border region). All of these sequences are well-characterized and are non-coding regulatory regions only. Therefore, these sequences will not cause the 98140 corn line to promote plant disease.

A single copy of these genes and other DNA regulatory sequences were introduced into the corn genome with the transformation vector PHP24279 using disarmed (non-plant pest causing) *A. tumefaciens* transformation of immature embryos. Plant cells containing the introduced DNA were selected by culturing in the presence of glyphosate. After the initial transformation, the antibiotic carbenicillin was included in the culture medium to kill any remaining *Agrobacterium*. Therefore, no part of the plant pest *A. tumefaciens* remains in Pioneer HT corn due to the transformation method.

Pioneer's 98140 corn line has been considered a regulated article under the regulations in 7 CFR part 340 because it contains gene sequences from plant pathogens. The 98140 corn line has been field tested in the United States since 2005 as authorized by APHIS notifications and permits. In the process of reviewing the permits for field trials of the subject corn, APHIS determined that the vectors and other elements used to introduce the new genes were disarmed and that the trials, which were conducted under conditions of reproductive and physical confinement or isolation, would not present a risk of plant pest introduction or dissemination. Field tests conducted under APHIS regulatory oversight allowed for evaluation in a natural agricultural setting while imposing measures to minimize the risk of persistence in the environment after completion of the test. Data are gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These field test data, in turn, are used by APHIS to determine if the regulated corn event poses a plant pest risk. Pioneer has petitioned APHIS to make a determination that the 98140 corn line and the progeny derived from its crosses with other nonregulated corn will no longer be considered regulated articles under 7 CFR part 340.

In a notice[1] published in the **Federal Register** on December 8, 2008 (73 FR 74453-74454, Docket No. APHIS-2008-0094), APHIS announced the availability of Pioneer's petition and its associated draft environmental assessment (EA) for public comment. APHIS solicited comments on whether the subject corn would present a plant pest risk and on the EA. APHIS received 31 unique comments during the comment period. There were 12 comments from groups or individuals who supported deregulation and 19 from those who opposed deregulation; attached to one of these comments were 13,255 form letters (same letter, different submitters). In addition, APHIS received a number of documents attached to 12 blank comments. APHIS has addressed the issues raised during the comment period and has provided responses to these comments as an attachment to the finding of no significant impact.

[1] To view the notice, petition, EA, and the comments we received, go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0094*).

Determination

Based on APHIS' analysis of field, greenhouse, and laboratory data submitted by Pioneer, references provided in the petition, information described in the EA, comments provided by the public, and information provided in APHIS' response to those public comments, APHIS has determined that 98140 corn will not pose a plant pest risk and should be granted nonregulated status for the following reasons: (1) Gene introgression from Pioneer HT corn into wild relatives in the United States and its territories is extremely unlikely and is not likely to increase the weediness potential of any resulting progeny nor adversely affect genetic diversity of related plants any more than would introgression from traditional corn varieties; (2) it exhibits no characteristics that would cause it to be weedier than the non-genetically engineered parent corn line or any other cultivated corn; (3) horizontal gene transfer is unlikely to occur between Pioneer HT corn and soil bacteria; (4) based on its lack of toxicity and allergenicity, it does not pose a risk to non-target organisms, including beneficial organisms and federally listed threatened or endangered species, and species proposed for listing; (5) considering its cultivation in the agroecosystem, it does not pose a risk to non-target organisms, including threatened and endangered species, or designated critical habitat as a result of the use of EPA-registered glyphosate and ALS-inhibiting herbicides, as these have been safely used in corn for many years; (6) it does not pose a threat to biodiversity as it does not exhibit traits that increase its weediness, its unconfined cultivation should not lead to increased weediness of other cultivated corn, and it exhibits no changes in disease susceptibility; (7) its commercial use should not have significant effects on agricultural practices; (8) compared to current corn pest and weed management practices, cultivation of Pioneer HT corn should not impact standard agricultural practices in corn cultivation including those for organic growers; (9) it should not cause significant impacts on the development of herbicide resistant weeds or cumulative impacts in combination with other herbicide tolerant crops; (10) agronomic performance, disease and insect susceptibility, and compositional profiles of Pioneer HT corn are similar to those of its parent line and other corn cultivars grown in the United States, therefore no direct or indirect plant pest effects on raw or processed plant commodities are expected; (11) when considered in light of other actions, APHIS identified no significant environmental impacts that would result from a determination to grant nonregulated status to Pioneer HT corn.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the determination of nonregulated status for 98140 corn, an EA was prepared. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on that EA, the response to public comments, and other pertinent scientific data, APHIS has reached a finding of no significant impact (FONSI) with regard to the determination that Pioneer's 98140 corn line and lines developed from it are no longer regulated articles under its regulations in 7 CFR part 340. Copies of the EA and FONSI are available as indicated in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections of this notice.

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 3rd day of December 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–29264 Filed 12–8–09: 8:45 am]

BILLING CODE: 3410–34–S

DEPARTMENT OF AGRICULTURE

Forest Service

Eastern Arizona Counties Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Eastern Arizona Counties Resource Advisory Committee will meet in Pinetop, Arizona. The purpose of the meeting is to review and recommend funding of project proposals in accordance with Public Law 110–343 (the Secure Rural Schools and Community Self-Determination Act).

DATES: The meeting will be held January 7, 2010 starting at 10 a.m. Should this meeting be postponed due to inclement weather, the alternate meeting date is December 12, 2010.

ADDRESSES: The meeting will be held in the conference room of the Arizona Game and Fish Department Regional Office, 2878 East White Mountain Boulevard, Pinetop, Arizona 85935. Send written comments to Julia Faith Rivera, Coordinator, Eastern Arizona Counties Resource Advisory Committee, c/o Forest Service, USDA, P.O. Box 640, Springerville, Arizona 85938 or electronically to *jfrivera@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Julia Faith Rivera, Apache-Sitgreaves National Forests, (928) 333–4301.

SUPPLEMENTARY INFORMATION: The meeting is open to the public and opportunity for public input will be provided. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Public Law 110–343 related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: December 3, 2009.

Chris Knopp,

Forest Supervisor, Apache-Sitgreaves National Forests.

[FR Doc. E9–29301 Filed 12–8–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Opportunity for Designation in the Muncie, IN; Fremont, NE; Maryland; and West Lafayette, IN Areas; Request for Comments on the Official Agencies Servicing These Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: The designations of the official agencies listed below will end on June 30, 2010. We are asking persons or governmental agencies interested in providing official services in the areas presently served by these agencies to submit an application for designation. In addition, we are asking for comments on the quality of services provided by the following designated agencies: East Indiana Grain Inspection, Inc. (East Indiana); Fremont Grain Inspection Department, Inc. (Fremont); Maryland Department of Agriculture (Maryland); and Titus Grain Inspection, Inc. (Titus).

DATES: Applications and comments must be received on or before January 4, 2010.

ADDRESSES: Submit applications and comments concerning this notice using any of the following methods:

- *Internet:* Apply using FGIS*online* (*https://fgis.gipsa.usda.gov/default_home_FGIS.aspx*) by clicking on the Delegations/Designations and Export Registrations (DDR) link. You will need to obtain an FGIS*online* customer number and USDA eAuthentication username and password prior to applying. Submit comments at *http://www.regulations.gov*. Instructions for submitting and reading comments are detailed on the site.
- *Hand Delivery/Courier Address:* William A. Ashley, Acting Review Branch Chief, Compliance Division, GIPSA, USDA, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250.
- *Mail:* William A. Ashley, Acting Review Branch Chief, Compliance Division, GIPSA, USDA, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604.
- *Fax:* William A. Ashley, 202–690–2755.
- *E-mail:* *William.A.Ashley@usda.gov*.

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

FOR FURTHER INFORMATION CONTACT: William A. Ashley, 202–720–8262 or *William.A.Ashley@usda.gov*.

SUPPLEMENTARY INFORMATION: Section 7(f)(1) of the United States Grain Standards Act (USGSA) (7 U.S.C. 71–87k) authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services. Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Areas Open for Designation

East Indiana

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the States of Indiana and Ohio are assigned to this official agency:

- Blackford, Delaware, Fayette, Grant (east of State Route 5 and north of State Route 18), Henry, Jay, Madison (north of State Route 132 and east of State Route 13), Randolph, Rush, Union, and Wayne Counties in Indiana.
- Darke County, Ohio.

Fremont

Pursuant to Section 7(f)(2) of the Act, the following geographic areas in the States of Iowa and Nebraska are assigned to this official agency:

- Carroll (west of U.S. Route 71), Clay (west of U.S. Route 71), Crawford, Dickinson (west of U.S. Route 71), Harrison (east of State Route 183), O'Brien (north of County Road B24 and east of U.S. Route 59), Osceola (east of U.S. Route 59), and Shelby Counties in Iowa.
- Burt, Butler, Colfax, Cuming, Dodge, Madison (east of U.S. Route 81), Pierce (east of U.S. Route 81 and South of U.S. Route 20), Platte, Polk, Saunders (west of U.S. Route 77), Stanton, Washington (north of State Route 91), and Wayne Counties in Nebraska.

Fremont also services two elevators within Omaha Grain Inspection Service, Inc.'s area: Farmers Union Cooperative Association and Krumel Grain and Storage, both located in Wahoo, Saunders County, Nebraska.

Fremont's assigned geographic areas do not include the following grain elevators:

- Huskers Cooperative Grain Company located in Columbus, Platte County, Nebraska (serviced by Hastings Grain Inspection, Inc.).
- United Farmers Cooperative located in Rising City, Butler County and two elevators in Shelby, Polk County, Nebraska (serviced by Omaha Grain Inspection Service, Inc.).

Maryland

Pursuant to Section 7(f)(2) of the Act, the entire State of Maryland, except those export port locations within the State, is assigned to this official agency.

Titus

Pursuant to Section 7(f)(2) of the Act, the following geographic area within the State of Indiana is assigned to this official agency:

- Benton, Carroll (north of State Route 25), Fountain (east of U.S. Route 41), Jasper (south of U.S. Route 24), Newton (east of State Route 55 and south of U.S. Route 24), Pulaski, Tippecanoe, Warren (east of U.S. Route 41), and White Counties.

Titus also services the following grain elevators located within Champaign-Danville Grain Inspection Department, Inc. and Frankfort Grain Inspection, Inc.'s service areas:

- Boswell Chase Grain, Inc., Boswell, Benton County; Archer Daniels Midland Company, Dunn, Benton County; and Archer Daniels Midland Company, Raub, Benton County (Champaign-Danville Grain Inspection Department, Inc.'s, area).
- The Andersons, Delphi, Carroll County; Frick Services, Inc., Leiters Ford, Fulton County; and Cargill, Inc., Linden, Montgomery County (Frankfort Grain Inspection, Inc.).

Opportunity for Designation

Interested persons or governmental agencies may apply for designation to provide official services in the geographic areas specified above under the provisions of section 7(f) of the USGSA and 7 CFR 800.196(d). Designation in the specified geographic areas is for the period beginning July 1, 2010, and ending June 30, 2013. To apply for designation or for more information, contact William A. Ashley at the address listed above or visit GIPSA's Web site at *http://www.gipsa.usda.gov*.

Request for Comments

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the East Indiana, Fremont, Maryland, and Titus official agencies. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicants. Submit all comments to William A. Ashley at the above address or at *http://www.regulations.gov*.

We consider applications, comments, and other available information when determining which applicant will be designated.

Authority: 7 U.S.C. 71–87k.

J. Dudley Butler,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E9–29349 Filed 12–8–09; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Proposed New Fee Site; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447)

AGENCY: Arapaho-Roosevelt National Forest, USDA Forest Service.

ACTION: Notice of Proposed New Fee Site.

SUMMARY: The Arapaho-Roosevelt National Forest is proposing to charge a $90 expanded amenity recreation fee for

the overnight rental of the historic Squaw Mountain Fire Lookout. Fees are assessed based on the level of amenities and services provided, cost of operations and maintenance, market assessment and public comment. The fee is proposed and will be determined upon further analysis and public comment. Funds from fees would be used for the continued operation, maintenance and improvements of this lookout. An analysis of the lookout shows that the proposed fees are reasonable and typical of comparable sites.

DATES: Comments will be accepted through February 28, 2010. New fees would begin the summer 2010.

ADDRESSES: Daniel Lovato, District Ranger, Clear Creek Ranger District, P.O. Box 3307, Idaho Springs, CO 80452.

FOR FURTHER INFORMATION CONTACT: Nicole Malandri, Clear Creek Ranger District Recreation Fee Manager, 303–567–3016.

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) instruct the Secretary of Agriculture to publish a six month advance notice in the Federal Register whenever new recreation fee areas are established. Once public involvement is complete, these new fees will be reviewed by a Recreation Resource Advisory Committee prior to a final decision and implementation. People wanting to rent Squaw Mountain Lookout will need to do so through the National Recreation Reservation Service, at *http://www.recreation.gov* or by calling 1–877–444–6777 when it becomes available.

Dated: November 24, 2009.

Glenn P. Casamassa,

Forest Supervisor.

[FR Doc. E9–29234 Filed 12–8–09; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Wednesday, December 16, 2009; 11:30 a.m. EST.

PLACE: Via Teleconference, Public Dial In—1–800–597–7623, Conference ID # 45249677.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda
II. State Advisory Committee Issues
- Pennsylvania

III. Program Planning
- Update on Status of Title IX Project
- Motion to Approve Institutions to be Included in Project
- Update on Status of 2010 Enforcement Report
- Multi-Ethnic Placement Act Briefing Report
- Consideration of Findings & Recommendations
- Motion to Approve MEPA Finding #9
- Motion to Approve MEPA Recommendation #3
- Motion to Approve MEPA Recommendation #8
- Consideration of Deadlines for Concurring or Dissenting Statements & Rebuttals
- Discussion of Timetable for Future Briefings

IV. Approval of December 4, 2009 Meeting Minutes
V. Staff Director's Report
VI. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: December 4, 2009.

Martin Dannenfelser,

Staff Director.

[FR Doc. E9–29382 Filed 12–7–09; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

2009 Calculation of Expected Non-Market Economy Wages

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Finalization and Effective Date of 2009 Expected Non-Market Economy Wage Calculation.

SUMMARY: On October 7, 2009, the Department of Commerce ("Department") published the preliminary calculation of the 2009 expected non-market economy ("NME") wages, and provided the public with an opportunity to comment on potential clerical errors. *See Expected Non-Market Economy Wages: Request for Comments on 2009 Calculation,* 74 FR 51555 (October 7, 2009) ("*2009 preliminary calculation*"). The 2009 calculation was based on 2007 data and the methodology described in the *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, October 19, 2006 ("*Antidumping Methodologies Notice*"). Subsequently, the Department received comments from King & Spalding LLP on behalf of U.S. domestic industry ("domestic industry") regarding the Department's *2009 preliminary calculation*, as further discussed below. The Department received no other comments. This notice constitutes the Department's announcement of the finalization and effective date of the 2009 calculation.

DATES: These expected NME wage rates are finalized on the date of publication of this notice in the **Federal Register** and will be in effect for all antidumping proceedings for which the Department's final decision is due after the publication of this notice.

FOR FURTHER INFORMATION CONTACT: Bobby Wong, International Trade Analyst, Operations Office IX, or Christopher Mutz, Import Policy Analyst, Office of Policy, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0409 and (202) 482–0235, respectively.

SUPPLEMENTARY INFORMATION: Domestic industry claims that the Department committed several clerical errors in its calculation of the surrogate wage rate, which should be correct for the final calculation.

Domestic industry claims that the Department erred by applying International Labour Statistics ("ILO") "wages" data rather than "earnings" data of five countries. Domestic industry cites the *Antidumping Methodologies Notice,* which specifies that the Department will only use reported earnings data, and should therefore exclude from the dataset countries for which there is no available earnings data, including Honduras, Indonesia, Peru, and the Philippines. However, domestic industry claims that, while the Department erred by applying wages data for Hong Kong, the ILO also reported suitable Hong Kong earnings data, and should therefore revise the dataset to include the Hong Kong earnings data rather than wages data.

Also, domestic industry claims that the Department erred by selecting 2006 ILO data for Germany over base year 2007 data. Domestic industry asserts that the *Antidumping Methodologies Notice* specifies that the Department

shall choose base year data over prior year data.

Moreover, domestic industry also states that, for countries in which the Department relied on prior year 2006 data, the Department erred by applying the 2006 exchange rate to the earnings data prior to inflating using the *International Financial Statistics* ("IFS") published consumer price index ("CPI"). Domestic industry claims that the *Antidumping Methodologies Notice* specifies that the Department shall first inflate using CPI and subsequently apply the base year exchange rate to convert the foreign currency into U.S. dollars using the reported 2007 IFS exchange rate. Moreover, in applying the exchange rate, domestic industry asserts that the Department should consistently apply the reported six-digit exchange rate. Furthermore, domestic industry notes that, because the IMF did not provide a 2007 Egyptian period average exchange rate for Egypt, the Department should exclude the country from the dataset.

Lastly, domestic industry notes that, subsequent to the data available to the Department for the *2009 preliminary calculation*, the World Bank (*World Development Indicators*) published a corrected gross national income ("GNI") for the People's Republic of China ("PRC"), and argues that the Department should apply the corrected value in calculating the expected 2009 wage rate for the PRC.

Department's Position

With respect to the Department's criteria to use only earnings data, the Department agrees with domestic industry that the calculation inappropriately included wages data in the regression dataset. The *Antidumping Methodologies Notice* specifies that the Department will only use data that is reported as "earnings" by the ILO. *See Antidumping Methodologies Notice*, at 61721–22. Therefore, for the final 2009 wage rate recalculation, the Department has excluded Honduras, Indonesia, Peru, and the Philippines from the regression dataset, and applied the appropriate earnings data for Hong Kong.

With respect to the 2006 ILO data for Germany, the Department agrees with domestic industry that it erred in selecting 2006 ILO data over base year data. The *Antidumping Methodologies Notice* states that, if more than one record exists which meets the prescribed data requirements, the Department will choose the data point from the base year over data from previous years. *See Antidumping Methodologies Notice*, at 61722. Therefore, for the final 2009 wage rate recalculation, the Department has revised the dataset to include the 2007 ILO wages data for Germany.

The Department also agrees with domestic industry that the Department erred by converting foreign denominated 2006 earnings data using the 2006 IFS exchange rate prior to applying the CPI inflator. The *Antidumping Methodologies Notice* states that data meeting the Department's selection requirements shall be adjusted using the CPI inflator prior to conversion to U.S. dollars using the base year exchange rate. *See Antidumping Methodologies Notice*, at 61723. Therefore, for the final 2009 wage rate recalculation, the Department has applied the sequence as described in the *Antidumping Methodologies Notice*. The Department also applied the full six-digit exchange rate for the base year as reported by the IFS. Furthermore, the Department has excluded Egypt from the regression dataset since the period average exchange rate for Egypt in 2007 was not available from IFS.

With respect to the corrected 2007 PRC GNI data published by the *World Development Indicators*, which was updated subsequent to the publication of the *2009 preliminary calculation*, the Department finds that while the error is not a ministerial error committed by the Department in the recalculation, the revision is due to an error by the World Bank. *See Data & Statistics: Errata* at *http://go.worldbank.org/UA5M23MPU0*. Therefore, for the final 2009 expected wage rate recalculation, the Department has revised the per-capital GNI for the PRC to reflect the corrected GNI.

Results

Following the data compilation and regression methodology described in the *Antidumping Methodologies Notice*, and using Gross National Income and wage data for 2007, the regression results are: Wage = 0.328698 + 0.00043957 * GNI. The final expected NME wage rates, as calculated with the above mentioned changes, are shown in Attachment 1.

Dated: December 2, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

ATTACHMENT 1

	2007 GNI	Expected wages
Armenia	2,580.00	1.46
Azerbaijan, Rep. of	2,710.00	1.52
Belarus	4,240.00	2.19
China, P.R.: Mainland	2,410.00	1.39

ATTACHMENT 1—Continued

	2007 GNI	Expected wages
Georgia	2,090.00	1.25
Kyrgyz Republic	610.00	0.60
Moldova	1,130.00	0.83
Tajikistan	460.00	0.53
Uzbekistan	730.00	0.65
Vietnam	770.00	0.67

The World Bank did not publish a GNI for Turkmenistan.

The final results and underlying data for the 2009 calculation have been posted on the Import Administration Web site at (*http://ia.ita.doc.gov*).

[FR Doc. E9–29357 Filed 12–8–09; 8:45 am]
BILLING CODE P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2009–0054]

Request for Comments on Enhancement in the Quality of Patents

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO) has in place procedures for measuring the quality of patent examination, including the decision to grant a patent based on an application and of other Office actions issued during the examination of the application. The USPTO in conjunction with the Patent Public Advisory Committee (PPAC) has undertaken a project related to overall patent quality. This notice is one element in that endeavor. As part of this effort to improve the quality of the overall patent examination and prosecution process, to reduce patent application pendency, and to ensure that granted patents are valid and provide clear notice, the USPTO would like to focus, *inter alia*, on improving the process for obtaining the best prior art, preparation of the initial application, and examination and prosecution of the application. The USPTO is seeking public comment directed to this focus with respect to methods that may be employed by applicants and the USPTO to enhance the quality of issued patents, to identify appropriate indicia of quality, and to establish metrics for the measurement of the indicia. This notice is not directed to patent law statutory change or substantive new rules. It is directed to the shared responsibility of the USPTO and the public for improving quality and reducing pendency within the

existing statutory and regulatory framework.

Comment Deadline Date: To be ensured of consideration, written comments must be received on or before February 8, 2010. No public hearing will be held.

ADDRESSES: Written comments should be sent by electronic mail message over the Internet addressed to *patent_quality_comments@uspto.gov*. Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kenneth M. Schor and Pinchus M. Laufer. Although comments may be submitted by mail, the USPTO prefers to receive comments via the Internet.

The written comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the USPTO Internet Web site (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: By telephone: Pinchus M. Laufer, Legal Advisor, at (571) 272–7726, or Kenneth M. Schor, Senior Legal Advisor, at (571) 272–7710; by mail addressed to U.S. Patent and Trademark Office, Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Pinchus M. Laufer and Kenneth M. Schor; or by electronic mail (e-mail) message over the Internet addressed to *pinchus.laufer@uspto.gov* or *kenneth.schor@uspto.gov*.

SUPPLEMENTARY INFORMATION: This notice is directed to the quality of the examination and prosecution of patent applications in the USPTO and the quality of patents resulting from that examination and prosecution.

I. Purpose of Notice

The USPTO is responsible for the granting and issuing of patents. *See* 35 U.S.C. 2(a)(1). The USPTO examines patent applications to determine whether an applicant is entitled to a patent under the law, and issues a notice of allowance if, upon such examination, it appears that the applicant is entitled to a patent. *See* 35 U.S.C. 131 and 151. The USPTO examines applications for compliance with the applicable statutes and regulations, and for patentability of the invention as defined in the claims. *See* 37 CFR 1.104(a).

The USPTO is seeking to improve the quality of the examination of patent applications and patents resulting from that examination.

A quality patent is defined, for purposes of this notice, as a patent: (a) For which the record is clear that the application has received a thorough and complete examination, addressing all issues on the record, all examination having been done in a manner lending confidence to the public and patent owner that the resulting patent is most likely valid; (b) for which the protection granted is of proper scope; and (c) which provides sufficiently clear notice to the public as to what is protected by the claims. The present quality improvement effort has, as one goal, reduction of overall application pendency and is thus also directed towards identifying quality issues that give rise to process inefficiencies. The term "quality patent" as used herein does not include the economic value of the resulting patent, which is a result of market conditions and not the patent process itself. Rather, providing the strongest quality patent possible in the shortest time permits making the best use of a patent, given any set of marketing conditions.

Improvement of the quality can reliably be achieved by a four step process:

(1) Identification of the key aspects of the examination process that affect quality. These key aspects are the quality items—*i.e.*, activities and actions carried out by the USPTO, by the applicant, or by both;

(2) Identification of indicia of the presence (existence) of the desired quality items;

(3) Establishment of a process that can meaningfully measure such indicia (establishing the metrics that can measure the indicia); and

(4) Establishment/modification of policy and USPTO operations to optimize successful performance of the quality items (activities and actions carried out) to bring about desired improvements in patent quality and reductions in patent application pendency.

The public is being requested to comment on items that affect patent quality, as well as addressing patent process inefficiencies with the aim of simultaneously improving patent quality while reducing overall application pendency. It is preferred that comments be provided in the manner set forth in the "Public Comments Requested" section of this notice (which immediately follows this section) and address the criteria for evaluating such comments set out below in Section III of this notice. In this regard, the USPTO is seeking comments from the public on improved methods of identifying indicia of existing quality items, and additional metrics for the measurement of indicia of existing quality items. Improvement to the monitoring of existing quality items should include methods of more reliable and efficient monitoring, as well as methods for making procedural changes based on the results of the monitoring. The USPTO desires to assess whether existing measures are reflective of the quality items they are designed to measure, how these measures can be improved upon, whether other measures could better assess the same quality items, and whether there are other aspects more indicative of quality that can be readily measured and used to improve quality and reduce application pendency.

The public is also being requested to comment on suggested quality items of particular interest identified below in Section V of this notice by which the examination process can be meaningfully enhanced, or to suggest other key quality items; to identify appropriate indicia of the enhancement of quality provided by the quality items; and to establish metrics for the measurement of the indicia of enhancement. These quality items of particular interest, which will be discussed below, include (but are not limited to) identifying and analyzing the best prior art and evidence bearing on patentability, facilitating the presentation of the positions of the USPTO and the applicant to each other, coming to a definitive resolution of the issues that are presented which resolution is clearly stated, and presenting a clearly identified scope of the patent coverage, to provide the strongest quality patent possible in the shortest time.

II. Categories of Public Comments Requested

For ease of organization and analysis, the areas for which the USPTO is requesting comment by way of this notice are divided into specific categories. The categories for which public comments are solicited are as follows:

Category 1—Quality measures used: The USPTO is specifically requesting feedback on the quality measures that it is currently using (described below in Section IV.A), and new measures that it may adopt in the future. As to quality measures currently in place, the USPTO desires to assess whether these

measures are reflective of the quality items they are designed to measure, whether these measures can be improved upon, whether other measures could better assess the same quality items, and whether there are other aspects more indicative of quality that can be readily measured.

Additionally, areas in which the USPTO is particularly interested are those of: (1) Finding the best prior art; (2) obtaining a comprehensive initial application; (3) providing a comprehensive first Office action on the merits including a clear explanation of all issues raised; (4) obtaining a comprehensive and clear response to Office actions on the merits; and (5) proper use of interviews. These are discussed in Section V of this notice. The public is invited to comment on those areas, including suggesting modifications of the USPTO's suggestions. In addition, the public is invited to suggest other areas of the process which are believed to have a significant bearing on quality. Any such suggestions should be accompanied by an explanation of the basis for the belief that the suggested area(s)/modification(s) has/have a significant bearing on quality.

The USPTO is requesting that such feedback be provided in terms of the following information:

A. Identification of the key items, *i.e.*, the activities and actions that are carried out by the USPTO, by the applicant, or by both, that bear on quality. What is the nature of activity, action, or conduct that increases quality, and why is it believed to do so?

B. Identification of indicia of the presence of the desired quality items. How do the proposed indicia show that the desired activities and actions were indeed carried out, and show the quality or effectiveness of that activity performed by the USPTO and/or the applicant?

C. What metric(s) should the USPTO use to measure each indicium, and what is the nexus between the measured indicium and the metric(s) used (why is the existence of the indicium proved by the metric)? Based on that nexus, why is the proposed metric believed to provide a practical combination of reliability and efficiency?

Category 2—Stages of Monitoring: With a view toward reducing patent pendency, the USPTO is considering the monitoring of quality at each step, or at as many steps, in the patent application, prosecution, and examination processes as is feasible, and monitoring of quality as close in time to when the step whose quality is being measured is performed as is feasible. The USPTO is specifically considering monitoring quality at each of the following stages of the patent application and examination process: (1) When the application is filed in the USPTO; (2) when the initial search for the application has been completed; (3) when the first Office action for the application has been completed; (4) when an interview for the application has been conducted; (5) when a reply to the first or any subsequent non-final Office action has been filed; (6) when an Office action (non-final or final) or notice of allowance in response to a reply to a non-final Office action has been completed; (7) when an after-final submission has been filed; and (8) when an appeal brief or other appeal-related paper has been filed.

The USPTO is requesting comments on the choice of these stages, and the practicality of measuring quality at each one of these stages. It is requested that the public point out at what step or steps in the patent application and examination process the USPTO should measure the quality obtained by the identified activity, action, or conduct that increases quality. While measuring quality at each stage may yield much information, it seems credible that increasing quality of the application in the early stages would be most effective in reducing pendency, and the USPTO is seeking comment on this hypothesis.

The public is also invited to provide information on how quality is affected by action taken in the above-identified eight stages, or in other stages in the patent application process and to identify the nature of activity, action, or conduct that increases quality in that stage—such information would be included as "other areas of the process which are believed to have a significant bearing on quality" in the comments responding to Category (1) of this section. Also included would be how the USPTO should measure the quality obtained at each such step, and the nexus between the targeted quality aspect and the measured indicia of the activity, action, or conduct that increases quality in that stage.

Feedback from the USPTO: In connection with this category, the USPTO is also requesting input on the timing of the USPTO's *assessment and reporting* of various measures of quality in relation to the stages of monitoring. For example, should the USPTO await final disposition of the application before reporting on the quality measure obtained for that application? Or, would there be a practical, cost-effective way for the USPTO to report quality measures, during certain identified stages in the proceeding to be identified in the comments (with an explanation of why it would be practical and cost-effective)?

Category 3—Pendency: The USPTO is also requesting comments on whether the quality of the prosecution and examination of the application and quality of the resultant patent can be improved at the same time as reducing the overall pendency of an application. This category also includes input on how the use of continuing applications (continuations, voluntary divisional applications) has affected overall pendency and quality. For example, where specific claims are allowed in a given application, does the filing of a continuation application to address the broader rejected claims add to or detract from the quality of prosecution and examination of the applications and the quality of the resultant patents?

Category 4—Pilot Programs: The USPTO is interested in receiving feedback regarding the effect on patent quality and examination quality resulting from various pilot programs (*e.g.*, Peer-to-Patent, Pre-Appeal Brief Conference Pilot, First Action Interview Pilot, Continuing Education for Practitioners (CEP) Pilot) either expired or currently in effect. This quality effort does not include at this time providing selection options for different examination procedures such as deferred examination. Input as to what metrics could be used to measure enhancements of quality due to any of these pilot programs is also solicited.

Category 5—Customer Surveys Regarding Quality: The USPTO is requesting feedback on past USPTO surveys of the patent community and proposed modifications for future surveys. In 2006 the USPTO launched the Customer Panel Quality Survey (CPQS). The survey is designed to capture input from the USPTO's frequent customers regarding key examination quality issues and to provide customers with a mechanism to suggest critical training needs and areas on which the USPTO should focus in terms of quality improvement. The survey is also designed to assist the USPTO in monitoring changes in patent examination quality between survey periods.

The USPTO partners with an independent research firm to administer the CPQS. The survey has been administered in regular survey periods or "waves" on a roughly quarterly basis from fiscal year 2006 through fiscal year 2009. The target population for the survey is a panel of patent customers who have had the most interaction with the USPTO over the past year. Top filers are defined as law firms, organizations, or individual inventors who have

submitted six or more patent applications in the previous year. The survey uses a rotating panel survey design; customers are asked to participate in two consecutive survey periods in order to provide valid trend comparisons between survey periods. On average, there have been about 1,100 respondents per survey period. Survey results are analyzed on a quarterly basis to assist USPTO in developing data-driven improvement strategies on topics related to examination quality.

The USPTO is interested in comments regarding survey composition and methodology, such as questions, format, and population. Comments as to how survey results can be more effectively used to enhance quality are also solicited.

Category 6—Tools for Achieving Objectives: The USPTO is requesting identification of existing tools which are, or can be made, available to users and the USPTO to enhance the quality of the USPTO's processes. Such would include, for example, software tools that will provide meaningful monitoring, search tools, claim analysis tools, and case law identification tools. In addition, the USPTO is interested in data mining tools to help monitor its quality items and other useful statistics.

Category 7—Incentives: The USPTO is requesting comments on means to incentivize applicants and USPTO personnel to adopt procedures and practices that support the achievement of patent quality. It is recognized that any additional effort to increase the quality of the product has an associated cost.

The criteria used to evaluate comments and proposals are set out below in section III which immediately follows. Comments should consider these criteria and address them as best possible to enhance the value and impact of any proposals and comments.

III. Criteria for Evaluating Comments and Proposals

Public input which is received will be evaluated in terms of:

(a) The feasibility of implementation of each proposed enhancement;

(b) The relative value of the proposed enhancement—

1. Will it affect a statistically significant number of cases, as compared to other suggestions?

2. Will there be any negative consequences of proposed enhancement to the USPTO and practitioners that could outweigh the benefits of it implementation?

3. Will cost/expenditure in USPTO resources outweigh the benefits of it implementation?

(c) The ability to provide clear indicia of successful quality enhancement, and metrics that will meaningfully measure the results of such enhancement—

1. Are there associated metrics that accurately reflect the indicia?

2. Are there indicators associated with the metric that are capable of accurately reflecting meaningful progress?

3. Do the indicia and metrics reflect a behavior that can, in response to its being tracked, affect a statistically significant number of cases or apply only to certain technologies?

(d) Practicality of implementing a process to obtain data reflecting the indicia, including—

1. Will cost/expenditure in USPTO resources be too much or how should it otherwise be paid for?

2. Will the tracking of the metric require major overhaul of USPTO internal process in order to gather the appropriate data?

3. Will there be any negative consequences of using the indicia or its metrics to the USPTO and practitioners (*e.g.*, chilling effect on other actions taken) that could outweigh the benefits of it use?

IV. Background for the Requested Information

A. *Quality Monitoring:* The Office of Patent Quality Assurance (OPQA) conducts in-depth reviews of examiner work products, evaluates findings, and assists the Patent Examining Corps in the development and implementation of quality improvement initiatives. The OPQA reviews are currently used to generate the official USPTO examination quality metrics.

Prior to fiscal year 2005, the USPTO official quality metric was directed to only the final output of the examination process—an allowed application. Since fiscal 2005, OPQA's quality review focus was expanded to encompass all substantive actions within the USPTO's control in the patent process, namely, the quality of the decision to allow an application and the quality of the Office actions issued during the course of examination of an application.

From fiscal years 2005 through 2009, the USPTO employed two official metrics of examination quality: (1) The Allowance Compliance Rate; and (2) the In-Process Review (IPR) Compliance Rate. In fiscal year 2010 the USPTO has modified the official metrics to report (1) Final Action/Allowance Compliance Rate; and (2) IPR Compliance Rate for non-final Office actions.

(1) *Allowance Compliance Review:* Allowance Compliance is determined by performing a review of a randomly selected sample of allowed applications drawn from all Technology Centers. The reviews are conducted on applications after a notice of allowance has been mailed in an application but prior to patent grant. The focus of this review is on the examiner's decision to allow the application. If any allowed claim is found to be unpatentable for any reason provided in the patent laws, the allowance of the application is considered to be in error. In addition to the assessment of the patentability determination for the claims, the record is reviewed for completeness and clarity and to ensure compliance with procedural and formal matters. The review also evaluates the quality of the examiner's search.

(2) *In-Process Review:* IPR Compliance is determined by performing a review of a randomly selected sample of applications containing Office actions issued prior to allowance or appeal of an application, drawn from all Technology Centers. The focus of this review is on indicators of quality that were determined on the basis of feedback from patent practitioners obtained prior to the development of the IPR program and includes, but is not limited to, determining: (1) Whether the rejections made in the Office action are proper; (2) whether the Office action fails to include rejections that would have been appropriate; (3) whether the examiner has responded to all matters of substance in the applicant's reply; (4) whether the examiner has clearly set forth his or her reasoning; (5) the propriety of the finality of a final Office action (where applicable); (6) the propriety of any restriction requirement; (7) the quality of the search; and (8) the propriety of the examiner's handling of formal matters. If there is a clearly erroneous action on the part of the examiner that would cause the applicant or USPTO unnecessary rework or expense in the examination process (such as a clearly erroneous rejection of a claim, failing to include an appropriate rejection where institution of the rejection would necessitate an additional Office action, failure to substantively treat applicant's reply, or improperly making an action final), the action is considered to be an error.

B. *Quality Reporting: Fiscal years 2005–2009:* As pointed out above, from fiscal years 2005 through 2009, the two official metrics of examination quality used by the USPTO were the Allowance Compliance Rate and the In-Process Review (IPR) Compliance Rate.

The IPR Compliance Rate encompassed both non-final and final Office actions. The IPR Compliance Rate was determined on the basis of a review

of a randomly selected sample of both non-final and final Office actions: in FY 2009, the sample size was 3,199, with approximately two non-final actions reviewed for every final action reviewed. The IPR Compliance Rate was defined as the percentage of reviewed applications in which no clearly erroneous action was found.

The Allowance Compliance Rate was a stand-alone review, limited to allowed applications. The Allowance Compliance Rate was determined on the basis of a review of a randomly selected sample of allowed applications. In FY 2009, the sample size was 4,588; thus, approximately three allowances were reviewed for every IPR Compliance Rate action reviewed. The Allowance Compliance Rate was defined as the percentage of applications undergoing Allowance Compliance Review whose allowance was not considered to be in error.

Fiscal year 2010: For fiscal year 2010, the In-Process Review compliance rate has been redefined to include only non-final Office actions, and the metric is designated as the "Non-Final In-Process Compliance Rate." In FY 2010 approximately three out of five (58.4%) of all reviews (finals, allowances, and non-finals) will be of non-final actions. Also, final Office actions are now grouped with allowances, to provide a new metric—the "Final Action/ Allowance Compliance Rate." In FY 2010, an approximately equal number of allowances (19.4%) and final rejections (22.3%) will be reviewed.

Note that, the new sampling ratios and groupings shift the emphasis of the USPTO quality review process towards the earlier stages of prosecution by emphasizing non-final Office actions. It is believed that an emphasis on the quality of initial actions can do much toward reducing overall application pendency, by identifying weaknesses in the examination process that may have escaped scrutiny by the prior emphasis on allowance compliance.

The Final Rejection/Allowance Compliance Rate is determined on the basis of a review of a randomly selected sample (2,793 for FY 2010) of allowed applications and finally rejected applications. An allowed application is considered to be compliant if it is free from error as defined by the criteria set forth above in Section IV.A(1) titled "Allowance Compliance Review." A final Office action is considered to be compliant if it is free from error as defined by the criteria set forth above in Section IV.A(2) titled "In-Process Review." The Final Action/Allowance Compliance Rate is defined as the percentage of applications undergoing Final Action/Allowance Compliance Review for which no deficiency is found with respect to the examiners' final determination concerning the patentability of the claims.

The Non-Final In-Process Compliance Rate is determined on the basis of a review of a randomly selected sample of non-final Office actions (3,914 for FY 2010). An Office action is considered to be compliant if it is free from error as defined by the criteria set forth above in Section IV.A(2) titled "In-Process Review." The Non-Final In-Process Compliance Rate is the percentage of non-final actions reviewed in which no examination deficiency is found.

Information obtained through the various reviews will be analyzed to identify trends in examination quality, areas where improvement is needed, and strategies for gaining improvements.

C. *Quality Index Ranking (QIR):* In fiscal year 2010, the USPTO will be using internal statistical measures to identify outliers and other anomalies in processing and examination.

QIR involves obtaining data from the PALM internal USPTO tracking system on items such as multiple non-final actions, restrictions (after first action, or multiple, sequential or late in prosecution), reopening of prosecution after the filing of an appeal brief, reopening of prosecution after a final rejection, first action allowances, multiple requests for continued examination (RCE) made in a single application, and allowances after RCE filing without any substantive amendment. The data are analyzed to identify outlier populations—*i.e.*, individuals or populations for which there is a frequency of any of these data points that is significantly different from the norm for a particular cohort. Such outliers may signal the presence of quality or procedural issues that need to be addressed (or conversely, in some instances they may indicate superior examination practices, from which best practices could be identified and shared).

A quality initiative for fiscal year 2010 is for the USPTO to perform reviews of Office actions for the purpose of providing individual examiner feedback and training. These reviews will be in addition to the statistical reviews performed by OPQA and those normally performed within the Technology Centers; these additional reviews will be conducted by a combination of OPQA Review Quality Assurance Specialists and Technology Center managers. Applications will be selected for review on the basis of statistical analysis of prosecution parameters identified as being probable indicators of procedural or examination practices that are in need of improvement, such as those that are enumerated in the paragraph above. Such review findings will be used for the purpose of providing one-on-one examiner feedback, and for developing broader training initiatives where such needs are identified. Follow-up reviews and/or analysis will be conducted subsequent to feedback and training, in order to assess effectiveness of the feedback loop. At the time of drafting of this Request, the sample size for these reviews has not been finalized.

D. *Looking to the Future in Quality Monitoring:* The USPTO has, in the past, reviewed quality studies obtained from the public and those generated internally, and it has included the input from such studies in its effort to continually improve the quality examination process. Recently, however, the USPTO has received feedback that its current quality measures do not accurately measure the quality of patents issued by the USPTO or the quality of the USPTO's examination process. In addition, the USPTO has received feedback that some measures it has taken to improve the quality of the patents it issues have resulted in prolonging the prosecution of applications. The USPTO is continually seeking ways to improve the quality of its examination of patents, to improve the means used to measure that quality, and to reduce application pendency. Thus, the USPTO is seeking public input (as above requested in Section II of this notice) on the best ways to improve quality, measure that improvement, without extending the examination/prosecution process, and in fact to shorten the process. It is preferred that the improvements proposed should be directed to (a) ways of identifying and analyzing the best prior art and evidence bearing on patentability and presenting that information "up front," (b) a clear presentation of the positions of the USPTO and the applicant to each other at each stage of the process, and (c) coming to and clearly stating a definitive resolution of the issues that are presented, and clearly identifying the scope of the patent coverage. Comments that focus on specific issues which apply to certain technologies are also solicited.

V. Some Specific Areas of Particular USPTO Interest

Enhancement of the process and its quality, as well as monitoring of same, are best accomplished when process changes are a product of input from the USPTO and from the public. In that

context, and in the interest of making this request for comments more focused for subsequent action, five specific areas in which the USPTO is particularly interested in receiving comments will now be discussed. The completeness and quality of action taken in these areas prepares the application for an efficient and reliable conclusion in its evaluation, and furthers the goal of providing valid patents.

This notice makes no representation that these five specific areas are the only areas where quality can be improved. The USPTO welcomes any further suggestions to address the details of improving quality in the five areas specifically identified below, as well as suggestions to address any other specific areas of concern which may be included in this or follow-up quality improvement efforts.

1. *Prior Art:* Recognizing the essential need for having the best prior art before a patent examiner during the initial examination of a patent application to the quality of the examiner's decision on the patentability of the invention as defined in the claims and the ultimate validity of a granted patent, the USPTO provides specific instructions to examiners for identifying the most pertinent prior art for an application. These instructions are designed to furnish patent examiners with sufficient information to make appropriate novelty and nonobviousness determinations.

Examiners are instructed to conduct "a thorough investigation of the available prior art relating to the subject matter of the claimed invention." See 37 CFR 1.104(a). More specifically, the Manual of Patent Examining Procedure (MPEP) instructs examiners that prior art searches are to include not only the field in which the invention is classified, but also analogous arts. *See* MPEP § 904.01(c) (8th ed. 2001) (Rev. 7, July 2008).

To assist examiners in obtaining the best prior art, the USPTO has invested a substantial amount of resources in the search and retrieval of a wide variety of prior art documents. Patent examiners can readily search classified files, microfilm, and CD–ROMs, comprising United States patents, foreign patent documents, Patent Cooperation Treaty (PCT) publications, as well as a large selection of non-patent literature, including technical journals, books, magazines, encyclopedias, product catalogues, and industry newsletters. In addition, patent examiners have access to in-house and commercial on-line databases providing convenient access, from their desktop, to millions of United States and foreign patent and non-patent literature documents. Furthermore, all patent examiners have access to the Internet to search relevant Web sites for prior art.

The most rapidly changing technologies, for example, in the telecommunications and the computer-related arts, present challenges in searching and identifying the most relevant prior art. This is because often the best prior art with respect to these emerging technologies is available as non-patent literature months to years before it is available in the form of United States or foreign patents. Accordingly, searching the non-patent literature in rapidly changing technologies is vital to the quality of the patentability determination. To ensure complete coverage, the USPTO is working on assembling a larger, more complete non-patent literature prior art collection in emerging technologies and is working on providing patent examiners with better access to non-patent literature in new areas of technology, as new areas continue to emerge.

In addition to the prior art uncovered during the search conducted by the examiner, applicants have a duty to submit all information known to them to be material to patentability of the claims. *See* 37 CFR 1.56. Applicants are also encouraged to review certain types of information, *e.g.*, prior art cited in search reports of a foreign patent office in a counterpart application, to ensure that material information is disclosed to the USPTO. *See* 37 CFR 1.56(a)(1) and (a)(2). It is also helpful for applicants to perform a search on the disclosed invention prior to drafting claims for presentation for examination. This applicant contribution is important to high quality patent examination because inventors often are in the best position to be aware of the state of the art and are in possession of, or have access to, the most pertinent prior art. The quality of patent examination increases when applicants assist the examiners in identifying prior art information, particularly non-patent literature, which is material to patentability. This is especially so when the information is identified to the USPTO as early as possible in the examination process, so that issues can be clarified, defined and resolved at an early stage in the examination process.

Given the above, comments are being solicited to improve upon the performance of the USPTO in identifying relevant prior art. In this regard, the USPTO would like to address the difficulties involved in locating the best prior art, and any perception that the best art is not being found with particularity regarding gaps in certain technology areas. Comments are also being solicited regarding search techniques and procedures which can improve the success of identifying relevant prior art, as well as how the parties' efforts in bringing this about can be better achieved and measured. Comments are further being solicited on how the success of identifying relevant prior art can be measured, as well as how the parties' efforts in bringing this about can be measured.

2. *Comprehensive Initial Application:* The patent acquisition process is best streamlined when the applicant presents a comprehensive initial application. It is suggested that such an application could include the following elements:

Applicant's representative practitioner would present a reasonable number of claims upon filing that cover the broadest and narrowest claim coverage the application clearly supports under 35 U.S.C. 112 and the applicant is willing to accept. The claims would be drafted taking into consideration the relevant prior art and evidence available, and the closest prior art (*e.g.*, 5–10 most relevant references) and evidence would be presented to the USPTO as early as possible.

Applicant's representative practitioner would present a clear and complete specification that provides clear written description and support that provides antecedent basis for all claim language. The specification would be readily understandable, with terms or phrases that are not clearly defined in the state of the art having special definitions so that the applicant, examiner, and the public share a common understanding of the scope of the specification and claims.

Comments are being solicited as to the various aspects of the initial application. In addition, input is sought as to what guidelines the USPTO can disseminate, to best assist applicants in preparing applications in a manner that the USPTO can most efficiently and completely examine the applications; and how the completeness of filed applications can be measured. In particular, the USPTO is interested in suggestions as to what features of an initial filing can be used as indicia of the quality and completeness of the submitted application and how to measure the effect these indicia have on pendency of the application and quality of the final result.

3. *Comprehensive First Office Action on Merits, With Clear Explanation of All Issues:* After reviewing the entire specification in detail, the examiner construes the claims and searches the disclosed invention defined by the

claims as construed. The examiner then reviews the entire application for compliance with all the relevant statutory and regulatory requirements, and communicates his/her findings to the applicant in an Office action on the merits. The examiner provides a clear explanation of all issues in the Office action. *See* 37 CFR 1.104(a).

A comprehensive initial Office action (which is geared toward eliciting a comprehensive response from applicant) is important to streamline the effective resolution of issues between applicant and examiner. It is suggested that initial Office action could include the following. When warranted, the examiner may explain in the Office action the examiner's claim construction as compared with the scope of the disclosed invention, and how the prior art is being applied to the claims. In those instances, the examiner would explain how the prior art is applied against the claims given their broadest reasonable claim construction, as that construction was explained by the examiner. The examiner would also apply the prior art to the claims, as they may be interpreted in light of the specification. The examiner would point out any issues of claim clarity and support for the claims (as well as any other statutory or formality deficiency in the claims and disclosure as a whole), and how to address the issues, as appropriate.

It is contemplated that examiners be explicitly instructed not to always rely solely on form paragraphs, and to modify any form paragraph used, when such is appropriate to a given situation. In general, when using a form paragraph, the examiner should be familiar with any statutory, regulatory, and case law cited in the form paragraph and discuss it in detail as it applies to the specific facts of the case.

It is also contemplated that the Office action would be structured to not only clearly define the issues that are raised, but also to explain any subtleties that an applicant might not recognize. Likewise, the action would not only respond to all points made by applicant, but also would address applicant's assumed logic on which those points were based. Finally, the action would provide suggestions to resolve any issues, whether clearly raised or not, that the examiner believes can and should be resolved, to facilitate the process and resolve issues at the earliest point possible.

Comments are being solicited as to the aspects of the initial Office action that will enhance quality, how one can measure the particular suggestions, whether any aspect of the suggestions should be mandatory or be otherwise procedurally handled, and further addresses the cost impact and how and whether any resultant additional costs to the system of implementing the suggestions can be dealt with or whether the costs exceed the perceived benefits. Comments are also solicited as to how examiners can best communicate the information discussed above, to best assist applicants in responding to Office actions; and how the success of that communication can be measured.

4. *Comprehensive and Clear Response to Office Action on the Merits:* Following the Office action, the process is most efficiently advanced when the applicant's response presents all the information at applicant's disposal bearing on the patentability of the claims and desired issuance of a patent. It is desirable that the response place the application in a position where applicant has addressed all the examiner's points as well as all of applicant's needs, while at the same time preparing the application for final resolution of the issues. It is suggested that the response include the following elements.

In responding to the Office action, applicant would address the examiner's explanation of claim construction to the extent it is given, including explaining any disagreement between the USPTO and applicant as to the claim construction. After reading the USPTO's position in the Office action, applicant would provide all needed independent and dependent claims to cover all aspects of coverage desired—prior to the need for a final Office action; this set of claims should include claims that would result in the coverage desired should the examiner's claim construction be adopted (*i.e.*, define patentability over the examiner's claim construction and the examiner's overall position). Applicant would not assume that arguments directed to independent claims will be persuasive, but rather would also argue all meaningful dependent claims individually and explicitly point out which limitations define patentability, and which do not. Also, all evidence to address the examiner's position would be presented as early as possible and before final Office action; it should not to be assumed that if applicant's arguments are not accepted, the evidence can later be presented.

Comments are being solicited as to the various aspects of the above suggested response. In addition, comments are being sought as to what guidelines the USPTO can disseminate to best assist applicants in preparing responses in a manner that the USPTO can most efficiently and completely resolve issues, and bring the examination of the application to a rapid, yet comprehensive, conclusion; and how the success of this can be measured.

5. *Proper Use of Interviews:* It is highly desirable that the examiner encourages, and is prepared to conduct, an interview whenever it will facilitate resolving ambiguities and issues, or will otherwise allow for a more effective examination.

As to applicant's role, it is suggested that (to obtain maximum benefit from the interview) whenever the practitioner requires clarification of a USPTO position, the practitioner have an interview on the application prior to submitting the response and after comments on Office actions have been received from the client. Before an interview, the practitioner would provide the examiner with an agenda for the interview, including copies of any proposed amendments, exhibits, or other information that would be beneficial to review in advance.

After the interview, both the examiner and applicant would independently set forth in detail what took place at the interview (as required by current procedure). Prior art, and other information/evidence discussed would be specifically identified and the points regarding the claim limitations and/or the disclosure and teachings of the references would be made part of the record. The response to the outstanding Office action would make reference to the points noted in the practitioner's interview summary. Likewise, the response would also address the examiner's interview summary, if it is already of record; if there is conflict with attorney's summary, that conflict can be explicitly noted and clarified as needed.

Comments are being solicited on how to improve upon interview practice, to resolve issues at the interview, and to make the full substance of the interview of record; and how the effectiveness of the interview, as well as the completeness of its recorded summary, can be measured.

VI. Guidelines for Written Comments

Written comments should include the following information: (1) The name and affiliation of the individual responding; and (2) an indication of whether comments offered represent views of the respondent's organization or are the respondent's personal views.

As discussed previously, the USPTO prefers to receive comments via the Internet. Information provided in response to this request for comments will be made part of a public record and

may be available via the Internet. In view of this, parties should not submit information that they do not wish to be publicly disclosed or made electronically accessible. Parties who would like to rely on confidential information to illustrate a point are requested to summarize or otherwise submit the information in a way that will permit its public disclosure.

Dated: November 30, 2009.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E9–29328 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–822]

Stainless Steel Sheet and Strip in Coils From Mexico: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 9, 2009.

FOR FURTHER INFORMATION CONTACT: Patrick Edwards, Brian Davis, or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–8029, (202) 482–7924, or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2009, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils (S4 in coils) from Mexico for the period July 1, 2007, through June 30, 2008. *See Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review and Intent Not To Revoke Order in Part*, 74 FR 39622 (August 7, 2009) (*Preliminary Results*). In the *Preliminary Results*, we invited parties to comment. In response to the Department's invitation to comment on the preliminary results of this review, Mexinox submitted a request for a public hearing and a case brief on September 4, 2009, and September 15, 2009, respectively. *See* Letter from Hogan & Hartson LLP (counsel for respondent) titled "Stainless Steel Sheet and Strip in Coils from Mexico—Request for Hearing," dated September 4, 2009; *see also* Case Brief from Hogan & Hartson, LLP titled "Stainless Steel Sheet and Strip in Coils from Mexico—Case Brief," dated September 15, 2009. Allegheny Ludlum Corporation, AK Steel Corporation, and North American Stainless (collectively referred to as petitioners), submitted their rebuttal brief on September 24, 2009. *See* Letter from Kelley, Drye, & Warren, LLP (counsel for petitioner), titled "Stainless Steel Sheet and Strip in Coils from Mexico—Petitioner's Rebuttal Brief," dated September 24, 2009. To accommodate respondent's request, a public hearing was held on October 2, 2009. *See* Transcript of "In the Matter of: The Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Mexico," dated October 9, 2009. The current deadline for the final results of this review is December 5, 2009.

Extension of Time Limits for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to complete the final results of an administrative review within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend the 120 day time period for the final results up to 180 days.

The Department finds that it is not practicable to complete this review within the original time frame because additional analysis must be performed with respect to several complex issues raised by the parties, such as Mexinox's cost of production, etc. Accordingly, the Department is extending fully the time limit for completion of the final results of this administrative review until no later than February 3, 2010, which is 180 days after the date on which the preliminary results of review were published.

This extension is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: December 3, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–29362 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–868]

Folding Metal Tables and Chairs From the People's Republic of China: Extension of Time Limit for the Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 9, 2009.

FOR FURTHER INFORMATION CONTACT: Giselle Cubillos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1778.

SUPPLEMENTARY INFORMATION:

Background

On July 30, 2008, the Department of Commerce ("Department") published the initiation of the administrative review of the antidumping duty order on folding metal tables and chairs from the People's Republic of China ("PRC"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220 (July 30, 2008). On July 7, 2009, the Department published the preliminary results of review. *See Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 32118 (July 7, 2009). This review covers the period June 1, 2007, through May 31, 2008.

Extension of Time Limit for Final Results of Review

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), the Department shall make a final determination in an administrative review of an antidumping duty order within 120 days after the date on which the preliminary results are published. The Act further provides that the Department may extend that 120-day period to 180 days after the preliminary results if it determines it is not practicable to complete the review within the foregoing time period.

On November 4, 2009, the Department published a notice extending the time limit until December 4, 2009, for the final results of this administrative review. *See Folding Metal Tables and Chairs from the People's Republic of*

China: Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review, 74 FR 57146 (November 4, 2009).

The Department now finds that it is not practicable to complete the final results of the administrative review of folding metal tables and chairs from the PRC within the current deadline due to complex issues the parties have raised related to surrogate financial statements and market-economy purchases. We find that additional time is needed to complete these final results. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending by 14 days the time period for completion of the final results of this review. This extension makes these final results due 164 days after the date on which the preliminary results were published, *i.e.*, December 18, 2009.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: December 3, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations,

[FR Doc. E9–29361 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No.: PTO–P–2009–0041]

Patent Cooperation Treaty Task Force; Notice of Public Meeting

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of public meeting; request for comments.

SUMMARY: This notice announces a public meeting to solicit public opinions on improvement of the USPTO's efficiency, operation and utilization of the Patent Cooperation Treaty (PCT).

DATES AND TIMES: The public meeting will be held on Wednesday, January 13, 2010, from 2 p.m. to 5 p.m. Persons interested in attending the meeting must register by January 8, 2010.

Written comments must be submitted by January 8, 2009.

Location: The public meeting will be held in the South Auditorium of Madison West, 600 Dulany Street, Alexandria, VA 22314.

ADDRESSES: Written comments should be sent by electronic mail message over the Internet addressed to *IP.Policy@uspto.gov*. Comments may also be submitted by mail addressed to: Mail Stop Office of International Relations, USPTO, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Karin Ferriter. Although comments may be submitted by mail, submission via e-mail to the above address is preferable.

The written comments will be available for public inspection on the USPTO Web site and by appointment at the Executive Library, located in Madison West, Tenth Floor, 600 Dulany Street, Alexandria, Virginia. Contact: Elizabeth Shaw at *elizabeth.shaw2@uspto.gov* or 571–272–8494.

Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included.

For Registration to Attend and/or to Give a Presentation in the Meeting: If you wish to attend the public meeting and/or make an oral presentation at the meeting, you must register by e-mail (*see* **ADDRESSES**) by close of business on Friday, January 8, 2010. When registering, you must provide the following information: (1) Your name, title, and, if applicable, company or organization, address, phone number, and e-mail address and (2) if you wish to make a presentation, the specific topic or issue to be addressed (e.g., suggestions to improve the quality of an International Search Report) and the approximate desired length of your presentation.

There is no fee to register for the public meeting and registration will be on a first-come, first-served basis. Early registration is recommended because seating is limited. Registration on the day of the public meeting will be permitted on a space-available basis beginning at 1 p.m. on Wednesday, January 13, 2010.

We will do our best to accommodate all persons who wish to make a presentation at the meeting. After reviewing the list of speakers, we will contact each speaker prior to the meeting with the amount of time available and the approximate time the speaker's presentation is scheduled to begin. Speakers must then send the final electronic copies of their presentations in Microsoft PowerPoint, Microsoft Word, or Adobe Portable Document Format (PDF) to *IP.Policy@uspto.gov* by Monday, January 11, 2010 so that the presentation can be displayed in the Auditorium.

If you need special accommodations due to a disability, please inform the contact person (*see* **FOR FURTHER INFORMATION CONTACT**) by Friday January 8, 2010.

FOR FURTHER INFORMATION CONTACT: Karin L. Ferriter (571) 272–9300, Office of Intellectual Property Policy and Enforcement, directly by phone, by e-mail to *Karin.Ferriter@uspto.gov*, or by mail addressed to: Mail Stop International Relations, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

SUPPLEMENTARY INFORMATION: The United States Patent and Trademark Office (USPTO) is establishing a PCT Task Force to consider the perspectives of interested parties concerned with improving the USPTO's activities as a receiving Office, an International Searching Authority (ISA), and an International Preliminary Examination Authority (IPEA), as well as of the PCT System as a whole. To support the operation of the Task Force, the USPTO will be holding a public meeting and inviting public comments. Further meetings may be announced as the Task Force develops its work.

The number of patent applications filed in the USPTO and other Offices has increased significantly over the last decade. As worldwide patent protection is increasingly requested, Patent Offices are struggling under the burden of this increasing workload. With 142 members, the PCT offers a comprehensive framework with widespread acceptance that can be used to address this challenge. To build upon this framework, the USPTO is considering how PCT applications could be included in worksharing efforts, and other process improvements such as allowing submission of prior art by applicants and third parties to further improve PCT processing.

This notice is to inform users of the PCT and others of this opportunity to help the USPTO in its strategy to improve efficiencies and optimize the usefulness of the PCT system.

The World Intellectual Property Organization (WIPO) recently completed a PCT user survey. The results of this survey are posted here: *http://www.wipo.int/export/sites/www/pct/en/activity/pct_survey_2009.pdf*. The survey respondents indicate that the PCT system is functioning generally well, but that there is room for improvement in the USPTO, as well as other Offices. Participants may wish to provide more detailed information regarding matters addressed in the survey, or raise new matters such as those items listed in the questions below. Comments upon one or more of the following would be helpful:

1. Please identify overall changes you recommend to the PCT system.

2. Please explain why you use the PCT system, as opposed to direct foreign filing via the Paris Convention. What benefits are applicants seeking by the use of the PCT system, in addition to the longer time to decide where to enter the national stage?

3. The USPTO has been contracting out the international search of international applications that designate the USPTO as the International Searching Authority, so as to help the USPTO improve the timeliness of the international search. From the applicant's viewpoint, please identify the advantages and disadvantages from this contracting out of the international search.

4. In addition, please explain whether applicants have concerns with the USPTO's use of contractors for the international search of PCT applications.

5. Please explain whether you support including PCT search and examination results in worksharing mechanisms, such as the Patent Prosecution Highway (PPH).

6. Where the international search report and written opinion of the International Searching Authority are at least partially negative, please explain whether you would expect to request international preliminary examination under Chapter II of the PCT more often in order to get PPH benefit at the national phase?

7. Please explain whether you believe the USPTO should encourage early national stage entry when designated as an ISA or IPEA, and implement a system that combines the international and national phase.

8. Please identify any changes you recommend to improve the quality of the work produced under the PCT system.

9. Please explain whether delaying the issuance of the International Search Report until after publication of the international application has any significant impact on your use of the PCT?

10. Please explain whether you believe that the PCT would benefit from a third-party observation system (including submission of prior art) and/or more efficient means for applicant-submitted prior art.

11. Please explain your primary reasons for choosing an ISA.

12. Please explain how the USPTO could improve its processing as a receiving Office.

13. Please explain how the USPTO could improve its processing as a designated/elected Office.

The USPTO plans to make the meeting available via Web cast. Web cast information will be available on the USPTO's Internet Web site before the roundtable. The written comments and list of the meeting participants and their associations will be posted on the USPTO's Internet Web site (*http://www.uspto.gov*).

Dated: December 2, 2009.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E9–29329 Filed 12–8–09; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, December 9, 2009, 9 a.m.–12 noon.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED:

1. Pending Decisional Matter: (a) Tracking Labels for Drywall Notice of Inquiry.

2. Final Rule on Registration Cards.

A live webcast of the Meeting can be viewed at *http://www.cpsc.gov/webcast/index.html.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: December 2, 2009.

Todd A. Stevenson,

Secretary.

[FR Doc. E9–29192 Filed 12–8–09; 8:45 am]

BILLING CODE 6355–01–M

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, December 9, 2009, 2:00–4 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTER TO BE CONSIDERED:

Compliance Weekly Report—Commission Briefing.

The staff will brief the Commission on various compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: December 2, 2009.

Todd A. Stevenson,

Secretary.

[FR Doc. E9–29193 Filed 12–8–09; 8:45 am]

BILLING CODE 6355–01–M

COUNCIL ON ENVIRONMENTAL QUALITY

Draft Principles and Standards Sections of the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies"; Initiation of Revision and Request for Comments

AGENCY: Council on Environmental Quality.

ACTION: Notice and request for comments.

SUMMARY: Section 2031 of the Water Resources Development Act of 2007 (Pub. L. 110–114) directs the Secretary of the Army to revise the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies," (P&G) dated March 10, 1983, consistent with a number of considerations enumerated in the statute. The Administration has initiated the development of uniform planning standards for the development of water resources that would apply to water resources development programs and activities government-wide, to agencies in addition to the traditional water resources development agencies covered under the current Principles and Guidelines: the Army Corps of Engineers, Bureau of Reclamation (Interior), Natural Resources Conservation Service (USDA), and Tennessee Valley Authority. Therefore, the Council on Environmental Quality (CEQ), in coordination with the Office of Management and Budget, has implemented a two phase interagency process revising the planning guidance. The first phase focused on facilitating interagency revisions to the "Principles and Standards" (Chapter I of the existing P&G) of Principles and Guidelines for planning water resources

projects. The second phase will address revisions to the Procedures (Chapters II through IV of the 1983 P&G)

Upon approval of the revised "Principles and Standards" and the future revision of the Procedures, the entire revision will apply to Federal water resources implementation studies including project reevaluations and modifications except those commenced prior to the issuance of the revised guidance. The purpose of this notice is to provide an opportunity for interested individuals and organizations to submit comments on the revised "Principles and Standards". Using these comments and those from the National Academy of Sciences, CEQ will lead an interagency effort to finalize the Principles and Standards and draft the Procedures sections of the Principles and Guidelines.

Draft Document for Review: The draft "Principles and Standards" for review can be accessed on the Internet at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/* or, upon request, will be provided by mail or e-mail.

DATES: CEQ is inviting written comments and they will be accepted through March 5, 2010.

ADDRESSES: Comments may be submitted in writing to the Council on Environmental Quality, Attn: Terry Breyman, 722 Jackson Place, NW., Washington, DC 20503, via e-mail to *P&G@ceq.eop.gov*, FAX 202–456–6546, or submitted via the CEQ Web page at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/*.

FOR FURTHER INFORMATION CONTACT: Terry Breyman, Deputy Associate Director for Natural Resources, at 202–456–9721.

SUPPLEMENTARY INFORMATION: The Council on Environmental Quality in conjunction with the Office of Management and Budget is seeking comments on the revised draft of the "Principles and Standards" (Chapter I of the 1983 P&G) which is the first phase. Revision of Chapters II through IV of the Procedures will be initiated at a later date. Written comments should be submitted to Terry Breyman, 722 Jackson Place, NW., Washington, DC 20503 or via e-mail to *P&G@ceq.eop.gov* or FAX 202–456–6546. Comments may also be submitted directly to the Council of Environmental Quality Web page at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/*. To help understand the changes, the following background documents will be made available by mail or e-mail or they may be accessed at the Internet addresses indicated: "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies dated March 10, 1983 (*http://www.usace.army.mil/CECW/PlanningCOP/Documents/library/Principles_Guidelines.pdf*) Water Resources Development Act of 2007 (Pub. L. 110–114) at *http://www.usace.army.mil/CECW/PlanningCOP/Documents/library/hr1495_pl110-114.pdf*.

Dated: December 3, 2009.

Nancy H. Sutley,

Chairman, Council on Environmental Quality.

[FR Doc. E9–29270 Filed 12–8–09; 8:45 am]

BILLING CODE 3125–W0–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 8, 2010.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 3, 2009.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Revision.

Title: Trends in International Mathematics and Science Study (TIMSS:11) and Progress in International Reading Literacy Study (PIRLS:11).

Frequency: Annually.

Affected Public: Individuals or households; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 2,130.
Burden Hours: 5,858.

Abstract: NCES seeks OMB approval to recruit schools for the full-scale administration of the Trends in International Mathematics and Science Study (TIMSS) 2011 and the Progress in International Reading Literacy Study (PIRLS) 2011, both coordinated by the International Association for the Evaluation of Educational Achievement (IEA). TIMSS is administered every four years in more than 60 countries and provides data for internationally benchmarking U.S. performance in mathematics and science at the fourth- and eighth-grade levels against other countries around the world. PIRLS is administered every five years in more than 50 countries and provides assessment data for internationally benchmarking U.S. performance in fourth-grade reading. NCES has received OMB approval for the international field test for the two studies, March 1–April 15, 2010. The full-scale data collection will be in April–May 2011. NCES will seek approval for the full-scale instruments in the fall of 2010.

Requests for copies of the proposed information collection request may be

accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 4181. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–29337 Filed 12–8–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education Overview Information; Indian Education Formula Grants to Local Educational Agencies

Notice inviting applications for fiscal year (FY) 2010.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.060A.

Dates:

Part I of the Formula Grant Electronic Application System for Indian Education (EASIE) Applications Available: January 4, 2010. *Deadline for Transmittal of PART I Applications:* February 12, 2010.

Part II of Formula Grant (EASIE) Applications Available: April 5, 2010. *Deadline for Transmittal of Part II Applications:* May 5, 2010.

Applications that do not meet both the deadline for Part I and the deadline for Part II will not be considered for funding in the initial allocation of awards. If, after the initial allocation of funds, the Secretary determines that funds are not needed by an LEA that filed on time or that additional funds have otherwise become available, the Secretary may reallocate those funds to LEAs not included in the initial allocation. Such allocations might not be made in the same amount, or at the same time, as if the LEA had applied on time.

Deadline for Intergovernmental Review: July 5, 2010.

SUPPLEMENTARY INFORMATION:

Purpose of Program: The Indian Education Formula Grants to Local Educational Agencies program provides grants to support local educational agencies (LEAs) and other eligible entities described in this notice in their efforts to reform and improve elementary and secondary school programs that serve Indian students. The Department funds programs designed to help Indian students meet the same challenging State academic content and student academic achievement standards used for all students. In addition, under section 7116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), the Secretary will, upon receipt of an acceptable plan for the integration of education and related services, authorize the entity receiving the funds under this program to consolidate, in accordance with the entity's plan, the funds for any Federal program exclusively serving Indian children, or the funds reserved under any Federal program to exclusively serve Indian children, that are awarded under a statutory or administrative formula to the entity, for the purpose of providing education and related services to Indian students. Instructions for submitting an integration of education and related services plan are included in the EASIE described elsewhere in this notice under *Application Process and Submission Information.*

Eligible Applicants: LEAs, including charter schools authorized as LEAs under State law, certain schools funded by the Bureau of Indian Education of the Department of the Interior, and Indian tribes under certain conditions, as prescribed by section 7112(c) of the ESEA.

Application Process and Submission Information: Formula Grant EASIE is an easy-to-use, electronic application system. It communicates with data from State submissions to ED*Facts*, the Department's data collection system that contains performance information from State educational agencies about schools and Federal education programs. To the extent that your State has provided the necessary ED*Facts* data files, Formula Grant EASIE will be able to interface with ED*Facts* and pull those LEA-specific data into the application. Additionally, this system allows the Department to review applications and interact online with applicants during the application review and approval process.

Although you may download and print sample forms from the system, the application must be submitted electronically through the Formula Grant EASIE unless you do not have Internet access and have made prior arrangements with the Department. For approval to submit a paper application, you must contact the ED*Facts* Partner Support Center (see the contact information listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT**) prior to the deadline for transmittal of both Part I and Part II—applications. If you are approved to submit a paper application, you must meet the submission deadlines included in this notice.

Registration for Formula Grant EASIE is required. For information on how to register, contact the ED*Facts* Partner Support Center listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT.**

The Formula Grant EASIE application is divided into two parts—Part I and Part II.

Part I, Student Count, provides the appropriate data entry screens to submit your Indian student count totals.

Part II, Program and Budget Information, provides your award amount based on the Indian student count total submitted under Part I. Part II also enables you to enter student performance data, identify your project's services and activities, and build a realistic program budget based on a known grant amount. Based on student assessment data, you will select your program objectives and services from a variety of menu options that were designed with grantee input.

Estimated Available Funds: The Administration has requested $99,331,000 for this program for FY 2010. The actual level of funding, if any, depends on final Congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $4,000–$2,000,000.

Estimated Average Size of Awards: $78,460.

Estimated Number of Awards: 1,266.

Note: The Department is not bound by any estimates in this notice and funding levels may change based on final appropriations for the program.

Project Period: 12 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Performance Measures: The Secretary has established the following key performance measures for assessing the effectiveness and efficiency of the Indian Education Formula Grants to

Local Educational Agencies program: (1) The percentage of American Indian and Alaska Native students in grades four and eight who score at or above the basic level in reading on the National Assessment of Educational Progress (NAEP); (2) the percentage of American Indian and Alaska Native students in grades four and eight who score at or above the basic level in mathematics on the NAEP; (3) the percentage of American Indian and Alaska Native students in grades three through eight meeting State performance standards by scoring at the proficient or the advanced levels in reading and mathematics on State assessments; (4) the difference between the percentages of American Indian and Alaska Native students in grades 3 through 8 at the proficient or advanced levels in reading and mathematics on State assessments and the percentage of all students scoring at those levels; (5) the percentage of American Indian and Alaska Native students who graduate from high school; and (6) the percentage of funds used by grantees prior to award close-out.

FOR FURTHER INFORMATION CONTACT: Contact the ED*Facts* Partner Support Center, telephone: 877–457–3336 (877–HLP–EDEN) or by e-mail at: *eden_OIE@ed.gov*.

If you use a telecommunications device for the deaf (TDD), call the ED*Facts* Partner Support Center, toll free, at 1–888–403–3336 (888–403–EDEN).

Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the ED*Facts* Partner Support Center.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Program Authority: 20 U.S.C. 7421 *et seq.*

Dated: December 4, 2009.

Thelma Meléndez de Santa Ana,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. E9–29358 Filed 12–8–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Grace Period From Enforcement of Energy-Efficiency Certification for Residential Products

AGENCY: Office of the General Counsel, U.S. Department of Energy.

ACTION: Notice.

SUMMARY: This notice announces the Department of Energy's (DOE) intent to allow manufacturers subject to certain certification requirements to remedy deficiencies in their certification submissions and/or to certify covered products. DOE will refrain from initiating an enforcement action for any violations of 10 CFR 430.62 that are remedied prior to 30 days from the date of this Notice.

DATES: This Notice is effective December 9, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Laura Barhydt at 202–287–5772.

SUPPLEMENTARY INFORMATION: The Energy Policy and Conservation Act of 1974, as amended, (EPCA or the "Act") authorizes the Department of Energy (DOE or the "Department") to enforce compliance with the energy conservation standards established for certain consumer products. 42 U.S.C. 6299–6304. To ensure that all covered products distributed in the United States comply with DOE's energy conservation standards, the Department has promulgated enforcement regulations, which include specific certification requirements. *See* 10 CFR part 430, subpart F. Specifically, the Department's rules require manufacturers of covered consumer products to "certify by means of a compliance statement and a certification report that each basic model(s) meets the applicable energy conservation standard," before distributing it in commerce within the United States. 10 CFR 430.62.

On October 14, 2009, DOE issued guidance setting forth the Department's interpretation of its enforcement regulations. (74 FR 52793) The guidance clarified that a failure to certify covered products in accordance with DOE's rules is an independent violation of EPCA and DOE's implementing regulations and may be subject to enforcement action, including the imposition of civil penalties. The guidance also announced the Department's intent to exercise its enforcement authority more rigorously in the future, beginning with a compliance review of certification reports for products and equipment covered by DOE regulations.

DOE has initiated the compliance review announced in the October 14, 2009 **Federal Register** notice. We recognize, however, that DOE's clarification regarding certification obligations combined with its intent to enforce all regulatory obligations much more vigorously were not anticipated by the market. Moreover, some manufacturers previously have been given, on an *ad hoc* basis, a thirty day grace period to cure defective certifications.

DOE's goal is threefold: (1) To ensure compliance with its regulations; (2) to sanction those who fail to comply with those regulations; and (3) to treat all those subject to the regulations fairly and equally. To accomplish this goal, DOE therefore believes that a one-time grace period of very limited duration and scope is warranted to allow manufacturers to immediately review previously submitted certification reports and compliance statements for accuracy and completeness. The grace period will also allow any manufacturers who have not previously submitted the required information to come into compliance.

We hereby notify all manufacturers of covered products that for 30 days from this Notice DOE will refrain from initiating enforcement actions for violations of the certification regulations set forth in 10 CFR 430.62. We strongly encourage manufacturers to take advantage of this limited window to review, correct, and file certification reports and compliance statements as needed to come into compliance with our rules. Any violations of DOE's certification rules not remedied by January 8, 2010 will be subject to enforcement action, including the imposition of a civil penalty in accordance with 10 CFR 430.74.

DOE's determination to refrain from initiating enforcement actions for 30 days is limited to violations of the certification requirements specified in 10 CFR 430.62. This grace period does not apply to violations of the energy efficiency or water conservation standards or any other requirements set forth in EPCA or DOE's implementing regulations. DOE intends to pursue immediately and aggressively all violations of the Department's energy

efficiency and water conservation standards.

We have prepared a page of Frequently Asked Questions (FAQ) related to this certification grace period, which is available at *http://www.gc.doe.gov/documents/Frequently_Asked_Questions.pdf.*

In response to this notice, manufacturers may file required certification reports and compliance statements either by mail or electronic filing.

Electronic filing is preferred. To file electronically, go to our FAQ at *http://www.gc.doe.gov/documents/Frequently_Asked_Questions.pdf* for instructions.

Paper filings should be submitted to: Appliance Standards Program (EE–2J), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

Issued in Washington, DC, on December 4, 2009.

Scott Blake Harris,

General Counsel.

[FR Doc. E9–29356 Filed 12–8–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2106–059]

Pacific Gas and Electric Company; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions, and Intent To Prepare an Environmental Impact Statement

December 1, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2106–059.

c. *Date Filed:* July 16, 2009.

d. *Applicant:* Pacific Gas and Electric Company (PG&E).

e. *Name of Project:* McCloud-Pit Hydroelectric Project.

f. *Location:* The existing project is located on the McCloud and Pit Rivers in Shasta County, California. The project occupies lands of the United States, managed by the United States Department of Agriculture—Forest Service and the United States Department of Interior—Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act 16 USC 791 (a)–825(r).

h. *Applicant Contact:* Randal S. Livingston, Vice President—Power Generation, Pacific Gas and Electric Company, P.O. Box 770000, Mail Code N11E, San Francisco, CA 94177–0001; Telephone (415) 973–7000.

i. *FERC Contact:* Emily Carter at (202) 502–6512 or *emily.carter@ferc.gov.*

j. Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they also must serve a copy of the document on that resource agency.

Motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions may be filed electronically via the Internet. See 18 C.F.R. 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents also may be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

k. *Cooperating Agencies:* We are asking federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions in item l below.

l. *Deadline for filing requests for cooperating agency status:* February 1, 2010.

m. This application has been accepted for filing and is now is ready for environmental analysis.

n. *Project Description:* The existing McCloud-Pit Project consists of three existing developments (James B. Black, Pit 6, and Pit 7), which collectively include two storage reservoirs (McCloud and Iron Canyon), two regulating reservoirs (Pit 6 and Pit 7), one afterbay (Pit 7), two tunnels, three powerhouses (James B. Black, Pit 6, and Pit 7), and associated equipment and transmission facilities. The project has an installed capacity of 368 megawatts (MW), produces an average annual generation of 1,542 gigawatt-hours (GWh), and occupies 3,707.6 acres of land. Approximately 1,651.4 of these acres are federally owned, with 1,621.9 managed by the Shasta-Trinity National Forest and 29.5 managed by the U.S. Bureau of Land Management. In addition to the existing facilities, PG&E is proposing to construct two generation additions consisting of powerhouses at the base of McCloud dam (5–8 MW) and at the base of Pit 7 Afterbay dam (10 MW).

The project involves the transfer of water from the McCloud River basin to the Lower Pit River basin via a tunnel from the McCloud reservoir to Iron Canyon reservoir. Iron Canyon reservoir is on Iron Canyon creak, a tributary of the Pit River. Water flows from Iron Canyon reservoir via a tunnel to the James B. Black powerhouse. Although the project diverts water from the McCloud River basin to the Lower Pit River basin, both basins drain to Shasta Lake.

James B. Black Development

McCloud Dam and McCloud Reservoir

McCloud dam is a 241-foot-high, 630-foot-long earth and rock filled dam located on the McCloud River and impounds McCloud reservoir. The McCloud reservoir has a surface area of 520 acres and a maximum storage capacity of approximately 35,234 acre-feet (af). The spillway [elevation 2,696.0 feet National Geodetic Vertical Datum (NGVD)] is on the south side of the dam. The reservoir has a normal maximum water surface elevation of 2,680 feet. The dam is equipped with three radial gates measuring 27 feet by 24.5 feet, discharging into a spillway that returns spillage flows to the McCloud River below the dam. The dam also has a 12-foot diameter diversion/outlet tunnel that runs under the dam to supply a 24-inch Howell-Bunger valve for releasing instream flows to the McCloud River, as well as an 84-inch diameter butterfly valve for emergency use to control reservoir levels. Controls for the

diversion/outlet tunnel are located at the intake within McCloud reservoir.

McCloud Tunnel

A 7.2-mile-long tunnel and a 563-foot-long pipeline at Hawkins Creek crossing hydraulically link McCloud reservoir and Iron Canyon reservoir. An intake tower within McCloud reservoir collects water for the McCloud tunnel, which is approximately 17 feet in diameter and heads easterly to Iron Canyon reservoir. The differential in water surface elevations between the two reservoirs controls the amount of water drafted through the tunnel.

Iron Canyon Dam and Reservoir

An earth-filled dam 214-feet-high and 1,130-feet-long impounds Iron Canyon reservoir. The reservoir has a maximum storage capacity of 24,241 af with an approximate 500-acre surface area. The dam has a slide gate leading to a 48-inch diameter pipe for instream flow releases to Iron Canyon Creek. Normal maximum water surface elevation within the reservoir is 2,664 feet NGVD. When the water surface of Iron Canyon reservoir is lowered, water flows through the McCloud tunnel from McCloud reservoir to Iron Canyon reservoir.

Iron Canyon Tunnel and Penstock

Iron Canyon reservoir is connected to James B. Black powerhouse via the 2.9-mile long, 18-foot diameter Iron Canyon Tunnel, an associated 1,194-foot-long, 11.5-foot diameter pipeline at the Willow Spring Creek crossing, and a 5,467-foot-long, 11.5-foot diameter steel penstock. The penstock bifurcates before James B. Black powerhouse to deliver water flow to the two turbine generator units. The tunnel and penstock have a total flow capacity of 2,000 cfs.

James B. Black Powerhouse

James B. Black powerhouse is located on the northwest bank of the Pit River, approximately 0.5 miles upstream of the Pit 5 Project powerhouse (FERC Project No. 233). The powerhouse is a three-level, reinforced concrete structure containing two vertical shaft impulse turbines rated at 104,000 hp each. They operate at a normal maximum gross head of 1,226 feet. Two vertical axis outdoor generators, Unit 1 rated at 94.8 megavolt-ampere (MVA) and Unit 2 rated at 92.6 MVA, are connected to a three phase, 86 MVA transformer bank. Their combined maximum capacity is 172 MW. Average annual generation within the past 25 years at the station is 656.3 GWh.

Transmission

Transmission lines (230 kilovolt [kV]) extend approximately 0.5 mile from the transformer bank in the switchyard adjacent to the James B. Black powerhouse to the switchyard adjacent to the Pit 5 powerhouse.

Pit 6 Development

Pit 6 Dam and Reservoir

Pit 6 dam and reservoir are located on the Pit River downstream of James B. Black powerhouse. The 183-foot-high, 560-foot-long concrete gravity Pit 6 dam has a crest elevation of 1,432 feet NGVD. The top of the dam contains a trash rake, motors for two 42-foot-high by 49-foot-long slide gates and a control building. The control building houses a hydraulic system for two low-level, eight-foot diameter outlets at the base of the dam. The Pit 6 reservoir has a maximum storage capacity of approximately 15,619 af and a maximum surface area of approximately 268 acres. The normal maximum water surface elevation within the reservoir is 1,425 feet NGVD. The reservoir serves as the forebay for the Pit 6 powerhouse. Two 18-foot diameter steel penstocks with a total flow capacity of 6,470 cfs extend 602 feet from the dam to the turbines in the powerhouse located at the base of the dam.

Pit 6 Powerhouse

Pit 6 powerhouse is located along the east bank of the Pit River at the base of Pit 6 dam. The powerhouse is a four-level reinforced concrete structure, three levels of which are below grade. The structure contains two vertical shaft, Francis reaction turbines, rated at 53,000 hp each and operating at a normal maximum gross head of 155 feet. There are two outdoor vertical axis generators, rated at 44 MVA each, with each unit connected to a three-phase 44 MVA transformer bank that steps up plant output to 230 kV. The maximum generator capacity is 80 MW. Average annual generation over the last 25 years is 373.8 GWh.

Transmission

Transmission lines extend approximately 3.3 miles from the switchyard adjacent to the Pit 6 powerhouse to the Applicant's interconnected transmission system.

Pit 7 Development

Pit 7 Dam and Reservoir

Pit 7 dam and reservoir are located on the Pit River downstream of Pit 6 powerhouse. The Pit 7 dam is a 228-foot-high and 770-foot-long concrete gravity dam. The top of the dam contains a trash rake, motors for two 49-foot by 42-foot slide gates at the crest of the dam, and a control building. The control building houses hydraulic controls for two eight-foot in diameter, low-level outlets at the base of the dam. The Pit 7 reservoir has a maximum storage capacity of 34,611 af and a surface area of approximately 471 acres at a normal maximum water surface elevation of 1,270 feet NGVD. As with Pit 6, the Pit 7 reservoir serves at the forebay for the Pit 7 powerhouse. Two penstocks, 15 feet in diameter, extend 572 feet from the dam to the turbines in the powerhouse, located at the base of the dam. Total flow capacity within the penstocks is 7,440 cfs.

Pit 7 Powerhouse

Pit 7 powerhouse is located along the east bank of the Pit River at the base of Pit 7 dam. The powerhouse consists of a four-level, reinforced concrete structure, three levels of which are below grade. The powerhouse contains two vertical-shaft reaction turbines that are rated at 70,000 hp each and operate at a normal maximum gross head of 205 feet. Two vertical axis generators are rated at 52.2 (Unit 2) and 62.1 MVA (Unit 1), respectively. Their maximum combined capacity is 112 MW. Each unit is connected to a three-phase, 58 MVA transformer bank that steps up plant output to 230 kV. The average annual generation over the last 25 years is 512 GWh.

Transmission

Transmission lines extend approximately 3.5 miles from the switchyard adjacent to the Pit 7 powerhouse to the Applicant's interconnected transmission system.

Pit 7 Afterbay

Pit 7 afterbay has a surface area of approximately 69 acres at a normal "maximum" water surface elevation of 1,067 feet NGVD (maximum water surface of Shasta Lake). The afterbay dam is a 30-foot-high, steel-reinforced, rock-fill structure, including a variable width concrete gravity weir section. Pit 7 afterbay serves to attenuate changes in the water flow from Pit 7 dam and powerhouse before entering Shasta Lake.

Proposed Facilities

McCloud Development

PG&E proposes to construct a powerhouse located at the base of McCloud dam. Generation output from the proposed powerhouse would be connected to a new transmission line that would be routed from the proposed powerhouse to connect to an existing

substation located approximately 14 miles to the north, in the town of McCloud, California. McCloud Development would use water stored in McCloud Reservoir and released into the Lower McCloud River to meet instream flow requirements and no new impoundments are proposed. With a flow range of 150 cfs to 400 cfs, the turbine and generator set would have an installed capacity of about 5 to 8 MW. The proposed McCloud Development would have an average range of annual energy production of 30 to 40 GWh and average monthly generation would be approximately 2.5 to 3.3 GWh. PG&E proposes to base the final size of the unit, powerhouse hydraulic capacity, and average annual energy production on instream flow requirements included in the new project license.

The proposed powerhouse would be positioned to the south of the current outlet works control building and would be a reinforced concrete-and-block masonry structure designed to enclose and protect the electro-mechanical generation equipment, withstand area snow loads, and prevent possible vandalism. It would be accessed via the existing project road that connects to Forest Road 38N11. The powerhouse would be equipped with a single vertical-axis Francis turbine. The turbine, which would have a discharge diameter of approximately 54 inches, would operate at about 450 revolutions per minute. The direct-coupled synchronous generator rating would range from 5,600 to 7,500 kW.

The proposed transmission line route from the powerhouse would follow Forest Road 38N11 and then county roads to the existing substation approximately 14 miles north in the town of McCloud.

Pit 7 Afterbay Development

PG&E proposes to construct at Pit 7 Afterbay Development, including a powerhouse located on the west side of Pit 7 Afterbay dam at the regulating weir. Generation output from the proposed powerhouse would be connected to a new transmission line that would be routed from the powerhouse to connect to the switchyard located approximately 1.6 miles to the east at Pit 7 powerhouse. The proposed facilities would have no meaningful storage and would operate in a run-of-the-river mode. The available flows for energy production would be dictated by the operation of the upstream Pit 7 powerhouse.

The proposed Pit 7 Afterbay powerhouse would use water released upstream from Pit 7 powerhouse and dam and no new impoundments are proposed. The proposed powerhouse would be configured for two horizontal-axis synchronous generating units, each rated at 5,500 kW and housed in an approximately 30-foot-wide x 110-foot-long intake approach bay. Each of the generating bays would have a design flow of 2,500 cfs. The upstream entrance to each intake bay would include a trashrack to stop large debris from entering the unit. Two radial gates approximately 26-foot-wide by 52-foot-high would be constructed upstream of the unit to regulate flow and for dewatering the turbine pit. A roller gate would be constructed at the downstream end of each bay or the tailrace to prevent backwatering during maintenance. A combination of ramps, walkways, and ladders would be used in each bay to allow for maintenance access and support the gate operator mechanism. A 20-foot-wide bypass flow bay, which would house a radial gate and operator, would be built in the first phase of construction. The bypass flow bay would be used to pass river flows during the second phase of construction and during times of non-generation. The bypass flow bay also would require a walkway to allow maintenance and operation access and support the gate operator mechanism. A new access road would be constructed to access the powerhouse for construction, operation, and maintenance. The access road would extend between Fenders Ferry Road and the afterbay, just west of Fenders Ferry Bridge. Based on a flow range of 2,500 cfs to 5,000 cfs, the 2-unit powerhouse would accommodate turbine and generator sets capable of an installed capacity of about 5 MW each for a total of 10 MW. The average monthly generation from this proposed powerhouse would be approximately 4.2 GWh.

The proposed powerhouse substation would be fenced and located on the ground near the control house, but above the maximum anticipated flood and tailwater levels. Substation equipment would include a step-up substation to transform energy for the transmission line. Powerhouse controls and switchgear would be installed in a separate building located on the right bank of the river, positioned above the maximum anticipated water level and inside the substation fence. The building would house the required equipment for control and protection of the generation units and would be equipped with electric heating and cooling. The transmission line would be a 1.6-mile-long, 34.5-kV, wooden-pole line connecting the proposed powerhouse to a new 34.5- to 230-kV transformer, positioned at or near the existing 230-kV Pit 7 switchyard. A new 230-kV circuit breaker and disconnect switch would be connected by a short span to the main bus of the existing Pit 7 switchyard.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST," "MOTION TO INTERVENE," "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "PRELIMINARY TERMS AND CONDITIONS," "PRELIMINARY FISHWAY PRESCRIPTIONS," or "COOPERATING AGENCY;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be

accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

q. Procedural Schedule (supersedes Procedural Schedule notice dated July 29, 2009): The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	02/01/2010
Commission issues Draft EIS ...	09/13/2010
Comments on Draft EIS	11/12/2010
Modified Terms and Conditions	01/11/2011
Commission Issues Final EIS ...	04/11/2011

r. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

s. A license applicant must file, no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in § 5.22: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29282 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP10–22–000; PF09–3–000]

Magnum Gas Storage, LLC, Magnum Solutions, LLC; Notice of Application

December 2, 2009.

Take notice that on November 17, 2009, Magnum Gas Storage, LLC (MGS) and Magnum Solutions, LLC (MS), 2150 South 1300 East, Suite 500, Salt Lake City, Utah 84106, filed an application in Docket No. CP10–22–000, pursuant to Section 7(c) of the Natural Gas Act (NGA) as amended and Parts 157 and 284 of the Commission's regulations requesting: (1) A certificate of public convenience and necessity authorizing MGS to construct and operate a high-deliverability, multi-cycle salt cavern natural gas storage facility and connecting header pipeline to be located in Millard, Juab and Utah Counties, Utah; (2) a limited-jurisdiction certificate of public convenience and necessity authorizing MS to construct and operate cavern leaching facilities; (3) a blanket certificate pursuant to Part 284, Subpart G of the Commission's regulations permitting MGS to provide open-access natural gas storage services; (4) blanket certificates pursuant to Part 157 of the Commission's regulations permitting MGS and MS to construct and operate facilities and; (5) authorization for MGS to provide the proposed storage services, including interruptible wheeling services, at market-based rates. Additionally, MGS seeks approval of its *pro forma* tariff and waiver of certain Commission regulations, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

The proposed project would be capable of injecting up to 0.3 Bcf of gas per day and withdrawing up to 0.5 Bcf per day and will be capable of cycling its inventory from nine to twelve times annually. The underground storage facility would consist of four salt caverns with a combined total working gas storage capacity of 42 Bcf. Surface facilities would occupy a 2,050 acre site and include, among other things, 18,800 hp of compression, gas handling and dehydration facilities, storage tanks, pig launchers and receivers, brine storage ponds, and water supply lines. The project would also include a 61.5 mile-long, 36-inch-diameter header pipeline that would extend to points of interconnection with Kern River Gas Transmission Co. (Kern River) and Questar Pipeline Co. (Questar) near Goshen, Utah.

Any questions concerning this application should be directed to David K. Detton, Managing Director, Magnum Gas Storage, LLC and Magnum Solutions, LLC, 2150 South 1300 East, Suite 500, Salt Lake City, Utah 84106, 801 990–2973 (phone), 801 990–2974 (fax) or via e-mail at *dave@westernenergyhub.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "e-Library" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676, or for TTY, (202) 502–8659.

On December 22, 2008, the Commission staff granted MGS's request to utilize the Pre-Filing Process and assigned Docket No. PF09–3 to staff activities involved with the MGS project. Now as of the filing the November 17, 2009 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP10–22–000, as noted in the caption of this Notice.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will

consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Protests and interventions may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: December 23, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29277 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 02, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–27–000.

Applicants: Empire Generating Co, LLC, Niagara Mohawk Power Corporation.

Description: Joint Application for Authorization of Transfer of Certain Limited Interconnection Related Facilities Under Section 203 of the FPA and Request for Waivers of Filing Requirements and 21-Day Comment Period.

Filed Date: 12/01/2009.

Accession Number: 20091201–5158.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–1330–002.

Applicants: Ebersen, Inc.

Description: Ebersen, Inc submits an application for market-base rate authority.

Filed Date: 11/30/2009.

Accession Number: 20091201–0057.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–310–000.

Applicants: Algonquin Energy Services Inc.

Description: Algonquin Energy Services, Inc submits application for market based rate authority for certain waivers and blanket approvals, and request for expedited Treatment.

Filed Date: 11/25/2009.

Accession Number: 20091130–0026.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–316–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest ISO submits their proposed clean up filing required by the Commission's Order 714.

Filed Date: 11/24/2009.

Accession Number: 20091125–0130.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–323–000.

Applicants: Tilton Energy LLC.

Description: Tilton Energy LLC submits Rate Schedule FERC No 1.

Filed Date: 11/25/2009.

Accession Number: 20091130–0025.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–324–000.

Applicants: E. ON U.S. LLC.

Description: EON US LLC submits Emergency Energy Transaction Protocol Agreement.

Filed Date: 11/25/2009.

Accession Number: 20091130–0024.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–325–000.

Applicants: Dynegy Midwest Generation, Inc.

Description: Dynegy Midwest Generation, Inc revised Rate Schedule FERC No 5.

Filed Date: 11/25/2009.

Accession Number: 20091130–0023.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–326–000.

Applicants: New England Power Pool.

Description: The New England Power Pool submits transmittal letter and counterpart signature pages of their agreement dated as of 9/1/71 re member applications and termination of memberships *etc.*

Filed Date: 11/30/2009.

Accession Number: 20091202–0005.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–327–000.

Applicants: Dynegy Midwest Generation, Inc.

Description: Dynegy Midwest Generation, Inc submits an Amended and Restated Black Start Service Agreement dated 11/25/09 with Ameren Services Company *et al.*

Filed Date: 11/30/2009.

Accession Number: 20091202–0004.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–328–000.

Applicants: Niagara Mohawk Power Corporation.

Description: Niagara Mohawk Power Corporation submit revised tariff sheets to the Open Access Transmission Tariff *etc.*

Filed Date: 11/30/2009.

Accession Number: 20091202–0003.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–329–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service with Kansas Electric Power Cooperative *etc.*

Filed Date: 11/30/2009.

Accession Number: 20091202–0002.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–322–000.

Applicants: Northeast Utilities Service Company.

Description: Western Massachusetts Electric Co submits a Notice of Cancellation of Rate Schedule FERC No 402 and all supplements *etc.*

Filed Date: 11/24/2009.

Accession Number: 20091125–0141.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–330–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits proposal to revise its Open Access Transmission Tariff to incorporate resident load reporting deadline.

Filed Date: 12/01/2009.

Accession Number: 20091202–0001.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–332–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submit Service Agreement No 9 *et al.* to FERC Electric Tariff, First Revised Volume No 4.
Filed Date: 12/01/2009.
Accession Number: 20091202–0012.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–331–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed amended Service Agreement with Kansas City Power & Light Greater Missouri Operations Company *etc.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0006.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–333–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service *etc.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0007.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–334–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service between Southwest Power Pool, Inc as Transmission Provide and Kansas Municipal Energy Agency *et al.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0008.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–335–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service between Southwest Power Pool, Inc as Transmission Provide and City of Coffeyville, Kansas *et al.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0009.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–336–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service between Southwest Power Pool, Inc as Transmission Provide and the Empire District Electric Company *etc.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0010.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–337–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed service agreement for Network Integration Transmission Service between Southwest Power Pool, Inc as Transmission Provide and Kansas Power and Light Company *etc.*
Filed Date: 11/30/2009.
Accession Number: 20091202–0011.
Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER10–338–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits executed service agreement for Network Integration Transmission Service between SPP and Kansas Electric Power Cooperative *et al.*
Filed Date: 12/01/2009.
Accession Number: 20091202–0013.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–339–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits executed service agreement for Firm Point to Point Transmission Service between SPP and Midwest Energy, Inc.
Filed Date: 12/01/2009.
Accession Number: 20091202–0014.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–340–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits Amendment No 4 to Interconnected Control Area Operating Agreement between the ISO and Nevada Power Company.
Filed Date: 12/01/2009.
Accession Number: 20091202–0018.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–341–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits executed service agreement for Network Integration Transmission Service between SPP and Grand River Dam Authority *et al.*
Filed Date: 12/01/2009.
Accession Number: 20091202–0017.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–342–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits Pseudo Participating Generator Agreement.
Filed Date: 12/01/2009.
Accession Number: 20091202–0016.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Docket Numbers: ER10–344–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC Request for Limited Tariff Waiver.
Filed Date: 12/01/2009.
Accession Number: 20091201–5152.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD10–4–000.
Applicants: North American Electric Reliability Corporation.
Description: Petition of the North American Electric Reliability Corporation for Approval of Two Reliability Standards Revisions to Withdraw MISO Waivers.
Filed Date: 11/20/2009.
Accession Number: 20091120–5150.
Comment Date: 5 p.m. Eastern Time on Wednesday, December 23, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be

listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–29274 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 01, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–24–000.

Applicants: Lost Lakes Wind Farm LLC.

Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Lost Lakes Wind Farm LLC.

Filed Date: 11/24/2009.

Accession Number: 20091124–5113.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: EC10–25–000.

Applicants: WPS Canada Generation, Inc., WPS New England Generation, Inc., WPS Power Development LLC, Algonquin Power Fund (America) Inc., Algonquin Power Income Fund.

Description: Joint Application for Authorization of Proposed Transaction Under Section 203 of the Federal Power Act, and Request for Expedited Consideration and Confidential Treatment of WPS New England Generation, Inc., et al.

Filed Date: 11/25/2009.

Accession Number: 20091125–5154.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: EC10–26–000.

Applicants: Grand Ridge Energy II LLC, Grand Ridge Energy III LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action of Grand Ridge Energy II LLC and Grand Ridge Energy III LLC.

Filed Date: 11/25/2009.

Accession Number: 20091125–5155.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–780–026; ER03–1383–015; ER01–1633–012; ER00–3240–015.

Applicants: Southern Company Services, Inc.; DeSoto County Generating Company, LLC; Southern Company—Florida LLC; Oleander Power Project, LP.

Description: Notice of Non-Material Change in Status of Southern Company Services, Inc., *et al.*

Filed Date: 11/30/2009.

Accession Number: 20091130–5178.

Comment Date: 5 p.m. Eastern Time on Monday, December 21, 2009.

Docket Numbers: ER97–4257–014.

Applicants: Mid-Power Service Corporation.

Description: Mid Power Service Corporation submits an Amended and Restated Application for authorization to make wholesale sales of energy and capacity at negotiated, market based rates.

Filed Date: 11/16/2009.

Accession Number: 20091123–0190.

Comment Date: 5 p.m. Eastern Time on Monday, December 07, 2009.

Docket Numbers: ER06–1280–005; ER02–556–012.

Applicants: Hess Corporation, Select Energy New York, Inc.

Description: Notice of Change in Status of Hess Corporation, *et al.*

Filed Date: 11/25/2009.

Accession Number: 20091125–5150.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER08–394–025.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits compliance filing.

Filed Date: 11/18/2009.

Accession Number: 20091119–0058.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 09, 2009.

Docket Numbers: ER09–980–001.

Applicants: WSPP Inc.

Description: WSPP Inc submits Substitute Original Sheet 90E to Rate Schedule FERC 6.

Filed Date: 11/23/2009.

Accession Number: 20091124–0099.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER09–1382–001.

Applicants: Allegheny Energy Supply Company, LLC.

Description: Allegheny Energy Supply Company, LLC submits First Revised Sheet No 2B.

Filed Date: 11/18/2009.

Accession Number: 20091119–0059.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 09, 2009.

Docket Numbers: ER09–1562–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits a revised executed Service Agreement for Network Integration Transmission Service etc.

Filed Date: 11/23/2009.

Accession Number: 20091124–0096.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER09–1613–001; ER09–1614–001.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Company refund report for the Interconnection Agreements.

Filed Date: 11/25/2009.

Accession Number: 20091125–5152.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER09–1653–001.

Applicants: Tampa Electric Company.

Description: Tampa Electric Company submit Second Revised Sheet 67 *et al.* to FERC Electric Tariff, Third Revised Volume 4 to be effective 11/24/09.

Filed Date: 11/23/2009.

Accession Number: 20091124–0095.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER09–1673–001.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits a minor revision to the Open Access Transmission Tariff in compliance with the Commission's 10/29/09 order in the proceeding.

Filed Date: 11/23/2009.

Accession Number: 20091124–0093.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–143–001.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Company submits the Substitute Original Service Agreement No. 264, Network Integration Transmission Service with the City of Vero Beach, Florida.

Filed Date: 11/24/2009.

Accession Number: 20091125–0142.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–182–001.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits Substitute Sixth Revised Sheet No. 37 *et al.* to FERC Electric Tariff, Sixth Revised Volume No. 1, to be effective January 1, 2010.

Filed Date: 11/25/2009.

Accession Number: 20091125–0138.

Comment Date: 5 p.m. Eastern Time on Monday, December 07, 2009.

Docket Numbers: ER10–204–002.

Applicants: FSE Blythe 1, LLC.

Description: FSE Blythe 1, LLC submits Second Substitute Original Sheet No 1 *et al.* to FERC Electric Tariff, Original Volume No 1, effective 11/23/09.

Filed Date: 11/24/2009.

Accession Number: 20091125–0126.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–236–001.

Applicants: Ohms Energy Company, LLC.

Description: OHMS Energy Company, LLC submits an amendment to petition for acceptance of initial rate filing, FERC Electric Tariff, Original Volume 1.

Filed Date: 11/24/2009.

Accession Number: 20091125–0143.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–296–000.

Applicants: Garden Wind, LLC.

Description: Request for authorization to sell energy and capacity at market based rates, and waivers of the 60 day notice requirement re Garden Wind, LLC.

Filed Date: 11/23/2009.

Accession Number: 20091125–0041.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–297–000.

Applicants: Crystal Lake Wind III, LLC.

Description: Request for authorization to sell energy and capacity at market based rates, and waiver of the 60 day notice requirement re Crystal Lake Wind, LLC.

Filed Date: 11/23/2009.

Accession Number: 20091125–0042.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–301–001.

Applicants: Black Hills Power, Inc.; Black Hills Wyoming

Description: Black Hills Power and Black Hills Wyoming submits a corrected version of a page with the corrected date and respectfully request FERC to allow it to be substituted in the Agreement on file.

Filed Date: 11/23/2009.

Accession Number: 20091124–0094.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–302–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submit First Revised Sheet 33 *et al.* to FERC Electric Tariff, First Revised Volume 5 Service Agreement 221 to be effective 1/23/10.

Filed Date: 11/23/2009.

Accession Number: 20091124–0097.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–303–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits Third Revised Interconnection Agreement among Illinois Power Company, *et al.*

Filed Date: 11/20/2009.

Accession Number: 20091124–0069.

Comment Date: 5 p.m. Eastern Time on Friday, December 11, 2009.

Docket Numbers: ER10–305–000.

Applicants: Xcel Energy Services Inc.

Description: Xcel Energy Services, Inc. submits First Revised Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 2.

Filed Date: 11/23/2009.

Accession Number: 20091124–0092.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–306–000.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Company submits Interchange Services Agreement between FPL and City of Vero Beach.

Filed Date: 11/23/2009.

Accession Number: 20091124–0081.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–307–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits two executed interconnection service agreements among PJM, Conectiv Delmarva Generation, LLC, and Delmarva Power and Light Company.

Filed Date: 11/23/2009.

Accession Number: 20091124–0082.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–308–000.

Applicants: Kleen Energy Systems, LLC.

Description: Kleen Energy Systems, LLC's Application for Market-Based Rate Authority, Related Blanket Waivers and Authorizations and Submission of Initial Rate Schedule.

Filed Date: 11/25/2009.

Accession Number: 20091125–0140.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–309–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement among PJM *et al.*

Filed Date: 11/23/2009.

Accession Number: 20091125–0104.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–311–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits an executed interim interconnection service agreement among PJM *et al.* and a notice of cancellation of an Interim ISA being superseded.

Filed Date: 11/23/2009.

Accession Number: 20091125–0103.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–312–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits an executed interconnection construction service agreement among PJM, *et al.*

Filed Date: 11/23/2009.

Accession Number: 20091125–0101.

Comment Date: 5 p.m. Eastern Time on Monday, December 14, 2009.

Docket Numbers: ER10–313–000.

Applicants: U.S. Energy Partners LLC.

Description: U.S. Energy Partners LLC submits notice of cancellation.

Filed Date: 11/24/2009.

Accession Number: 20091125–0102.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–314–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits updated Exhibit 4 to the Amended and Restated Facilities Rental and Wheeling Agreement with Moon Lake Electric Association.

Filed Date: 11/24/2009.

Accession Number: 20091125–0128.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–315–000.
Applicants: Northeast Utilities Service Company.
Description: Connecticut Light and Power Company *et al.* submits Localized Cost Responsibility Agreements by and between NU Companies and Waterbury Generation LLC *et al.*
Filed Date: 11/24/2009.
Accession Number: 20091125–0127.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–316–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest ISO submits their proposed clean up filing required by the Commission's Order 714.
Filed Date: 11/24/2009.
Accession Number: 20091125–0130.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–317–000.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Corporation submits the Sugarloaf Swithyard Interconnection Agreement with Salt River Project.
Filed Date: 11/24/2009.
Accession Number: 20091125–0125.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–318–000.
Applicants: Startrans IO, LLC.
Description: Startrans IO, LLC submits revisions to Appendix 1 of its Transmission Owner Tariff, FERC Electric Tariff Original Volume No. 1, effective January 1, 2010.
Filed Date: 11/24/2009.
Accession Number: 20091125–0129.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Docket Numbers: ER10–319–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corp submits an amendment to Eligible Intermittent Resource Provisions.
Filed Date: 11/25/2009.
Accession Number: 20091125–0116.
Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–320–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits revisions to Section 3.6.2 Meter Corrections between Market Participants.
Filed Date: 11/25/2009.
Accession Number: 20091125–0115.
Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–321–000.
Applicants: Allegheny Energy Supply Company, LLC.
Description: Alleghany Energy Supply Company, LLC submits request for authorization to make wholesale power sales to the Potomac Edison Company.
Filed Date: 11/25/2009.
Accession Number: 20091125–0144.
Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Docket Numbers: ER10–322–000.
Applicants: Northeast Utilities Service Company.
Description: Western Massachusetts Electric Co submits a Notice of Cancellation of Rate Schedule FERC No. 402 and all supplements *etc.*
Filed Date: 11/24/2009.
Accession Number: 20091125–0141.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 15, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–124–001.
Applicants: Idaho Power Company.
Description: Idaho Power Company submits Substitute First Revised Sheet 64 to FERC Electric Tariff, First Revised Volume 6 modified in accordance with letter order dated 10/29/09 and Order 890–B.
Filed Date: 11/25/2009.
Accession Number: 20091125–0139.
Comment Date: 5 p.m. Eastern Time on Wednesday, December 16, 2009.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR10–5–000.
Applicants: North American Electric Reliability Corporation.
Description: Petition of the North American Electric Reliability Corporation for Approval of Proposed Revisions to the Bylaws of Southwest Power Pool, Inc..
Filed Date: 12/01/2009.
Accession Number: 20091201–5093.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 22, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and § 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–29275 Filed 12–8–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM01–5–000]

Electronic Tariff Filings; Notice of Date for Submission of Transitional Schedules

December 1, 2009.

Take notice that the submission of proposed transitional schedules for making baseline electronic tariff filings should be made by January 22, 2010.

In Order No. 714,[1] the Commission adopted regulations requiring that tariff and tariff related filings must be made

[1] *Electronic Tariff Filings,* Order No. 714, 73 FR 57,515 (Oct. 3, 2008), 124 FERC ¶ 61,270, FERC Stats. & Regs [Regulations Preambles] ¶ 31,276 (2008) (Sept. 19, 2008).

electronically. The Commission provided that the conversion to electronic tariff filings would begin April 1, 2010, with pipelines and utilities filing baseline tariffs according to a six-month staggered filing schedule worked out between staff and industry. Standard notice and comment periods will apply to these baseline filings. Once an oil or gas pipeline or electric utility has made its baseline filing, all subsequent tariff-related filings must be made electronically.

At the Commission staff technical conference held on November 20, 2009, staff indicated that, from its perspective, a filing schedule would be acceptable as long as the baseline filings are reasonably dispersed throughout the six month period. Having to process many baseline applications at the same time would slow Commission processing time and would work to the disadvantage of both the companies and the Commission. Customers in comments on the Notice of Proposed Rulemaking in this proceeding and at the conference expressed concern that filings be staggered reasonably so that customers would not have to review a large number of baseline filings at the same time. Interest was expressed at the conference in providing the various industries an opportunity to meet with their customer groups to develop a staggered schedule that would balance the baseline filings longitudinally and perhaps geographically.

Commission staff will honor a consensus agreement so long as the filings are generally spread over the six-month transition period. Commission staff will issue a Notice of the filing schedule after reviewing the comments received.

For more information, contact Andre Goodson, Office of the General Counsel, at 202–502–8560 or Keith Pierce, Office of Energy Market Regulation at 202 502–8525 or by sending an e-mail to *ETariff@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29276 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12107–003–MT; Flint Creek Hydroelectric Project]

Granite County, MT; Notice of Availability of Environmental Assessment

December 2, 2009.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for an original license (Major Project) for the Flint Creek Hydroelectric Project (project), and has prepared an Environmental Assessment (EA). The proposed project would be located on Flint Creek at the existing Georgetown Lake Dam, in the Upper Clark Fork River basin near Philipsburg, in Granite County and Deer Lodge County, Montana. The proposed project would occupy a total of 2,857.5 acres, of which 1,243.3 acres (1,243 reservoir acres and 0.3 land acre) are within the Beaverhead-Deer Lodge National Forest, administered by the U.S. Forest Service (Forest Service); 1,605.4 reservoir acres owned by Granite County, Montana; and 8.8 acres of private lands.

The EA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project would not constitute a major Federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket (P–12107), number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Any Comments should be filed within 30 days from the date of this notice and should be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please affix Project No. 12107–003, to all comments. Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commissions Web site (*http://www.ferc.gov*) under the "e-Filing" link. For a simpler method of submitting text-only comments, click on "Quick Comment."

Please contact Gaylord Hoisington by telephone at (202) 502–6032 or by e-mail at *gaylord.hoisington@ferc.gov* if you have any questions.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29281 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2589–057]

Marquette Board of Light and Power; Notice of Intent To Prepare an Environmental Document and Soliciting Comments

December 2, 2009.

Take notice that the following material addressing dam safety repairs has been filed with the Commission and is available for public inspection:

a. *Filing:* Environmental report to support the repair of the Tourist Park Dam in order to restore Tourist Park Reservoir and operation of the Tourist Park Development under Part 12 of the Commission's regulations.

b. *Project No:* 2589–057.

c. *Date Filed:* September 17, 2009.

d. *Licensee:* Marquette Board of Light and Power.

e. *Name of Project:* Marquette Hydroelectric Project.

f. *Location:* The Marquette Hydroelectric Project is located on the Dead River in the City of Marquette, Marquette County, Michigan.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Licensee Contact:* Eric Booth, Manager of Utility Compliance, Marquette Board of Light and Power, 2200 Wright Street, Marquette, MI 49855–1398, (906) 228–0335.

i. *FERC Contact:* Rachel Price, (202) 502–8907, and e-mail: *rachel.price@ferc.gov.*

j. *Deadline for filing comments:* January 19, 2010.

All documents should be filed with: Kimberly D. Bose, Secretary, Federal

Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments may be filed electronically via the Internet, *see* 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under the "e-filing" link. The Commission strongly encourages electronic filings. In lieu of electronic filing, an original and eight copies of all documents may be mailed to the Secretary at the address above.

k. *Description of material:* Marquette Board of Light and Power has filed an Environmental Report in support of its plan to repair the Tourist Park Dam at the Tourist Park Development, part of the Marquette Hydroelectric Project (FERC No. 2589). The project consists of two separate developments: Forestville and Tourist Park. The proposed work at the Tourist Park Dam would take place within the Tourist Park Development which is the most downstream of the two developments on the Dead River. The Tourist Park Reservoir is operated in a non-peaking mode to re-regulate flows released from the upstream Forestville Development. In May of 2003, the Silver Lake Storage Reservoir, part of the upstream Dead River Project (FERC No. 10855), experienced a breach which resulted in the release of large quantities of water. The resultant high flows reached the Tourist Park Dam, crested the natural right abutment of the dam, and caused the wash out of the dam abutment which resulted in the release of the Tourist Park Reservoir. Since the time of the breach the development has not been operational. In order to restore the Tourist Park Reservoir and return the development to operational conditions as licensed, the licensee plans to repair the dam by constructing an un-gated concrete ogee spillway within the breach channel. In addition, the licensee plans to construct right and left retaining walls and a new embankment with the existing and new core walls. During construction activities, some recreational use of the development may be limited due to traffic and public safety concerns. Following repair of the dam, the licensee plans to refill the Tourist Park Reservoir and operate the development as licensed.

The Commission intends to prepare an environmental document under the National Environmental Policy Act (NEPA) for the planned Tourist Park Dam repair. The NEPA document will be used by the Commission to identify environmental impacts and to identify measures that would help mitigate the impacts caused by the activities associated with the dam repair.

l. *Locations of the Filing:* A copy of the filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments:* Anyone may submit comments on the material described in this notice. In completing its environmental review, the Commission will consider all comments filed. Any comments must be received on or before deadline for filing comments specified above.

o. Any filing made with the Commission in response to this notice must bear in all capital letters the title "COMMENTS" and the Project Number: P–2589–057.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the material described in this notice. A copy of the filing may be obtained by agencies directly from the licensee. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the licensee's representatives.

q. Comments may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29283 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–19–000]

Western Grid Development, LLC; Notice of Filing

December 2, 2009.

Take notice that on November 20, 2009, Western Grid Development, LLC (WGD) filed, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.208, section 219 of the Federal Power Act, 16 U.S.C. 824s, Order No. 679,[1] and section 35.35 of the Commission's regulations, 18 CFR 35.35, a Petition for Declaratory Order: (1) Requesting the Commission to find that the Energy Storage Devices that will be used in WGD's proposed projects are properly classified as wholesale transmission facilities subject to the Commission's jurisdiction; (2) concluding that the WGD projects at locations where transmission reliability is at issue (WGD Projects) are entitled to incentive-based rate treatment pursuant to FERC regulations; (3) authorizing the specific rate incentives described herein for such WGD Projects; and (4) providing insight on whether the Commission perceives any barrier that could prevent the California Independent System Operator from considering the WGD solution on equal footing with other utility and non-utility proposed transmission alternatives to solve reliability problems.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically

[1] *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679–A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (Order 679 and Order No. 679–A, respectively).

should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 21, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29279 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL10–20–000, QF84–447–008]

O.L.S. Energy—Camarillo; Notice of Filing

December 2, 2009.

Take notice that on November 24, 2009, O.L.S. Energy—Camarillo (Camarillo) filed, pursuant to 18 CFR 292.205(a)(1), 292.205(c) and 385.207 (2009) of the Commission's regulations implementing the Public Utility Regulatory Policies Act, a petition for temporary waiver of the efficiency standard for its natural gas-fired topping-cycle qualifying cogeneration facility, located in Camarillo, California, for calendar years 2009 and 2010.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 24, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29280 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–10–001]

City of Vernon, California; Notice of Filing

December 2, 2009.

Take notice that on November 20, 2009, the City of Vernon (Vernon), filed a correction, in one component of the calculation of the Transmission Revenue Balancing Account Adjustment (TRBAA), resulting in a downward reduction in its TRBAA for 2010 from $847,605 to $411,764, to its October 30, 2009 filing. Vernon also requests the effective date to be January 1, 2010 as requested in its October 30, 2009 filing.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 11, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29278 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Technical Conference on Commission Policy on Commencement of Accrual of Allowance for Funds Used During Construction

December 2, 2009.

Accrual of Allowance for Funds Used During Construction	Docket No. AD10–3–000.
Pacific Connector Gas Pipeline, LP	Docket Nos. CP07–441–000.
Florida Gas Transmission Company, LLC	Docket No. CP09–17–000.
	Docket No. AC08–161–000.
Southern Natural Gas Company	Docket No. CP09–36–002.
Southeast Supply Header, LLC/Southern Natural Gas Company	Docket No. CP09–40–001.

Ruby Pipeline, LLC	Docket No. CP09–54–001.
Texas Eastern Transmission, LP	Docket No. CP09–68–000.

In several recent and pending cases,[1] the Commission has been presented with proposals to accrue Allowance for Funds Used During Construction (AFUDC) on expenditures made prior to the time that an application is filed for authorization to construct and operate a natural gas pipeline. Applicants and potential applicants have suggested that the Commission should allow the accrual of AFUDC with respect to expenses incurred prior to the filing of a certification application, particularly those costs incurred during the pre-filing period.

In establishing cost-based rates, the Commission has traditionally included only costs relating to a plant that is "used and useful" in utility operations. However, the Commission has recognized that the entities it regulates incur costs associated with the funds invested in construction projects prior to the time the facilities are placed in service (i.e., are "used and useful"), and, accordingly, has allowed entities to reflect these financing costs by accruing AFUDC. When the completed facilities are placed in service, the cost of the facilities, including the accrued AFUDC, becomes part of rate base. The entity is then able to recover the capitalized AFUDC in the same manner as other capital costs, i.e. through rates which include depreciation charges to recover the capitalized amounts over the service life of the facilities. Gas Plant Instruction 3(17) prescribes the formula for determining the maximum amount of AFUDC that may be capitalized as a component of construction costs.[2] The Commission has required an applicant to limit its AFUDC rate to a rate no higher than it could earn on operating assets. The Commission has limited the maximum amount of AFUDC that the pipeline could capitalize by limiting the AFUDC rate to a rate no higher than the overall rate of return underlying its recourse rates.[3]

Until recently, the Commission has not addressed the question of what project-related expenditures may appropriately be the subject of AFUDC accrual. However, in 1968 the Chief Accountant issued AR–5, *Capitalization of Interest During Construction*, which among other things, provided guidance on when a natural gas pipeline company may begin accruing AFUDC on expenditures related to construction projects. AR–5 set forth two standards for beginning the accrual of AFUDC. Specifically, AR–5 states, in relevant part:

> Interest during construction may be capitalized starting from the date that construction costs are continuously incurred on a planned progressive basis. Interest should not be accrued for the period of time prior to: * * * the date of the application to the Commission for a certificate to construct facilities by a natural gas company. Interest accruals may be allowed by the Commission for the period prior to the above dates if so justified by the company.

Under this guidance, interest may be capitalized, i.e., AFUDC may be accrued, starting from the date (1) "construction costs are continuously incurred on a planned progressive basis," but (2) not before the date an application to construct the facilities is filed with the Commission, unless justified by the applicant.

Since the issuance of AR–5, the natural gas pipeline industry has gone though many changes. So, too, has the process for obtaining Commission authorization to construct and operate natural gas pipeline facilities. Commission staff has for several years strongly encouraged potential applicants to engage in extensive stakeholder contact, route development, facility design, and environmental study prior to filing an application. This process has the virtue of providing for early public engagement, as well as early understanding of environmental issues, stakeholder concerns, and other matters that may affect pipeline design and route selection issues. Substantial expenditures may be incurred during this period, raising the question of the continuing propriety of the Commission's current policy of limiting the accrual of AFUDC to expenditures incurred after the filing of an application. Therefore, the Commission is convening a technical conference seeking input and comment on this issue. Participants may be guided by, but should not consider themselves limited to, the following questions prepared by Commission staff.

(1) Is it appropriate to continue to use the filing date of an application for a certificate to construct facilities to determine the expenses on which an applicant may accrue AFUDC? Under what circumstances, if any, should the Commission allow an applicant to accrue AFUDC on expenditures made before the application date?

(2) Should the Commission seek to define the term "if construction results" as used in relation to Account 183.2, i.e., when it is appropriate to clear amounts from Account 183.2 and when an applicant may appropriately begin recording expenditures in Account 107, Construction Work in Progress? If so, how should the term be defined for these purposes and what objective indicia of "construction" would be appropriate?

(3) Is "the continuous incur[ing] of construction costs on a planned progressive basis" a useful standard for designating expenses on which an entity may accrue AFUDC; and, if so, what are the indications that this standard has been met?

(4) Should there be a presumption that it is appropriate to accrue AFUDC on all expenditures recorded in Account 107?

(5) Should the date an applicant is authorized to commence the formal pre-filing process be the date as of which it should be allowed to accrue AFUDC?

a. If so, when should applicants that do not participate in the pre-filing process be allowed to begin to accrue AFUDC?

b. If so, under what circumstances, if any, should an applicant be allowed to accrue AFUDC before commencing the pre-filing process?

(6) Should the Commission allow applicants to accrue AFUDC on amounts recorded in Account 183.2? If so, under what circumstances?

(7) What other bases should the Commission consider for allowing applicants to begin accruing AFUDC?

The technical conference will be held on Tuesday, December 15, 2009, from 9 a.m. until 1 p.m., in the Commission Meeting Room, at the Commission's offices at 888 First Street, NE., Washington, DC. The conference will begin with a presentation by Commission staff, followed by discussion among the attendees. All interested parties are invited to attend, and there is no registration fee to attend the conference.

Any person interested in filing comments before the technical conference may do so, in Docket No. AD10–3–000 and also, if the comments pertain to any ongoing proceeding, in

[1] *Texas Eastern Transmission, LP*, 129 FERC ¶ 61,151 (2009); *Florida Gas Transmission Company, LLC*, 129 FERC ¶ 61,150 (2009); *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 (2009); *Pacific Connector Gas Pipeline, LP*, Docket Nos. CP07–441–000, CP07–442–000, and CP07–443–000; *Southern Natural Gas Company*, Docket No. CP09–36–002.

[2] 18 CFR part 201 (2009).

[3] *See Gulfstream Natural Gas System, LLC*, 91 FERC ¶ 61,119 (2000) and *Buccaneer Gas Pipeline Co., LLC*, 91 FERC ¶ 61,117 (2000).

that proceeding's docket, as well, no later than 5 p.m., December 11, 2009. Following the conference, persons may file comments, in Docket No. AD10–3–000 and also, if the comments pertain to any ongoing proceeding, in that proceeding's docket, as well, no later than 5 p.m., December 29, 2009. A person is not required to attend the conference in order to file comments.

Any person with questions about the conference may contact Scott Molony, Chief Accountant, at (202) 502–8919, or Mark Klose, Senior Accountant, at (202) 502–8283.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–29284 Filed 12–8–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0888; FRL–8803–5]

Design for the Environment and Factual Product Label Statement Pilot Programs for Antimicrobial Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Two Workgroups of the Pesticide Program Dialogue Committee (PPDC) worked throughout 2009 on possible pilot programs for certain factual label statements and logos for antimicrobial pesticide products. The Workgroup included representatives from pesticide manufacturers (registrants), State pesticide regulatory agencies, U.S. Department of Agriculture Cooperative Extension Service, environmental and public advocacy groups, EPA's Office of Pesticide Programs (OPP), and others. With this notice, EPA's Office of Pesticides Programs is announcing the development of two voluntary pilot Programs.

FOR FURTHER INFORMATION CONTACT: Michael Hardy, Office of Pesticide Programs (7501P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–6432; fax number: (703) 308–4776; e-mail address: *hardy.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

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

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

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

II. Background

A. What Action Is the Agency Taking?

OPP worked collaboratively with the PPDC Workgroup to explore the different types of statements and the design fror the environment (DfE) logo on antimicrobial pesticide product labels. OPP has agreed to develop two voluntary pilot Programs. No antimicrobial registrant is required to participate in any of these pilots as they are both voluntary pilots.

The following describes the pilots, including their duration. Detailed instructions about applying for either of the pilots are available on OPP's Web site at *www.epa.gov/pesticides.*

1. *Factual label statement pilot program.* Increasingly, OPP has faced reviewing pesticide labels that contain purportedly factual statements that imply safety or environmental preferability of products. In each case, OPP must determine that the statements are not false or misleading before approving the label in accordance with FIFRA sections 2(q)(1)(A) and 3(c)(5)(B). This determination is rarely easy in the absence of any data on consumer perceptions of such claims. In order to increase the efficiency of such determinations, OPP and the PPDC workgroup on factual statements attempted to identify types of factual claims that would generally not be misleading and thus could be easily reviewed and approved by OPP.

At this time, the Agency has determined that only a subset of the initially considered factual statements would be generally acceptable on antimicrobial pesticide labels. In order for OPP to approve factual statements that imply safety or environmental preferability outside of this subset, registrants should provide information demonstrating that the statement is true and that consumers and users will not infer more meaning from the statement than what can affirmatively be proven to be true.

This pilot will permit the addition of the following factual statements to antimicrobial pesticide product labels when the terms of OPP's pilot are met by registrants.

a. *Dyes and/or fragrance free statements.* OPP will permit for the purposes and duration of this pilot the following label statements to be placed on qualifying antimicrobial pesticide products: "Dye-free," "Fragrance-free," and "Dye and fragrance free." Registrants applying for this pilot must submit as part of their application the current Confidential Statement of Formula (CSF) and a draft label with the new statements. OPP will examine the CSF to verify the dye/fragrance free claim prior to granting use of the label. Upon initial pre-acceptance of the statement(s) by OPP, a final printed label must be submitted to the Agency before the labeling is stamped acceptable.

b. *Corporate commitment statements.* OPP will permit for the purposes and duration of this pilot the following label statement to be placed on qualifying antimicrobial pesticide products:

> For technical assistance or information on [INSERT THE NAME OF THE COMPANY] environmental/sustainability initiatives, go to [INSERT COMPANY WEBSITE].

Registrants applying for this pilot must submit as part of their application a link to their company's website and their product's draft label with the new statement. Upon initial pre-acceptance of the statement(s) by OPP, a final printed label must be submitted to the Agency before the labeling is stamped acceptable.

The Agency has decided to allow the addition of information concerning product packaging of an antimicrobial pesticide product, such as the recycled content of the product's packaging in lieu of a pilot. The Agency examined OPP's existing Pesticide Registration Notice (PRN) 98–10 "Notifications, Non-

Notifications and Minor Formulation Amendments" *(http://www.epa.gov/PR_Notices/pr98-10.pdf)*. The following guidance is given in PRN 98–10 under section IV. Non-Notifications, H. Product Packaging, 1. Recycled Content:

> A statement about the recycled content of pesticide packaging itself may be made in accordance with guidance from the Federal Trade Commission." The Agency has concluded that PRN 98–10 sufficiently provided for label statements about product packaging, and therefore recycled content of product packaging additions may be made through the notification process at any time.

To be considered for this pilot, applicants must adhere to all the terms of the pilot, submit all of the applicable forms and fees (if necessary), and follow the pilot's mailing/delivery instructions. Please see the detailed instructions on applying for this pilot at *http://www.epa.gov/pesticides.*

If EPA determines, at any time during the pilots, that a company is making violative claims either on the product label or associated web sites, the company will be subject to enforcement action under FIFRA and other applicable laws. EPA may exclude any company deemed to be in violation from further participation in either of the pilots.

OPP will start accepting product label amendment applications for the factual label statements pilot program on January 25, 2010. If OPP decides not to allow use of approved factual statements at the end of this pilot, then the last day that pesticide products participating in this pilot can be released for shipment is May 3, 2013.

2. *OPP-DfE logo pilot program.* OPP is working with EPA's DfE program in the Office of Pollution Prevention and Toxics (OPPT) to empower consumers to make informed choices when purchasing antimicrobial pesticide products, and encourage registrants to develop pesticide formulations that are at the lower end of the toxicity spectrum.

Participation in this pilot is targeted towards antimicrobial pesticide products that are either Acute Toxicity Categories 3 or 4. In general, Antimicrobial pesticide products with the following characteristics would likely not qualify:

a. Are classified as acute toxicity category 1 or 2.

b. Have known, likely, or suggestive carcinogens.

c. Have known developmental, reproductive, mutagenic, or neurotoxicity issues.

d. Have significant, outstanding data issues for the active ingredient and/or product.

e. The label requires use of personal protective equipment.

Additional criteria can be found at *http://www.epa.gov/pesticides.* Participation in the pilot will require both a review under the DfE program as well as OPP's review of the registration application. Registrants must first submit their products to the DfE program for review along with any data necessary to prove that the product is eligible for recognition under their criteria. Once the DfE program determines that the product meets their program's criteria, the registrant must then submit to OPP their amendment request, including their draft label with the OPP-DfE logo. OPP will not accept applications that have not completed the DfE review. Details on how to apply for this pilot can be found at *http://www.epa.gov/pesticides.*

The new OPP-DfE logo established by EPA may be added to products only when registrants meet the terms of the OPP-DfE Pilot. The acceptable label statement accompanying the OPP-DfE logo is:

> For further information concerning the DfE for Pesticides Program, go to *http://www.epa.gov/pesticides.*

OPP is creating this OPP-DfE Website to reduce any potential confusion by consumers or registrants between the Pesticides DfE Program and the existing DfE Program for non-pesticide products.

Participation in this pilot requires the submission of a complete application for a PRIA regulatory application and, therefore, is subject to the applicable fees under the Pesticide Registration Improvement Act (PRIA). OPP will complete its review of the amendment according to the PRIA timeframe. To be considered for this pilot, applicants must adhere to all the terms of the pilot, submit all of the applicable forms and fees, and follow the pilot's mailing/delivery instructions. Please see the detailed instructions on applying for this pilot at *http://www.epa.gov/pesticides.*

The DfE program will start accepting applications for the OPP-DfE Logo pilot on December 9, 2009. OPP will start accepting product amendment applications starting on May 3, 2010. This pilot ends on May 3, 2013, and the last day that pesticide products participating in this pilot can be released for shipment is May 3, 2013.

List of Subjects

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

Dated: December 3, 2009.

Martha Monell,

Acting Director, Office of Pesticide Programs.

[FR Doc. E9–29333 Filed 12–8–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0628 and 2009–0825; FRL–8801–4]

Pesticides; Draft Guidance for Pesticide Registrants on Pesticide Drift Labeling and Petition to Protect Children from Pesticide Drift; Notices of Availability; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: EPA issued two related notices in the **Federal Register** of November 4, 2009, one concerning draft guidance on pesticide drift labeling, and one on a petition submitted to the Agency for protecting children from pesticide drift. Both notices announced the availability of the source documents and opened public comment periods of 60 days (until January 4, 2010). Today's notice extends the comment period on both notices for an additional 60 days, from January 4, 2010 to March 5, 2010.

DATES: Comments, identified by the docket identification (ID) number EPA–HQ–OPP–2009–0628 and EPA–HQ–OPP–2009–0825, must be received on or before March 5, 2010.

ADDRESSES: Follow the detailed instructions as provided under **ADDRESSES** in the **Federal Register** documents of November 4, 2009.

FOR FURTHER INFORMATION CONTACT: For EPA–HQ–OPP–2009–0628, Veronique LaCapra, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–605–1525; e-mail address: *lacapra.veronique@epa.gov.*

For EPA–HQ–OPP–2009–0825, Jill Bloom, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–308–8019; e-mail address: *bloom.jill@epa.gov.*

SUPPLEMENTARY INFORMATION: This document extends the public comment periods established in the **Federal Register** of November 4, 2009 (74 FR

57166) (FRL–8794–9) and (74 FR 57168) (FRL–8797–4). In both documents, comment periods of 60 days were established. Subsequent to publication, a number of stakeholders requested the extension of the original comment periods, citing potential delays due to the intervening holidays and the volume of material in the two dockets. The Agency agrees that an extension is warranted and is hereby extending the comment periods, which were set to end on January 4, 2010, for a period of 60 days, to March 5, 2010.

To submit comments, or access the docket, please follow the detailed instructions as provided under **ADDRESSES** in the November 4, 2009 **Federal Register** documents; the notice of availability – EPA–HQ–OPP–2009–0628; FRL–8794–9 and the petition – EPA–HO–OPP–2009–0825; FRL–8797–4. If you have questions, consult the persons listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Administrative practice and procedure,Agricultural commodities, Earthjustice, Environmental Justice, Farmworker Justice, Labeling, Pesticides and pests, Pesticide drift, Spray drift.

Dated: November 25, 2009.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. E9–29069 Filed–12–8–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0889; FRL–8803–2]

Policy Paper on Revised Risk Assessment Methods for Workers, Children of Workers in Agricultural Fields, and Pesticides with No Food Uses; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: EPA is making available for comment a policy paper entitled "Revised Risk Assessment Methods for Workers, Children of Workers in Agricultural Fields, and Pesticides with No Food Uses," that describes how the Agency will assess pesticide risks not governed by the Federal Food, Drug and Cosmetic Act. To provide comprehensive and consistent evaluation of potential risks of food use pesticides, non-food use pesticides, and related occupational exposures, EPA intends to apply risk assessment techniques developed in implementing the Food Quality Protection Act of 1996 to any pesticide risk assessment, whether it falls under FQPA or not, as long as applying the risk assessment technique is consistent with good scientific practice and is not otherwise prohibited by law. Specifically, this will include using an additional safety/uncertainty factor to protect children, considering aggregate exposures to pesticides from multiple sources, and considering cumulative effects which may occur from exposure to multiple pesticides with a common mechanism of toxicity. Moreover, risks will be explicitly reported for individuals who had not been explicitly considered, specifically workers age 12–17 and children taken into agricultural fields. Taking this step at this time has important environmental justice ramifications. EPA anticipates that implementing this policy will increase protections, especially for agricultural workers and children of workers in agricultural fields.

DATES: Comments must be received on or before February 8, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0889, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0889. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Deborah Smegal, Health Effects Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0175; fax number: (703) 305–5147; e-mail address: *smegal.deborah@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the

chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the chemical review manager listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is releasing and inviting comment on a policy paper that describes how the Agency plans to use revised methods in conducting risk assessments for pesticide uses and exposures not governed by the Federal Food, Drug and Cosmetic Act (FFDCA). Implementing this policy will increase protections, especially for workers and children of workers in agricultural fields.

EPA licenses or registers pesticides for sale and distribution under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Agency establishes tolerances, limits for pesticide residues in or on food, under section 408 of FFDCA. In contrast to the risk/benefit standard for registration under FIFRA, FFDCA applies a risk-only standard for tolerances and explicitly sets certain approaches for assessing risks. These risk assessment approaches include incorporating an additional safety factor to protect children, aggregating all non-occupational (food, water and residential) exposures to a pesticide, and considering the cumulative effects of pesticides with a common mechanism of action. The risk-only standard and the mandated risk assessment approaches were added to FFDCA by the Food Quality Protection Act of 1996 (FQPA). FIFRA does not require EPA to use these risk assessment approaches in assessing worker risks or non-food use pesticides. Also, historically, EPA has not considered children in assessing worker risks.

To provide more comprehensive and consistent evaluation of potential risks of food use pesticides, non-food use pesticides, and related occupational exposures, EPA intends to apply risk assessment techniques developed in implementing FQPA to any pesticide risk assessment, whether it falls under FQPA or not, so long as application of the risk assessment technique is consistent with good scientific practice and is not otherwise prohibited by law. Specifically, this will include using an additional safety/uncertainty factor to protect children, considering aggregate exposures to pesticides from multiple sources, and considering cumulative effects which may occur from exposure to multiple pesticides with a common mechanism of toxicity. Moreover, risks will be explicitly reported for individuals who had not been explicitly considered, specifically workers age 12 to 17 and children taken into agricultural fields.

Taking this step at this time has important environmental justice ramifications. EPA's commitment to environmental justice compels the Agency to act expeditiously, where consistent with statutory authority, to incorporate the risk assessment techniques developed in the implementation of FQPA in assessing pesticide risks under FIFRA.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 1, 2009.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E9–29209 Filed 12–08–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9090–7]

Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement concerning the Coffeyville Resources Superfund Site in Sequoyah County, Oklahoma.

The settlement requires the settling party to pay a total of $193,670.67 to Region 6 as payment of response costs to the Hazardous Substances Superfund. The settlement includes a covenant not to sue pursuant to Sections 106 and 107 of CERCLA, 42, U.S.C. 9606 and 9607. This is a joint settlement with Region 7, who shall publish a separate notice.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to this notice and will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202.

DATES: Comments must be submitted on or before January 8, 2010.

ADDRESSES: The proposed settlement and additional background information

relating to the settlement are available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202–2733. A copy of the proposed settlement may be obtained from Kevin Shade, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733 or by calling (214) 665–2708. Comments should reference Coffeyville Resources Superfund Site in Sequoyah County, Oklahoma, and EPA Docket Number 06–06–09, and should be addressed to Kevin Shade at the address listed above.

FOR FURTHER INFORMATION CONTACT: Amy Salinas, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733 or call (214) 665–8063.

Dated: December 1, 2009.

Al Armendariz,

Regional Administrator (6RA).

[FR Doc. E9–29353 Filed 12–8–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Submitted for Review to the Office of Management and Budget (OMB), Comments Requested

December 1, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comments on this information collection should submit comments on January 8, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to Judith B. Herman, Federal Communications Commission (FCC). To submit your PRA comments by e–mail send them to: PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to web page: http://www.reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called "Currently Under Review", (3) click on the downward–pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the FCC list appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, OMD, 202–418–0214. For additional information about the information collection(s) send an e–mail to PRA@fcc.gov or contact Judith B. Herman, 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control No: 3060–0270.

Title: Section 90.443, Content of Station Records.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for–profit, not–for–profit institutions and state, local or tribal government.

Number of Respondents: 65,295 respondents; 65,295 responses.

Estimated Time Per Response: .25 hours (15 minutes).

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. Section 303(j).

Total Annual Burden: 16,324 hours.

Privacy Act Impact Assessment: Yes. The FCC maintains a system of records notice (SORN), FCC/WTB–1, "Wireless Services Licensing Records," that covers the collection, purpose(s), storage, safeguards, and disposal of the records of private land mobile radio licensees under 47 CFR 90.443. The FCC published the SORN on April 5, 2006 (71 FR 17324, 17269). The FCC completed a Privacy Impact Assessment (PIA) as required by OMB Memorandum, M–03–22 (September 22, 2003) on November 5, 2008. The PIA may be viewed on the FCC's Privacy Act webpage at: <http://www.fcc.gov/omd/privacyact/System_of_records/pia–uls.pdf>.

Nature and Extent of Confidentiality: There is a need for confidentiality with respect to all Private Land Mobile Radio service filers subject to this information collection. Information on private land mobile radio licensees is maintained in the Commission's system of records, FCC/WTB–1, "Wireless Services Licensing Records." The licensee records will be publicly available and routinely used in accordance with subsection (b) of the Privacy Act. FCC Registration Numbers (FRNs) and material which is afforded confidential treatment pursuant to a request made under 47 CFR 0.459 will not be available for public inspection. Any personally identifiable information (PII) that individual applicants provide is covered by FCC/WTB–1 and these and all other records may be disclosed pursuant to the Routine Uses as stated in the SORN.

Need and Uses: The Commission is requesting an extension (no change in the recordkeeping requirement) of this information collection from the Office of Management and Budget (OMB) in order to obtain the full three year clearance from them. The Commission's estimates have increased since the 2007 submission to the OMB. The Commission is now reporting a 7,885 increase in the number of respondents which increased the total annual burden by 11,559 hours. This adjustment reflects more accurate estimates for Paperwork Reduction Act purposes.

Section 90.443 requires that the dates and pertinent details of any maintenance performed on station equipment, and the name and address of the service technician who did the work be entered in the station records. These records will reflect whether or not maintenance of the licensee's equipment has been performed.

The maintenance records may be used by the licensee or Commission field personnel to note any recurring equipment problems or conditions that may lead to degraded equipment performance and/or interference generation. Tower lighting records are required to ensure that the licensee is aware of the tower light condition and proper operation, in order to prevent

and/or correct any hazard to air navigation.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. E9-29309 Filed 12–8–09; 8:45 am]

BILLING CODE: 6712–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 24, 2009.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Karl Brent Vidrine, Executor for the Estate of Thelma Cummings Guilbeau, Sunset, Louisiana; to retain voting shares of Sunset Bancorp, Inc., and thereby indirectly retain voting shares of Bank of Sunset & Trust Company, both of Sunset, Louisiana.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. The Terry Beach Edwards Living Trust: The Ross Beach Living Trust; The Marianna Beach Living Trust; The 2009 Marianna Beach Irrevocable Trust; and Terry Beach Edwards, all of Hutchinson, Kansas; individually and as trustee, acting as a group in concert to retain control of Kansas Natural Gas, Inc., Hays, Kansas, and thereby indirectly retain control of Douglas County Bank, Lawrence, Kansas.

Board of Governors of the Federal Reserve System, December 4, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–29319 Filed 12–8–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of November 3 and 4, 2009

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 3 and 4, 2009.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee seeks conditions in reserve markets consistent with federal funds trading in a range from 0 to ¼ percent. The Committee directs the Desk to purchase agency debt agency and agency MBS during the intermeeting period with the aim of providing support to private credit markets and economic activity. The timing and pace of these purchases should depend on conditions in the markets for such securities and on a broader assessment of private credit market conditions. The Desk is expected to execute purchases of about $175 billion in housing–related agency debt and about $1.25 trillion of agency MBS by the end of the first quarter of 2010. The Desk is expected to gradually slow the pace of these purchases as they near completion. The Committee anticipates that outright purchases of securities will cause the size of the Federal Reserve's balance sheet to expand significantly in coming months. The System Open Market Account Manager and the Secretary will keep the Committee informed of ongoing developments regarding the System's balance sheet that could affect the attainment over time of the Committee's objectives of maximum employment and price stability.

[1] Copies of the Minutes of the Federal Open Market Committee at its meeting held on November 3 and 4, 2009, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

By order of the Federal Open Market Committee, November 30, 2009.

Brian F. Madigan,

Secretary, Federal Open Market Committee.

[FR Doc. E9–29266 Filed 12–8–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 4, 2010.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Apollo Bancshares, Inc., Coral Gables, Florida; to become a bank holding company by acquiring 50.5 percent of the voting shares of Union Credit Bank, Miami, Florida.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Stockgrowers State Bank Employee Stock Ownership Plan, Ashland, Kansas; to acquire up to an additional 3.24 percent, for a total of 37.0 percent, of the voting shares of Stockgrowers Banc Corporation, Ashland, Kansas, and thereby indirectly acquire additional voting shares of Stockgrowers State Bank of Ashland, Kansas, and Peoples Bank, Coldwater, Kansas.

Board of Governors of the Federal Reserve System, December 3, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–29271 Filed 12–8–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 4, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Family Bancorp, Inc., San Antonio, Texas; to acquire by merger Medina Bankshares, Inc., Hondo, Texas, and thereby indirectly acquire D'Hanis State Bank, D'Hanis, Texas.

Board of Governors of the Federal Reserve System, December 4, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–29318 Filed 12–08–09; 8:45 am]

BILLING CODE 6210–01–S

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 website at *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 December 23, 2009.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Bank Applications Officer) 33 Liberty Street, New York, New York 10045–0001:

1. BCP Holdings (USA), Inc., Newark, New Jersey; to engage *de novo* through its newly formed subsidiary, in extending credit and servicing loans; activities related to extending credit, including collection agency services; and asset–managment, servicing and collection activities, pursuant to sections 225.28(b)(1) and (b)(2) of Regulation Y.

Board of Governors of the Federal Reserve System, December 3, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–29272 Filed 12–8–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Inquiry Regarding Passenger Vessel Financial Responsibility

December 3, 2009.

AGENCY: Federal Maritime Commission.

ACTION: Notice of Inquiry.

SUMMARY: The Federal Maritime Commission is issuing this Inquiry to solicit information and comments concerning the benefits and burdens of the current Commission requirements by which passenger vessel operators establish proof of financial responsibility in the event of nonperformance of a contracted cruise from a U.S. port. Comments received from the public and interested segments of the passenger cruise industry will assist in determining whether or not the Commission should amend its regulations at 46 CFR Part 540, Subpart A.

DATES: Comments are due on or before February 10, 2010.

ADDRESSES: Address all comments concerning this Inquiry to: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001. E-mail: *secretary@fmc.gov*.

FOR FURTHER INFORMATION CONTACT: Sandra L. Kusumoto, Director, Bureau of Certification & Licensing. *Telephone:* (202) 523–5787. *E-mail:* *skusumoto@fmc.gov*.

SUPPLEMENTARY INFORMATION:

The Commission administers Chapter 441 of Title 46 of the U.S. Code, entitled Evidence of Financial Responsibility for Passenger Transportation. 46 U.S.C. 44101–44106. As relevant, this Chapter requires operators of vessels having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports to evidence proof of financial responsibility to reimburse passengers for the water portion of their fare in the event of nonperformance (46 U.S.C. 44102), and provide coverage in the event of death or injury to passengers or other persons on voyages to or from United States ports (46 U.S.C. 44103).

In order to indemnify passengers for nonperformance of contracted cruises, passenger vessel operators (PVOs) must establish proof of financial

responsibility (Nonperformance Coverage) in an amount determined by the Commission. Current Commission regulations require that Nonperformance Coverage be set at no less than 110 percent of the highest unearned passenger revenue [1] of the applicant within two fiscal years prior to filing an application with the Commission. 46 CFR 540.5–.6. The amount of Nonperformance Coverage required is presently capped at $15 million dollars. 46 CFR 540.9(j).

The $15 million ceiling for Nonperformance Coverage has been in existence since 1991, when it was raised from $10 million. The Commission is issuing this Notice of Inquiry (NOI) to gather information that will assist in assessing comprehensively the benefits or burdens that the Nonperformance Coverage requirement has on all sectors of the passenger vessel industry. Information derived through this Inquiry may determine whether changes to our program may be called for at this time. PVOs, ports, industry associations, credit and financial companies, sureties, guarantors, insurers, travel agents, cruise passengers and other interested parties are encouraged to participate by providing responses to the questions herein and information pertaining to the impact of Nonperformance Coverage.

To promote maximum participation, the NOI questions will be made available on the Commission's Web site, *http://www.fmc.gov*. The NOI questions also may be obtained by contacting the Commission's Secretary, Karen V. Gregory, by telephone at (202) 523–5725, or by e-mail at *secretary@fmc.gov*. In addition, non-confidential comments may be submitted as an attachment to an e-mail submission. These attachments must be submitted in Microsoft Word (2007 or prior version), Rich Text format (.rtf), or plain text (.txt).

Some commenters may wish to include some commercially sensitive information as necessary or relevant, whether by way of explaining their experience or detailing in practical terms the impact of Nonperformance Coverage. Any such information should be identified as commercially sensitive by the filer and the document or relevant portions thereof must be marked as confidential. Confidential treatment must be specifically requested for those marked portions, and one additional copy of the comments with the confidential portions redacted must be provided along with the original and one copy of the complete comments. Confidential comments should not be submitted by e-mail. The Commission will provide confidential treatment to the extent allowable by law for submissions, or parts of submissions, for which the parties request confidentiality.

While the Commission intends that this review of Nonperformance Coverage be as thorough as possible, *there is no requirement that participants answer all NOI questions.* Commenters are free to answer only those questions for which they have direct experience or specific views.

The Commission accordingly invites written comments from interested parties responding to the following inquiries:

Notice of Inquiry Questions

A. PVOs' Cost of Complying With Nonperformance Regulations

1. Do you expect your company's unearned passenger revenue to increase, decrease or remain the same over the next twelve to twenty-four months? If you expect it to change, by what percent?

2. Set forth a detailed description of your actual costs for 2008, and actual or projected costs for 2009, directly related to satisfying the FMC's PVO regulations for Nonperformance Coverage.

3. With respect to passenger bookings and payments:

(i) What is your company's policy with regard to passenger reimbursement in the event of nonperformance of a cruise?

(ii) What is your company's booking policy regarding the timing and amount of booking deposit and for payment of any fare balance?

B. Adequacy of Nonperformance Coverage

The Commission is interested in assessing whether Nonperformance Coverage remains adequate for the purpose of protecting cruise passengers. The following questions are addressed to all interested parties:

4. What is your position with regard to the adequacy of the current ceiling of $15 million? Please provide a detailed explanation with your response.

5. Should the Commission consider adjusting the $15 million cap periodically based on an inflation factor (*i.e.*, Consumer Price Index)?

6. Should the Commission consider alternatives to the current $15 million cap? Please provide a detailed explanation with your response.

7. If the $15 million cap is modified, what would be the likely benefits or burdens upon PVOs, related companies and the shipping public?

8. What other methodologies could the Commission use to establish adequate coverage amounts as required by current regulations?

9. Should the Commission consider legislative alternatives to the current Nonperformance Coverage requirement? If so, set forth a detailed response.

C. Practices of Sureties, Credit Card Companies and Others

The Commission is interested in assessing whether and to what extent the practices of sureties, credit card issuers or other companies may affect the availability of Nonperformance Coverage. The following questions are addressed primarily to financial entities, but may be answered by PVOs or other interested parties:

10. Have credit card companies added specific requirements for servicing PVOs?

11. What are the factors credit card issuers use to assess a cruise line's creditworthiness or financial fitness? How does a credit card issuer determine whether to implement additional security (*i.e.*, holdbacks, letters of credit, collateral)?

12. What are the factors that sureties or guarantors use to assess a cruise line's creditworthiness or financial fitness? Please describe the factors that affect premiums for passenger vessel operators. What indicators will cause an increase or decrease in premiums for bonds or guarantees?

Further Proceedings and Scheduling

Following receipt of written comments, the Commission anticipates holding one or more hearings to receive public testimony from interested parties. The Commission will announce the dates and locations of such hearings by subsequent Order.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. E9–29269 Filed 12–8–09; 8:45 am]

BILLING CODE 6730–01–P

[1] Unearned passenger revenue is defined as "that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed," 46 CFR 540.2(i).

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984

as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

ADP Logistics Corp., 517 W Wrightwood Ave., Elmhurst, IL 60126. *Officers:* Brian Lara, Associate Vice President, (Qualifying Individual) Yinggang Chen, President.

St. John Logistics Inc., 190 Middlesex Essex Turnpike, #205, Iselin, NJ 08830. *Officer:* Patrick P. Pulikal, Secretary (Qualifying Individual).

America's Trans-Logistics Inc., 3301 NW 97th Ave., Doral, FL 33172–1105. *Officers:* Jose R. Castillo, Vice President, (Qualifying Individual) Maria C. Ucros, President.

Ocean Air Transport, Inc. dba SCM International, 101 Frontier Way, Bensenville, IL 60106. *Officers:* W. Neely Mallory, III, President, (Qualifying Individual) Robert E. Mallory, Director.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Ameritrans Logistics, Inc., 112 SW Thomas Street, Ste. 100, Burleson, TX 76097. *Officers:* Michael J. Krall, President, (Qualifying Individual) Susan D. Curtis, Secretary.

OPM International Group LLC, 3315 NW 46 Street, Miami, FL 33142. *Officer:* Olenka Riglos, Manager (Qualifying Individual).

Dated: December 4, 2009.

Karen V. Gregory,

Secretary.

[FR Doc. E9–29366 Filed 12–8–09; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

[File No. 091 0138]

Service Corporation International; Analysis of the Agreement Containing Consent Orders 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 December 28, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "SCI Palm, File No. 091 0138" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink on: (*https://public.commentworks.com/ftc/sci-palm*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://public.commentworks.com/ftc/sci-palm*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "SCI Palm, File No. 091 0138" 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 H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. 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.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. 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.shtm*).

FOR FURTHER INFORMATION CONTACT: Goldie V. Walker (202-326-2919), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

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 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

[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* FTC Rule 4.9(c), 16 CFR 4.9(c).

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 November 25, 2009), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 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, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Service Corporation International ("SCI") that will completely remedy the anticompetitive effects that would likely result from SCI's proposed acquisition of Palm Mortuary, Inc. ("Palm"). Under the terms of the proposed Consent Agreement, SCI is required to divest a cemetery, Davis Memorial Park, an associated funeral home in the Las Vegas, Nevada, metropolitan area, rights to the Davis trade name, and the pre-need service contracts relating to both the associated Davis Funeral Home and a second Davis Funeral Home owned by SCI in the Las Vegas area.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

SCI, doing business as Alderwoods (Nevada) Inc., and Palm entered into an agreement for SCI to acquire 100 percent of Palm's outstanding voting securities on August 5, 2009. The Commission's Complaint alleges 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, 15 U.S.C. § 45, as amended, by lessening competition in the provision and sale of cemetery services in the Las Vegas, Nevada, metropolitan area.

II. The Parties

SCI is a public corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. SCI currently is the third largest provider of funeral home and cemetery services in the Las Vegas metropolitan area, where SCI operates two funeral homes and one funeral home and cemetery combination facility.

Palm is a privately-held corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 1325 N. Main Street, Las Vegas, Nevada 89101. In the Las Vegas metropolitan area, Palm operates five funeral home and cemetery combination facilities, three standalone funeral homes, and one mausoleum, making it the largest provider in the area of both funeral home and cemetery services.

III. The Complaint

According to the Commission's proposed Complaint, the relevant product market in which SCI and Palm compete is the provision and sale of cemetery services in the Las Vegas, Nevada, metropolitan area. Cemetery services include the traditional products and services offered by perpetual care cemeteries, including burial spaces, opening and closing of graves, memorials and burial vaults, mausoleum spaces, cemetery maintenance and upkeep, and advance disposition planning.

Concentration in the market for cemetery services in the Las Vegas area is very high, and the proposed acquisition would further increase concentration levels. Post-acquisition, the combined entity will have a 76 percent share in the cemetery services market.[2] Post-acquisition, the Herfindahl-Hirschman Index ("HHI") for cemetery services will be 6261, and the acquisition will increase HHI levels by 1876.

According to the Commission's proposed Complaint, entry into the cemetery services market is unlikely to be timely, likely, or sufficient to prevent anticompetitive effects in the Las Vegas area. Entry would be difficult because of the limited availability of geographically-desirable land, zoning regulations and other statutory restrictions, and high sunk costs. An entrant would also need to build a customer base in the face of competition from well-established cemeteries that are not capacity constrained and have long-standing reputations and heritage traditions in the community.

Finally, the proposed Complaint alleges that the proposed Acquisition will eliminate significant competition between SCI and Palm in the highly concentrated cemetery services market and increase the likelihood that SCI would be able to unilaterally raise prices or exercise market power through coordinated interaction among competitors.

IV. The Consent Agreement

The proposed Consent Agreement would preserve competition completely in the relevant market alleged in the Complaint by requiring that SCI divest to a Commission-approved acquirer the Davis combination cemetery/funeral home facility, rights to the Davis trade name, and all the pre-need service contracts associated with the Davis combination facility and with a second Davis funeral home in the Las Vegas metropolitan area (collectively the "Divestiture Business"). Divestiture of the pre-need service contracts associated with a second Davis funeral home in the Las Vegas area is to help ensure the competitiveness and viability of the Divestiture Business.

The proposed Consent Agreement requires that the divestiture occur no later than ninety (90) days after SCI consummates its acquisition of Palm. If SCI divests the assets during the public comment period, and if, at the time the Commission decides to make the Order final, the Commission notifies SCI that either the purchaser is not an acceptable acquirer or that the asset purchase agreement is not an acceptable manner of divestiture, then SCI must immediately rescind the transaction in question and divest those assets within six (6) months of the date the Order becomes final to an acquirer and in a manner that receives the prior approval of the Commission.

The Consent Agreement further requires SCI to maintain the economic viability, marketability, and competitiveness of the Divestiture Business until the potential acquirer is approved by the Commission and the divestiture is complete. For six (6) months following the divestiture, SCI is required to provide transitional services, as needed, to assist the acquirer of the Divestiture Business.

The proposed Consent Agreement also allows the Commission to appoint an interim monitor to ensure SCI's compliance with the Order to Maintain

[2] In calculating market shares, the Commission relied on the number of "calls" (funerals or interments) of each competitor rather than dollar revenues.

Assets and a trustee to divest any divestiture assets that SCI fails to timely divest. The Commission also may seek civil penalties from SCI for non-compliance with the Consent Agreement.

The proposed Consent Agreement prohibits SCI from acquiring any interest or assets engaged in the provision of cemetery services in the Las Vegas metropolitan area for ten (10) years without providing prior written notice to the Commission. In addition, SCI is required to file periodic reports of compliance with the proposed orders.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9–29332 Filed 12–8–09; 9:02 am]

BILLING CODE: 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–0021]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

National Coal Workers' Autopsy Study (NCWAS)—Extension—(0920–0021 Exp. 1/31/2010) National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Under the Federal Coal Mine Health and Safety Act of 1977, Public Law 91–173 (amended the Federal Coal Mine and Safety Act of 1969); the Public Health Service has developed a nationwide autopsy program (NCWAS) for underground coal miners. The Consent Release and History Form are primarily used to obtain written authorization from the next-of-kin to perform an autopsy on the deceased miner. Because a basic reason for the post-mortem examination is research (both epidemiological and clinical), a minimum of essential information is collected regarding the deceased miners, including occupational history and smoking history. The data collected will be used by the staff at NIOSH for research purposes in defining the diagnostic criteria for coal workers' pneumoconiosis (black lung) and pathologic changes and will be correlated with x-ray findings.

It is estimated that only 5 minutes is required for the pathologist to put a statement on the invoice affirming that no other compensation is received for the autopsy. From past experience, it is estimated that 15 minutes is required for the next-of-kin to complete the Consent Release and History Form. Since an autopsy report is routinely completed by a pathologist, the only additional burden is the specific request of abstract of terminal illness and final diagnosis relating to pneumoconiosis. Therefore, only 5 minutes of additional burden is estimated for the autopsy report.

There are no costs to respondents other than their time. The total estimated burden hours are 21.

ESTIMATED ANNUALIZED BURDEN

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Pathologist	Invoice	50	1	5/60
Pathologist	NCWAS Checklist	50	1	5/60
Next-of-Kin	Consent Release History	50	1	15/60

Dated: December 3, 2009.

Maryam Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–29385 Filed 12–8–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0569]

Approved Tobacco Retailer Training Program; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is establishing a public docket to obtain information on suggested elements for approved tobacco retailer training programs. FDA is establishing this docket in order to provide an opportunity for interested parties to provide information and share views on elements that should be included in an effective retailer training program as provided for in the Family Smoking Prevention and Tobacco Control Act (the Tobacco Control Act).

DATES: Submit electronic or written comments by January 8, 2010.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Anne Kirchner, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 301–796–4800, *Anne.Kirchner@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Tobacco products are responsible for more than 440,000 deaths each year. The Centers for Disease Control and Prevention (CDC) report an estimated 60 million adults smoke cigarettes in the

United States, even though this behavior will result in death or disability for half of all regular users. Paralleling this enormous health burden is the economic burden of tobacco use, which is estimated to total $193 billion annually in medical expenditures and lost productivity. Curbing the significant adverse consequences of tobacco use is one of the most important public health goals of our time. One way to do this is to prevent youth from beginning to smoke. According to the Substance Abuse and Mental Health Services Administration's (SAMHSA's) National Survey on Drug Use and Health, 80 percent of adults who are nicotine dependent report that they started smoking cigarettes before the age of 18.

On June 22, 2009, the President signed the Tobacco Control Act into law. The Tobacco Control Act grants FDA important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. Section 102 of the Tobacco Control Act requires FDA to issue, with certain modifications, its 1996 final regulation restricting the sale and distribution of cigarettes and smokeless tobacco products (August 28, 1996, 61 FR 44396 at 44615 to 44618). The rule contains provisions designed to limit young people's access to tobacco products, as well as restrictions on marketing to curb the appeal of these products to minors.

Section 103(q)(2) of the Tobacco Control Act includes two schedules for assessing civil money penalties against retailers for violations of restrictions on the sale and distribution of tobacco products, including restrictions on access to, and the promotion and advertising of, tobacco products. Under each schedule, violators are subject to increasing penalties for repeated violations within prescribed time periods. For the first three violations in a 24-month period, retailers with approved training programs are subject to lower penalties than retailers without such programs. Section 103(q)(2)(B) of the Tobacco Control Act defines "approved training program" as "a training program that complies with standards developed by the [FDA] for such programs."

We are requesting comments that will inform the development of guidance on approved training programs. A copy of the Family Smoking Prevention and Tobacco Control Act is available on the agency's Web site at *http://www.fda.gov/TobaccoProducts/Guidance ComplianceRegulatoryInformation/default.htm.*

II. Request for Comments and Information

We are interested in comments on the characteristics that comprise an effective training program for clerks selling tobacco products in a retail establishment. Such programs would effectively teach such clerks how to request and verify the photo identification of purchasers younger than 27 years of age and how to refuse the sale of cigarettes or smokeless tobacco to purchasers younger than 18 years of age. We are particularly interested in information about elements of current tobacco retailer training programs developed by trade associations, corporations, States and localities, as well as any studies on the effectiveness of these training programs in reducing retail sales of tobacco products to youth.

We believe that effective retailer training programs may include many of the following components and we welcome input on any of these specific elements:

- Methods for teaching salesclerks about:
  - Federal, State, and local laws prohibiting youth access to tobacco.
  - The health and societal costs of tobacco use as the basis for youth access laws.
  - Company policies on youth access to tobacco.
  - The definition of tobacco products covered by youth access laws.
  - Laws and company policies on requiring identification, including the age that triggers ID verification and the acceptable forms of ID.
  - The need to closely examine ID, including an explanation that many illegal sales are made to minors who produce IDs showing that they are under the legal age to purchase tobacco products.
  - Verification of an ID's authenticity, including the features of an ID that must be checked, how to tell if an ID might have been altered and what an employee should do if an ID appears to be altered.
  - The fact that salesclerks are not required to make a tobacco sale if there is any question that doing so would violate the law.
- Specific age-verifying protocols designed to ensure that the date of birth is read, clearly understood, and compared to a calendar or other age verification device.
- Practical techniques for:
  - Asking for ID.
  - When and how to ask for a second ID.
  - Declining a sale when the customer has no ID or when the ID shows the customer to be underage.
  - Declining a sale because of concerns about whether the ID has been altered.
  - Declining purchase attempts by a minor made with written parental permission.
  - Resisting customer pressure.
  - Declining to sell tobacco to underage persons who are friends, acquaintances, and peer group members and the techniques for refusal.
- Methods for ensuring and documenting that employees have the knowledge required to comply with youth access laws.

We also believe that effective programs would include strategies for initial training of new employees and refresher training for existing employees. We are interested in learning about programs that address both of these aspects, as well as information related to the appropriate length of time between initial and refresher training, and the most appropriate methods for training (e.g., in-person training, Web-based training, self-study). The agency will consider information submitted to the docket in developing guidance on approved training programs.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 3, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–29288 Filed 12–8–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Public Health Informatics: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–

463) of October 6, 1972, that the Board of Scientific Counselors, National Center for Public Health Informatics, Department of Health and Human Services, has been renewed for a 2-year period through November 5, 2011.

For information, contact Scott McNabb, Ph.D., Designated Federal Officer, Board of Scientific Counselors, National Center for Public Health Informatics, Department of Health and Human Services, 1600 Clifton Road, NE., M/S E91, Atlanta, Georgia 30333; Telephone 770/498–6427.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: December 3, 2009.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–29363 Filed 12–8–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908), on September 30, 1997 (62 FR 51118), and on April 13, 2004 (69 FR 19644).

A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Mandatory Guidelines, "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," sets strict standards that laboratories must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines dated April 13, 2004 (69 FR 19644), the following laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016, (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, 345 Hill Ave., Nashville, TN 37210, 615–255–2400, (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc.).

Baptist Medical Center-Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783, (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974, 215–674–9310.

DynaLIFE Dx*, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702/800–661–9876, (Formerly: Dynacare Kasper Medical Laboratories).

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630.

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823, (Formerly: Laboratory Specialists, Inc.).

Kroll Laboratory Specialists, Inc., 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130, (Formerly: Scientific Testing Laboratories, Inc.: Kroll Scientific Testing Laboratories. Inc.),

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986, (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984, (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339, (Formerly: LabCorp Occupational Testing Services, Inc.: MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845, (Formerly: Quest Diagnostics

Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.).

Maxxam Analytics*, 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8, 905–817–5700, (Formerly: Maxxam Analytics Inc., NOVAMANN (Ontario), Inc.).

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515.

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774, (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891x7.

Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121, 858–643–5555.

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590/800–729–6432, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403 610–631–4600/877–642–2216, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 866–370–6699/818–989–2521, (Formerly: SmithKline Beecham Clinical Laboratories).

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300/800–999–5227.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x1276.

Southwest Laboratories, 4625 E. Cotton Center Boulevard Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027.

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052.

STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421, 800–442–0438.

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273.

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260.

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085.

The following laboratory will be voluntarily withdrawing from the National Laboratory Certification Program on December 1, 2009:

Clendo Reference Laboratory, Avenue Santa Cruz #58, Bayamon, Puerto Rico 00959, 787–620–9095.

*The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register,** July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 13, 2004 (69 FR 19644). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Dated: December 1, 2009.

Elaine Parry,

Director, Office of Program Services, SAMHSA.

[FR Doc. E9–29360 Filed 12–8–09; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2006–D–0362] (Formerly Docket No. 2006–D–0044)

Guidance for Industry on Patient-Reported Outcome Measures: Use in Medical Product Development to Support Labeling Claims; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled "Patient-Reported Outcome Measures: Use in Medical Product Development to Support Labeling Claims." This guidance describes how FDA reviews and evaluates patient-reported outcome (PRO) instruments used to measure treatment benefit in medical product clinical trials. It also provides recommendations on how sponsors can use study results measured by PRO instruments to support claims in approved medical product labeling. This guidance finalizes the draft guidance published on February 3, 2006.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002; or Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448; or Office of Communication, Education, and Radiation Programs, Division of Small Manufacturers, International and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850–4307. Send one self-addressed adhesive label to assist in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov.* See the **SUPPLEMENTARY INFORMATION** section for

electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Laurie B. Burke, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 6462, Silver Spring, MD 20993–0002, 301–796–0900; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301–827–6210; or Sahar Dawisha, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0717.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled "Patient-Reported Outcome Measures: Use in Medical Product Development to Support Labeling Claims." This guidance describes how FDA reviews and evaluates PRO instruments used to measure treatment benefit in medical product clinical trials. A PRO instrument (e.g., questionnaire, diary, plus all the information and documentation that support its use) is a means to capture PRO data. This guidance also describes FDA's current thinking on how sponsors can use study results measured by PRO instruments to support claims in approved medical product labeling. It does not address the use of PRO instruments for purposes beyond evaluation of treatment benefit claims made about a drug or medical product in labeling.

By explicitly addressing the review issues identified in this guidance, sponsors can increase the efficiency of their discussions with FDA during the medical product development process, streamline FDA's review of PRO instrument adequacy, and provide optimal information about the patient's perspective for use in making conclusions about treatment benefit at the time of medical product approval.

A draft version of this guidance was made available for public comment in the **Federal Register** of February 3, 2006 (71 FR 5862). All of the public comments we received have been considered and the guidance has been revised as appropriate.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on the use of PRO measures in medical product clinical trials. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

This guidance contains information collection that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collection has been approved under OMB Control Numbers 0910–0001, 0910–0338, and 0910–0231. The information requested in the guidance is currently submitted to FDA to support the medical product's effectiveness and to support claims in approved medical product labeling (see 21 CFR 314.50(d)(5), 314.126(b)(6), 601.2, and part 814).

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*, *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm*, *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*, or *http://www.regulations.gov*.

Dated: December 3, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–29273 Filed 12–8–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biomedical Library and Informatics Review Committee.

Date: March 4–5, 2010.

Time: March 4, 2010, 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Time: March 5, 2010, 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room 8600, Rockville Pike, Bethesda, MD 20892.

Contact Person: Arthur A. Petrosian, PhD, Chief Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosia@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29231 Filed 12–8–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the

provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Pharmaceutical Approaches for Development of Pharmacotherapies for Drug Addiction (8893).

Date: December 16, 2009.

Time: 9:30 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, New Technologies: Integrating Data from Prescription, Monitoring Program(s) to Current Clinical Practice (2218).

Date: December 16, 2009.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, N43DA–10–7775: Tool Development for New or Improved Capture Reagents.

Date: January 7, 2010.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Minna Liang, PhD, Scientific Review Officer, Training and Special Projects Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, 6101 Executive Blvd., Room 220, MSC 8401, Bethesda, MD 20852, 301–435–1432, *liangm@nida.nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Web Based Cognitive/Neuropsychological Testing, for Substance Abuse (4412).

Date: January 12, 2010.

Time: 9:30 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29236 Filed 12–8–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of meetings of the Board of Regents of the National Library of Medicine.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The 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: Board of Regents of the National Library of Medicine, Subcommittee on Outreach and Public Information.

Date: February 2, 2010.

Time: 7:30 a.m. to 9 a.m.

Agenda: Outreach Activities.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20894, 301–496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine.

Date: February 2–3, 2010.

Open: February 2, 2010, 9 a.m. to 4:30 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: February 2, 2010, 4:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: February 3, 2010, 9 a.m. to 12 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20894, 301–496–6221, *lindberg@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nlm.nih.gov/od/bor/bor.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29233 Filed 12–8–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, National Center for Biotechnology Information.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual other conducted by the NATIONAL LIBRARY OF MEDICINE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Center for Biotechnology Information.

Date: April 27, 2010.

Open: 8:30 a.m. to 12 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: 12 p.m. to 2 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: 2 p.m. to 3 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: David J. Lipman, MD, Director Natl Ctr for Biotechnology Information, National Library of Medicine, Department of Health and Human Services, Building 38a, Room 8N805, Bethesda, MD 20894, 301–435–5985, *dlipman@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, drivers license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29232 Filed 12–8–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism, Initial Review Group Clinical, Treatment and Health Services Research Review Subcommittee.

Date: March 15–16, 2010.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Katrina L. Foster, PhD, Scientific Review Officer, National Institute on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 2019, Rockville, MD 20852, 301–443–4032, *katrina@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29230 Filed 12–8–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–99]

"HUD NEPA ARRA Section 1609(c) Reporting" Is the Name of the Attached Copy for This Collection

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Grantees who receive ARRA funding for projects must report on the status and progress of their projects and activities with respect to compliance with the National Environment Policy Act (NEPA) requirements and documentation. HUD consolidates and transmits the information received from grantees to the Council on Environmental Quality and OMB for the Administration's reports to the House and Senate committees designated in the legislation.

DATES: *Comments Due Date:* January 8, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0187) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: "HUD NEPA ARRA Section 1609(c) Reporting" is the name of the attached copy for this collection.

OMB Approval Number: 2506–0187.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: Grantees who receive ARRA funding for projects must report on the status and progress of their projects and activities with respect to compliance with the National Environment Policy Act (NEPA) requirements and documentation. HUD consolidates and transmits the information received from grantees to the Council on Environmental Quality and OMB for the Administration's reports to the House and Senate committees designated in the legislation.

Frequency of Submission: Quarterly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	6,000	4		2		12,000

Total Estimated Burden Hours: 12,000.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 3, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–29364 Filed 12–8–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–97]

Request for Occupied Conveyance

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Prior to acquisition, the mortgagee/loan servicer must provide a notice of acquisition and form HUD–9539 to any occupant of the property. The occupants may submit the form, which provides information on occupation, income, and obligations to HUD requesting to remain in the property. HUD uses the information to determine whether the occupant qualifies, to maintain rental accounts, and to facilitate collection of overdue rents. HUD may provide pertinent information to a local real estate broker who manages the property. Occupants who are accepted must execute a month-to-month lease.

DATES: *Comments Due Date:* January 8, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0268) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Request for Occupied Conveyance.

OMB Approval Number: 2502–0268.

Form Numbers: HUD–9539.

Description of the Need for the Information and its Proposed Use: Prior to acquisition, the mortgagee/loan servicer must provide a notice of acquisition and form HUD–9539 to any occupant of the property. The occupants may submit the form, which provides information on occupation, income, and obligations to HUD requesting to remain in the property. HUD uses the information to determine whether the occupant qualifies, to maintain rental accounts, and to facilitate collection of overdue rents. HUD may provide pertinent information to a local real estate broker who manages the property. Occupants who are accepted must execute a month-to-month lease.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	10,015	7.46		0.282		21,125

Total Estimated Burden Hours: 21,125.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 3, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–29370 Filed 12–8–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–98]

Revitalization Area Designation and Management

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Department accepts requests from local governments or interested nonprofit organizations to designate specified geographic areas as revitalization areas. A request must describe the nominated area in terms of census block groups.

DATES: *Comments Due Date:* January 8, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0566) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Revitalization Area Designation and Management.

OMB Approval Number: 2502–0566.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use:

The Department accepts requests from local governments or interested nonprofit organizations to designate specified geographic areas as revitalization areas. A request must describe the nominated area in terms of census block groups.

Frequency of Submission: On occasion

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	12	1		2		24

Total Estimated Burden Hours: 24.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: *December 3, 2009.*

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–29367 Filed 12–8–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2009–N226; 10137–1265–0000 S3]

Oregon Islands, Three Arch Rocks, and Cape Meares National Wildlife Refuges, Clatsop, Tillamook, Lincoln, Lane, Coos, and Curry Counties, OR

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of comprehensive conservation plan, wilderness stewardship plan, and finding of no significant impact.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our completed comprehensive conservation plan (CCP), wilderness stewardship plan (WSP), and finding of no significant impact (FONSI) for the Oregon Islands, Three Arch Rocks, and Cape Meares National Wildlife Refuges (Refuges) in Oregon. In this CCP, we describe how we will manage the Refuges for the next 15 years.

ADDRESSES: You can obtain printed or CD–ROM copies of the CCP/WSP/FONSI by any of the following methods:

Agency Web Site: Download a copy of the CCP/WSP/FONSI at *http://www.fws.gov/oregoncoast/ccp.htm/.*

E-mail: oregoncoastccp@fws.gov. Include "Oregon Islands CCP" in the subject line of the message.

Mail: Oregon Coast National Wildlife Refuge Complex, 2127 SE Marine Science Drive, Newport, OR 97365.

In-Person Viewing or Pickup: Call (542) 867–4550 to make an appointment during regular business hours to view the CCP/FONSI at 2127 SE Marine Science Drive, Newport, OR.

FOR MORE INFORMATION CONTACT: Roy W. Lowe, Project Leader, (542) 867–4550.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we complete the current CCP process for the Oregon Islands, Three Arch Rocks, and Cape Meares Refuges. We started this process with a notice of intent published in the **Federal Register** (71 FR 62605, October 26, 2006). We released the Draft CCP/Environmental Assessment (EA) to the public, requesting comments in a notice of availability in the **Federal Register** (74 FR 28270, June 15, 2009).

The Oregon Islands, Three Arch Rocks, and Cape Meares Refuges are parts of the Oregon Coast National Wildlife Refuge Complex. Planning for these Refuges occurred simultaneously because all three Refuges consist of rocks, reefs, islands, and headlands located along the Oregon coast, and many of the same issues and management opportunities occur at all three Refuges.

These Refuges span the coast of Oregon and support a rich diversity of wildlife habitats including coastal rocks, reefs, islands, and forested and grass-covered headlands. Oregon Islands Refuge includes 1,854 rocks, reefs, islands, and two headland units, spanning 320 miles of the Oregon Coast. With the exception of Tillamook Rock, all of the rocks, reefs, and islands within the Refuge are included in the Oregon Islands Wilderness Stewardship Area. The Three Arch Rocks Refuge and Wilderness Stewardship area is located offshore in the Pacific Ocean, one-half mile west of Oceanside, Oregon, in Tillamook County. The Refuge encompasses nine rocks and islands with a total land area of 15 acres. Cape Meares Refuge consists of vertical coastal cliffs, rock outcroppings, and rolling headlands with old-growth forest dominated by Sitka spruce and western hemlock.

We announce our decision and the availability of the CCP/WSP/FONSI for Oregon Islands, Three Arch Rocks, and Cape Meares Refuges in accordance with the National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of impacts on the human environment, which we included in the EA that accompanied the Draft CCP.

The CCP will guide us in managing and administering the Refuges for the next 15 years. Alternative 2, as we described in the Draft CCP/EA, is the foundation for the completed CCP. We made minor additions and corrections to the CCP based on public comments we received on the Draft CCP/EA.

Background

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year direction 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 our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

CCP Alternatives, Including the Selected Alternative

We addressed several issues in our Draft CCP/EA through development and evaluation of two alternatives for managing the Refuges. The Draft CCP/EA was available for a 30-day public review and comment period. The Service received 11 comments on the Draft CCP, which were incorporated into or responded to in the completed CCP. No substantive changes were required to address public comments. One new strategy was added to emphasize communication with all branches of the military that conduct flights along the Oregon coast to educate pilots about the Refuges and the impacts caused by low-level overflights along the Oregon coast. Additional text was added to highlight the Service's plan to formalize the U.S. Coast Guard's supporting role in reporting Federal wildlife violations and enforcing Refuge regulations.

Selected Alternative

After considering the comments we received, we selected Alternative 2 for the CCP. As planned in the CCP, we will develop law-enforcement assistance agreements to increase resource protection along the coast; continue seabird surveys; develop GIS-based inventory and monitoring programs for target wildlife and plant species; actively work with partners to design and implement research on seabirds, pinnipeds, climate change, and other pertinent issues; expand the volunteer program to include interpretation at new locations; and develop agreements with school districts to implement environmental education programs at Oregon Islands and Three Arch Rocks Refuges.

For Cape Meares Refuge, we will maintain closed areas; create a wildlife checklist; conduct an official boundary survey and post the boundary; and develop law enforcement assistance agreements, as planned in the CCP. We will also increase the volunteer interpreter presence and recruit more volunteers to lead guided walks. Environmental education and evening campground programs at adjacent Cape Lookout State Park will be developed and implemented.

Public Availability of Documents

In addition to the methods in **ADDRESSES**, you can view or obtain documents at the following locations:

- Our Web site: *http://www.fws.gov/oregoncoast/CCP.htm.*
- Public libraries on the Oregon Coast will have a copy of the CCP in their Reference sections.

Dated: November 12, 2009.

David J. Wesley,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. E9–29316 Filed 12–8–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Amherst College Museum of Natural History, Amherst College, Amherst, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Amherst College Museum of Natural History (formerly Pratt Museum of Natural History), Amherst College, Amherst, MA, that meet the definition of "unassociated funerary objects" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

Between July 2 and July 27, 1909, cultural items were excavated from coastal shell middens on Sawyer's Island, Lincoln County, ME, by Professor F.B. Loomis. A document in the Amherst College Archives, Pratt Museum Papers, titled "Field Record of Specimens from 'Sawyer's Island First Digging,' a Paleo-Indian Site", gives the provenience for the materials he collected. This document shows that, among many other faunal and cultural objects, Loomis found one human jaw with five teeth. This jaw is no longer in the possession of the Amherst College Museum of Natural History; the date and circumstances under which these partial human remains left the museum collections are unknown. The 69 cultural items in this notice may have been associated with the now missing human remains. It is not known whether the cultural items come from the same burial or the same site as the partial human remains; only that all of the cultural items come from Sawyer's Island middens and were excavated in the same month. Consultation with the Wabanaki Intertribal Repatriation Committee, a non-Federally recognized Indian group, which represents the Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine, indicates that they consider the objects could have been funerary, and therefore, are unassociated funerary objects as defined by 25 U.S.C. 3001. The 69 unassociated funerary objects are 31 bone awls, 11 bone tools, 9 horn tools, 6 stone tools, 6 stone arrow or spear heads, 3 celts, 1 stone amulet, 1 tooth pendant, and 1 bone harpoon point.

Loomis interpreted the material collected on Sawyer's Island to be Algonquin and the people of the middens to be related to the present-day Abnakis of Maine, (see Loomis & Young, *American Journal of Science*, v. 34, p. 41). Loomis concluded that the middens were built between 200 to 400 years prior to European contact, A.D. 1627, (see Loomis, *American Journal of Science*, v. 31, p. 227). According to Dr. John Stubbs, Jr., Peabody Museum of Archeology and Ethnology, the presence of pottery fragments found within the Sawyer's Island midden suggests the human remains and cultural items are most likely less than 2,700 years old. The Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine, represented by the Wabanaki Intertribal Repatriation Committee, a non-Federally recognized Indian group, are widely recognized as having a shared cultural relationship with the people of the Ceramic Period of Maine (2,000 B.P. to European contact).

Officials of the Amherst College Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 69 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the Amherst College Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine, which are represented by the Wabanaki Intertribal Repatriation Committee, a non-Federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Tekla A. Harms, Repatriation Coordinator & Professor of Geology, Department of Geology, Amherst College, Amherst, MA 01002, telephone (413) 542–2711, before January 8, 2010. Repatriation of the unassociated funerary objects to the Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine may proceed after that date if no additional claimants come forward.

The Amherst College Museum of Natural History is responsible for notifying the Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine that this notice has been published.

Dated: November 9, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29289 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Denver Museum of Nature & Science, Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The five cultural items are Navajo *jish*, represented by three medicine bundles (AC.11423A-J; AC.11424A-R; AC.11425A-L), one stone prayer club (AC.4918), and one fetish and its wrapping (AC.194A-B).

The first medicine bundle (AC.11423A-J) dates between about 1880 and 1920, and consists of one outer wrapping blanket (AC.11423A), two plain rattles (AC.11423B), three lightning rattles (AC.11423C), three eagle feather brushes (AC.11423D), eight medicine bows and arrows (AC.11423E), six small medicine bags (AC.11423F), and four horned hats (AC.11423G-J).

The second medicine bundle (AC.11424A-R) dates to an unknown period, and consists of one outer wrapping blanket (AC.11424A), four bullroarers (AC.11424B), three lightning rattles (AC.11424C), two small plain rattles (AC.11424D), four sacks of medicine (AC.11424E), one gourd rattle (AC.11424F), four prayer sticks and hide (AC.11424G), two small medicine bags (AC.11424H), one blue stone horse fetish (AC.11424I), one bag of minerals and grease (AC.11424J), four fetish amulets (AC.11424K), three painted shell pots (AC.11424L), eight medicine stones (AC.11424M), one turtle shell (AC.11424N), four claw necklaces (AC.11424O), two pairs of claw wristlets (AC.11424P-Q), and one pottery painted pot (AC.11424R).

The third medicine bundle (AC.11425A-L) dates between about 1880 and 1920, and consists of one outer wrapping blanket (AC.11425A); eight streamer racks made of wood,

metal, and cloth (AC.11425B); two streamers made of wood, metal, and cloth (AC.11425C); two eagle feather brushes (AC.11425D); one set of fire sticks (AC.11425E); two hide bags (AC.11425F); nine small medicine bags (AC.11425G); one corn meal basket tray (AC.11425H); two feather prayer sticks (AC.11425I); one small hide (AC.11425J); one medicine bow and arrow (AC.11425K); and one lynx hide (AC.11425L).

The three medicine bundles were originally sold by a Navajo medicine man named Mike Salt or Ushie, from Sawmill, AZ. He sold them to an art dealer named Don Pablo of Scottsdale, AZ, who in turn sold the objects to Mr. Charles M. Eberhart of the Western Trading Post, located in Denver, CO. Mr. and Mrs. Eberhart donated the bundles to the museum in 1974.

The stone prayer club (AC.4918) dates to an unknown period. It is made from black slate and is approximately 11 x 3 inches in size. The club was originally accessioned as ldquo;Alaskan," but then later changed to "probably Navajo." This change was based on a similar object on display at the Navajo Museum of Ceremonial Arts in Santa Fe, NM, which had a label reading "Ceremonial knife (slate) held by medicine man or patient during certain acts of various ceremonies and pressed against certain parts of the patient's body to expel evil." Furthermore, in 1978, two Navajo consultants visited the Denver Museum of Nature & Science, and explained that this item was "used ceremonially in prayer to ward off evil." In 1959, the stone prayer club was purchased by Francis V. and Mary W.A. Crane at Southwest Indian Arts & Crafts, Santa Fe, NM. The Cranes later donated the club to the museum in 1983.

The fetish and wrapping (AC.194A-B) date to an unknown period. It is a carved stone with turquoise, white stone and black stone inlay; shell pieces; feathers; yarn; hide (AC.194A); and one calico cloth (AC.194B). These objects were accessioned as a "Navajo" "talking prayerstick." In 1954, the fetish and wrapping were purchased by Francis V. and Mary W.A. Crane at Kohlberg's Antiques and Indian Arts, Denver, CO. The Cranes later donated the fetish and wrapping to the museum in 1972.

During consultation, representatives of the Navajo Nation provided detailed documentation to demonstrate Navajo rights of possession, and that the items are both objects of cultural patrimony and sacred objects. In particular, the tribe detailed that these Navajo *jish* are used in the *Na'at'oyéé* (The Male Shooting Way ceremony) and the *Hochoiji* (The Evil Way ceremony), which are still widely practiced by members of the present-day Navajo tribe. The Navajo people believe that *jish* are alive and must be treated with respect. The primary purpose of the *jish* is to cure people of diseases, mental and physical illness, and to restore beauty and harmony. Furthermore, the Navajo Nation asserts that no single individual can truly own any *jish*. These sacred objects are made by knowledgeable Navajo people and *Hataaliis* (Medicine persons) from animals and plants that unselfishly contributed themselves for the benefit of the Navajo people and the universe. In order to possess sacred *jish*, one must have the proper ceremonial knowledge with which to care and utilize them. The right to control *jish* is outlined by traditional laws, which vests this responsibility in *Hataaliis*. The *Hataaliis* only care, utilize, and bequeath *jish* for the Navajo people. *Hataalii* do not have the right to sell *jish*, because they do not own them, they are only caretakers on behalf of the Navajo people.

The extant anthropological literature substantiates these claims. Medicine bags are made during ceremonies out of "sacred" materials, stored in special places, used only in prescribed ritual contexts, and hold myriad articles to which supernatural properties are attributed. Anthropologists have documented, in particular, the use of *jish* in the Male Shooting Way and Evil Way ceremonies, and the ways in which the medicine objects are linked to traditional myths. Anthropologists have further documented that medicine bundles are sacred items, fundamental to the practice of traditional Navajo religion. *Jish*, used for ceremonial healing, are unique from Western notions of medicine in part because of the special sacred properties believed to be imbued in the bundles. Further, unlike Western medical objects, Navajos consider the *jish* to be animate and, therefore, are subject to culturally-defined rules for handling. Therefore, museum officials reasonably believe that the *jish* is a sacred object.

While the anthropological literature seems to be unanimous that *jish* are sacred objects, some scholars have suggested that they are alienable possessions. However, other scholars have documented that some Navajos consider certain bundles to be "indestructible property" that are "ultimately owned by a definable social group." Other researchers emphasize that the medicine ceremonies belong to all Navajos and the bundles are cared for by entire clans. Additionally, some of the earliest documented efforts to collect *jish* (by Washington Matthews in 1888 and Stewart Culin in 1903), demonstrate that Navajos traditionally view *jish* as inalienable. Moreover, the courts have established that *jish* should be considered objects of cultural patrimony. In *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998), the court held that *jish* fall within NAGPRA's definition of object of cultural patrimony. During consultation, the Navajo Nation insisted that the *jish* is a kind of clan property. When a holder of the *jish* dies and does not have a son or student to pass them on to, the *jish* reverts back to the clan. Therefore, museum officials reasonably believe that the *jish* is also an object of cultural patrimony.

Officials of the Denver Museum of Nature & Science have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the five cultural items are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Denver Museum of Nature & Science have also determined that, pursuant to 25 U.S.C. 3001 (3)(D), the five cultural items have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the Denver Museum of Nature & Science have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects/objects of cultural patrimony and the Navajo Nation of Arizona, New Mexico & Utah.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred objects/objects of cultural patrimony should contact Dr. Chip Colwell-Chanthaphonh, Curator of Anthropology, NAGPRA Officer, Department of Anthropology, Denver Museum of Nature & Science, 2001 Colorado Boulevard, Denver, CO 80205, telephone (303) 370–6378, before January 8, 2010. Repatriation of the sacred objects/objects of cultural patrimony to the Navajo Nation of Arizona, New Mexico & Utah may proceed after that date if no additional claimants come forward.

The Denver Museum of Nature & Science is responsible for notifying the Navajo Nation of Arizona, New Mexico & Utah that this notice has been published.

Dated: November 9, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29299 Filed 12–9–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Paul H. Karshner Memorial Museum, Puyallup, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Paul H. Karshner Memorial Museum, Puyallup, WA, that meets the definition of "unassociated funerary objects" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1937, two unassociated funerary objects were removed from a grave in Alaska, by Dr. Warner and Mrs. Ella Karshner while on a tourist cruise of southeast Alaska, and donated to the Paul H. Karshner Memorial Museum in 1938 (Catalog No. 1938.01.1–71). The objects are described in museum records as, "2 strings of old Russian beads from an Alaskan grave. Probably used in barter with Indians when Alaska belonged to Russia." The two necklaces are composed of glass beads of various colors. One necklace has faceted blue and round red beads (26" long); the other necklace has blue, green, white, red, black, and yellow round beads (66" long).

While there is no record of the exact location the funerary objects were obtained, the museum has a letter written by Mrs. Karshner describing the couple's 1937 Alaskan cruise on the *SS Cordova*, an Alaska Steamship Company (ASC) vessel. On their cruise, she noted they stopped for two weeks at Klawock, located on the west side of Prince of Wales Island. A 1936 Alaska Steamship Company route map confirms Klawock was a stop along their Seattle-Skagway-Sitka route. All of the other items donated by the Karshners from their 1937 Alaskan cruise were recorded as collected from southeast Alaska. Based on this evidence, the museum considers the objects to have been removed from a location along the Alaska Steamship Company's Seattle-Skagway-Sitka route in southeast Alaska.

The museum consulted with the Sealaska Corporation regarding these unassociated funerary objects. In 1971, the Sealaska Corporation was formed under the Alaska Native Claims Settlement Act, and its shareholders include Native residents of southeast Alaska and Native people who originated from southeast Alaska. Southeast Alaska is within the traditional territory of the Tlingit and Haida Alaskan Native groups (De Laguna 1990: 203–228; Whorl 1990:149–158 in *Handbook of North American Indians*, Vol. 7, Northwest Coast). Consultation evidence presented by the Sealaska Corporation supports the use of Russian trade beads among Alaskan Native Tlingit people as early as 1741, when the first contact between Tlingit people and Russians occurred (Dauenhauer, 2008). The beads became a symbol of wealth for Tlingit people who owned them, and it was a common practice among the Tlingit to inter beads with their deceased.

Officials of the Paul H. Karshner Memorial Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the two cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the Paul H. Karshner Memorial Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Sealaska Corporation.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Dr. Jay Reifel, Assistant Superintendent, Puyallup School District, telephone (253) 840–8971, or Ms. Beth Bestrom, Curator, Paul H. Karshner Memorial Museum, 309 4th St. NE, Puyallup, WA 98372, telephone (253) 841–8748, before January 8, 2010. Repatriation of the unassociated funerary objects to the Sealaska Corporation may proceed after that date if no additional claimants come forward.

The Paul H. Karshner Memorial Museum is responsible for notifying the Sealaska Corporation that this notice has been published.

Dated: October 29, 2009.

Richard C. Waldbauer,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29290 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK, and Public Museum of West Michigan, Grand Rapids, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK, and in the possession of the Public Museum of West Michigan (Grand Rapids Public Museum), Grand Rapids, MI. The human remains and associated funerary objects were removed from Amaknak Island, Aleutians East Borough, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains and associated funerary objects was made by the Bureau of Land Management, Alaska State Office, and the Grand Rapids Public Museum professional staff in consultation with representatives of the Ounalashka Corporation and Qawalangin Tribe of Unalaska.

In 1971, human remains representing a minimum of 15 individuals were removed from the Dutch Harbor Site on Amaknak Island, Aleutians East Borough, AK, during an expedition that was co-sponsored by the American Institute for Exploration, Western Michigan University, and the Public Museum of Grand Rapids. The expedition was directed by Western Michigan University faculty and Ted

Banks, president of the American Institute for Exploration. No known individuals were identified. The 2,152 associated funerary are 131 hammer stones; 17 stone lamps; 1,184 stone flakes; 5 lithic cores; 49 lithic scrapers; 34 slate knives; 44 projectile points; 23 net sinkers; 203 fired cracked rocks; 25 stone abraders; 36 harpoon points; 169 bone tools; 1 bottle of whale amber; 1 quartz crystal; 1 channel coal fragment; 1 stone maul; 1 bone seal effigy; 1 stone effigy; 1 stone human effigy; 1 ground stone discoidal; 3 labrets; 1 bone fishhook; 205 bags of fish, shell, animal, and sea mammal bone; and 15 charcoal, wood, and soil samples.

The human remains and associated funerary objects were removed from a 35–foot mound. This mound was the result of multiple dumping episodes from a succession of native villages. The funerary objects were found with the human remains and are consistent with other associated funerary objects reported from other locations in this region. The human remains and associated funerary objects have been determined to be prehistoric.

Consultation with the Qawalangin Tribe of Unalaska, the Ounalashka Corporation, as well as academic expert opinions provided by the Alaska State Archaeologist and anthropology professors at the University of Alaska, are unanimous in identifying the current residents of Unalaska Island to be the descendants of the prehistoric people who occupied the site. Amaknak Island and the surrounding area have been inhabited for over 8,000 years by Aleut (Unangan) people. Based on geographic location, oral history and archeological evidence, the human remains and associated funerary objects from Amaknak Island are determined to be Native American and ancestors of members of the Ounalashka Corporation and Qawalangin Tribe of Unalaska.

Officials of the Bureau of Land Management have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of a minimum of 15 individuals of Native American ancestry. Officials of the Bureau of Land Management have also determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 2,152 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Land Management have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ounalashka Corporation and Qawalangin Tribe of Unalaska.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. Robert E. King, Alaska State NAGPRA Coordinator, Bureau of Land Management, 222 W. 7th Ave., Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, before January 8, 2010. Repatriation of the human remains and associated funerary objects to the Ounalashka Corporation and Qawalangin Tribe of Unalaska may proceed after that date if no additional claimants come forward.

The Alaska State Office, Bureau of Land Management is responsible for notifying the Ounalashka Corporation and Qawalangin Tribe of Unalaska that this notice has been published.

Dated: November 13, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29291 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Southwest Museum of the American Indian at the Autry National Center of the American West, Los Angeles, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and an associated funerary object in the possession of the Southwest Museum of the American Indian at the Autry National Center of the American West, Los Angeles, CA. The human remains and associated funerary object were removed from either Inyo or Tulare County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Southwest Museum of the American Indian at the Autry National Center of the American West professional staff in consultation with representatives of the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada, which is representing the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, consisting of the Inter-Tribal Council of Nevada, a non-Federally recognized Indian group, and the following Federally-recognized Indian tribes: Battle Mountain Shoshone Tribe (Constituent band of the Te-Moak Tribe of Western Shoshone Indians of Nevada); Bridgeport Paiute Indian Colony of California; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Ely Shoshone Tribe of Nevada; Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada; Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; Reno-Sparks Indian Colony, Nevada; Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada; South Fork Band (Constituent band of the Te-Moak Tribe of Western Shoshone Indians of Nevada); Susanville Indian Rancheria, California; Te-Moak Tribe of Western Shoshone Indians of Nevada; Washoe Tribe of Nevada and California; and Yomba Shoshone Tribe of the Yomba Reservation, Nevada. Additional tribes consulted were the Alturas Indian Rancheria, California; Big Pine Band of Owens Valley Paiute Shoshone; Burns Paiute Tribe; Cedarville Rancheria, California; Chemehuevi Indian Tribe of the Chemehuevi Reservation, California; Confederated Tribes of the Goshute Reservation, Nevada and Utah; Death Valley Timbi-Sha Shoshone Band of California; Elko Band (Constituent band of the Te-Moak Tribe of Western Shoshone Indians of Nevada); Fort Bidwell Indian Community of the Fort Bidwell Reservation of California; Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California; Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; Northwestern Band of the Shoshoni Nation of Utah (Washakie); Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, and Shivwits Band of Paiutes); Paiute-

Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California; Pit River Tribe, California; Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada; San Juan Southern Paiute Tribe of Arizona; Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho; Skull Valley Band of Goshute Indians of Utah; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Summit Lake Paiute Tribe of Nevada; Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada.

In an unknown year, human remains representing a minimum of one individual were removed from a cave at R.M. Fuller's ranch in Round Valley, in either Inyo or Tulare County, CA. R.M. Fuller did not remove the human remains until the grave was vandalized. On June 28, 1952, R.M. Fuller donated the human remains and associated funerary object to the museum. No known individual was identified. The one associated funerary object is a stone point fragment.

Museum records are inconclusive concerning the county from which the human remains and point fragment originated. Museum records indicate R.M. Fuller's ranch was located "west of the crest of the Sierras across from Little Lake and probably in Tulare (rather than Inyo) County." Based on museum records and consultation, museum officials locate the cave near the intersection of Inyo and Tulare Counties, across from Little Lake. Therefore, the human remains and associated funerary object are from the very lower portion of Owens Valley.

Consultation with local museums and Federal agencies confirms the existence of cave burials in the Little Lake area. A cave burial and the associated funerary object demonstrates that, more likely than not, the human remains are Native American. The Paiute and Shoshone have occupied the lower portion of Owens Valley both prehistorically and historically. Literature and consultation evidence with tribal representatives from the Great Basin Inter-Tribal NAGPRA Coalition indicate that the Paiutes and Shoshone have been known to use caves for burial practices. Ethnography, geography, and consultation with the Great Basin Inter-Tribal NAGPRA Coalition, local Federal agencies and museums, supports cultural affiliation of the human remains as Paiute and/or Shoshone.

Officials of the Southwest Museum of the American Indian at the Autry National Center of the American West have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Southwest Museum of the American Indian at the Autry National Center of the American West also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Southwest Museum of the American Indian at the Autry National Center of the American West have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary object and the Battle Mountain Shoshone Tribe; Bridgeport Paiute Indian Colony of California; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Ely Shoshone Tribe of Nevada; Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada; Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; Reno-Sparks Indian Colony, Nevada; Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada; South Fork Band; Susanville Indian Rancheria, California; Te-Moak Tribe of Western Shoshone Indians of Nevada; Washoe Tribe of Nevada and California; and Yomba Shoshone Tribe of the Yomba Reservation, Nevada, which are part of the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition. Additional culturally affiliated tribes are the Big Pine Band of Owens Valley Paiute Shoshone; Burns Paiute Tribe; Chemehuevi Indian Tribe of the Chemehuevi Reservation, California; Confederated Tribes of the Goshute Reservation, Nevada and Utah; Death Valley Timbi-Sha Shoshone Band of California; Elko Band; Fort Bidwell Indian Community of the Fort Bidwell Reservation of California; Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California; Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; Northwestern Band of the Shoshoni Nation of Utah (Washakie); Paiute Indian Tribe of Utah; Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California; Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada; San Juan Southern Paiute Tribe of Arizona; Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho; Skull Valley Band of Goshute Indians of Utah; Summit Lake Paiute Tribe of Nevada; Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact LaLeña Lewark, Senior NAGPRA Coordinator, Southwest Museum of the American Indian at the Autry National Center of the American West, 4700 Western Heritage Way, Los Angeles, CA 90027, telephone (323) 667–2000, ext. 220, or Steven M. Karr, Ph.D., Ahmanson Curator of History and Culture and Interim Executive Director for the Southwest Museum of the American Indian at the Autry National Center of the American West, 234 Museum Dr., Los Angeles, CA 90065, telephone (323) 221–2164, ext. 234, before January 8, 2010. Repatriation of the human remains and associated funerary object to the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada, representing the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, and its members, may proceed after that date if no additional claimants come forward.

The Southwest Museum of the American Indian at the Autry National Center of the American West is responsible for notifying the Alturas Indian Rancheria, California; Battle Mountain Shoshone Tribe; Big Pine Band of Owens Valley Paiute Shoshone; Bridgeport Paiute Indian Colony of California; Burns Paiute Tribe; Cedarville Rancheria, California; Chemehuevi Indian Tribe of the Chemehuevi Reservation, California; Confederated Tribes of the Goshute Reservation, Nevada and Utah; Death Valley Timbi-Sha Shoshone Band of California; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Elko Band; Ely Shoshone Tribe of Nevada; Fort Bidwell Indian Community of the Fort Bidwell

Reservation of California; Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California; Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada; Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada; Northwestern Band of the Shoshoni Nation of Utah (Washakie); Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California; Paiute Indian Tribe of Utah; Paiute Tribes of the Duck Valley Reservation, Nevada; Pit River Tribe, California; Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada; Reno-Sparks Indian Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho; Skull Valley Band of Goshute Indians of Utah; South Fork Band; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Summit Lake Paiute Tribe of Nevada; Susanville Indian Rancheria, California; Te-Moak Tribe of Western Shoshone Indians of Nevada; Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California; Walker River Paiute Tribe of the Walker River Reservation, Nevada; Washoe Tribe of Nevada and California; Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada; Yomba Shoshone Tribe of the Yomba Reservation, Nevada; the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, and the Inter-Tribal Council of Nevada, a non-Federally recognized Indian group, that this notice has been published.

Dated: November 13, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29300 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: University of Colorado Museum, Boulder, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the University of Colorado Museum, Boulder, CO. The human remains and associated funerary objects were removed from Graham, Pinal, and Yavapai Counties, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the University of Colorado Museum professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

On an unknown date prior to 1961, human remains representing a minimum of five individuals were removed from Pima, Graham County, AZ, by G.W. Hoofnagle. No known individuals were identified. The five associated funerary objects are one unknown brownware jar, one Maverick Mountain black-on-red jar, one Nantack Polychrome jar, one San Carlos red-on-brown jar, and one brownware jar with knobby protrusions.

Burial practices, associated funerary objects, and the geographic location support Salado and Hohokam cultural determinations.

On an unknown date prior to 1961, human remains representing a minimum of five individuals were removed from a midden site near Safford, Graham County, AZ, by G.W. Hoofnagle. No known individuals were identified. The six associated funerary objects are one lot of bird bones, two Maverick Mountain black-on-red jars, one unknown red slip brownware jar, one Gila Polychrome jar, and one San Carlos red-on-brown jar.

Burial practices, associated funerary objects, and the geographic location support Salado and Hohokam cultural determinations.

On an unknown date prior to 1980, human remains representing a minimum of two individuals were removed from Burial Site 140, in the Gila-Salt area near Phoenix, Maricopa County, AZ, by an unknown individual. At one point, they were part of the Charles Petrat Collection. In February 1980, Asa Maxson donated them to the museum. No known individuals were identified. The two associated funerary objects are a Sacaton red-on-buff jar and an unknown brownware jar.

Burial practices, associated funerary objects, and the geographic location support Salado and Hohokam cultural determinations.

On an unknown date, human remains representing a minimum of two individuals were removed from Los Robles Wash, Pinal County, AZ, by an unknown individual. No known individuals were identified. The five associated funerary objects are one lot of undecorated buffware pottery sherds, one lot of lithics, one lot of non-human mammal bone and tooth fragments, and two lots of animal bone.

Burial practices, associated funerary objects, and the geographic location support Hohokam cultural determination. Los Robles Wash Archaeological District is comprised of Hohokam-Salado sites on the National Register of Historic Places.

In 1953, human remains representing a minimum of one individual were removed from four miles south of Toltec, Pinal County, AZ, by Mr. J. Whitman of Phoenix, AZ. In 1953, Herbert W. Dick, Trinidad State Junior College, Trinidad, CO, obtained them and negotiated a trade with the museum. No known individual was identified. The one associated funerary object is a Santa Cruz red-on-buff jar.

Burial practices, the associated funerary object, and the geographic location support Hohokam cultural determination.

On an unknown date prior to 1967, human remains representing a minimum of one individual were removed from near Florence, Pinal County, AZ, by Edward H. Eiberger. No known individual was identified. The associated funerary object is one lot of non-human bone fragments.

Burial practices and the geographic location support Hohokam cultural determination.

On an unknown date prior to 1980, human remains representing a minimum of one individual were removed from Maxson site 125, Verde River Ruin, north of Phoenix, Yavapai County, AZ, by an unknown individual.

In 1980, the human remains were donated to the museum by Asa Maxson. In February 2008, they were found in the museum. No known individual was identified. No associated funerary objects are present.

The geographic location of removal supports Hohokam cultural determination.

A relationship of shared group identity can be reasonably traced between the Hohokam culture, which dates from about A.D. 300 to A.D. 1450, and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona. These four Indian tribes are one cultural group known as the O'odham (anthropologically known as the Pima and Papago). The Piipaash (anthropologically known as the Maricopa) are a separate and distinct culture that is present in two of the four tribes. The four tribes are separated by political boundaries designated through the adoption/assignment of reservations by the Federal Government, and not by any cultural differences.

The O'odham people commonly refer to ancestors as "the Huhugam." The term "Huhugam" refers to all of the ancestors from the first of the O'odham people to walk the earth to those who have perished during modern times. The term "Hohokam" is an English adaptation of the word Huhugam, and has become known in the larger society as an archeological culture. The term Huhugam is often mistaken for the word Hohokam, although the terms do not have the same meaning and are not interchangeable. The four Federally-recognized O'odham Indian tribes claim cultural affiliation to the Hohokam archeological cultures, as well as to all others present in their aboriginal claims area during the prehistory of what is now known as Arizona and Mexico. These affiliations include several other archeological cultures, including (but not limited to) the Archaic, Paleo-Indian, Salado, Patayan, and Sinagua.

A written report, "The Four Southern Tribes and the Hohokam of the Phoenix Basin," provided to the museum by the Salt River Pima-Maricopa Indian Community, provides a preponderance of evidence for a relationship of shared group identity between the Hohokam culture and the present-day O'odham. The evidence in the report is archeological, linguistic, oral tradition, ethnographical, kinship, and biological. Linguistic evidence indicates that all the O'odham speak different dialects of the same Uto-Aztecan language. O'odham communities were historically recorded as living in the Gila River area by Jesuit missionaries in 1687. In the 1700s, when written records about the O'odham began, they occupied at least seven Rancherias. At the time of European contact, the O'odham, who occupied land previously inhabited by the Hohokam, mirrored the Hohokam in many ways. The Hohokam were desert agriculturalists who developed an elaborate system of irrigation canals to irrigate their crops. At European contact, it was documented that the O'odham were also desert agriculturalist who utilized irrigation canals and rivers. Based on scientific evidence, scholars view the complex irrigation systems of the O'odham and the Hohokam as evidence for a cultural continuity between the two that involved the ability to control mass labor in order to construct and maintain these canals. The Hohokam had a distinct settlement pattern that consisted of small farmsteads scattered throughout the landscape. The O'odham practiced this same type of settlement pattern. There was general architecture through the Hohokam Period to the historic O'odham Period that exhibited a trend from quadrangular to round structures through time.

A relationship of shared group identity can also reasonably be traced between the Hohokam and the Hopi Tribe and Zuni Tribe. Based on O'odham oral tradition, some of the people occupying the Hohokam area migrated north and joined the Zuni and Hopi ("The Four Southern Tribes and the Hohokam of the Phoenix Basin").

The "*Zuni Policy Statement Regarding the Protection and Treatment of Human Remains and Associated Funerary Objects*," (November 1992), which was sent to museums in the 1990s, states that Zuni is culturally affiliated to earlier groups, including Hohokam and Salado. On July 11, 1995, Zuni Tribe issued a *Statement of Cultural Affiliation with Prehistoric and Historic Cultures*. In the statement, the Zuni Tribe stated that it has a relationship of shared group identity with Hohokam and Salado culture based on oral teachings and traditions, ethnohistoric documentation, historic documentation, archeological documentation, and other evidence. Zuni Tribe oral tradition supports a relationship of shared group identity between the Zuni and the Hohokam and Salado. The Phoenix Basin is a part of the Zuni migration histories, as Medicine societies and Kiva groups have migration histories that place them in the Phoenix Basin.

Resolution H–70–94 signed on May 23, 1994, by the Hopi Tribal Council declares formal cultural affinity and affiliation with the Hohokam and Salado cultural groups. According to "Yep Hisat Hoopoq'yaqam Yeesiwa (Hopi Ancestors Were Once Here): Hopi Cultural Affiliation with the Ancient Hohokam of Southern Arizona," a report by T.J. Ferguson, Leigh J. Kuwanwisiwma, Micah Loma'omvaya, Patrick Lyons, Greg Schachner, and Laurie Webster, the Hopi people trace their historical relationship with ancestral Hoopoq'yaqam groups that resided in the Hohokam area using traditional history and geography, kinship, archeological materials, and on-going religious and cultural practices. This information is embedded in the navoti (traditional knowledge) and wiimi (religious practices and esoteric rites) that the Hopi inherited from their ancestors. Corroborating evidence of a historical relationship with the Hohokam comes from ethnographic and archeological studies. Ceramic iconography, ritual artifacts, and textiles constitute distinct patterns of material culture manufacture and distribution that link Hohokam and Hopi groups.

According to oral tradition, Hopi clan migration supports a shared group identity with Hohokam and Salado. Modern-day ritual pilgrimage practices support the oral tradition. According to the notes of archeologist Harold S. Colton, a Hopi shrine is located near the mountain peaks in the vicinity of Phoenix. Cremation was practiced by at least one clan that migrated from the south to present-day Hopi. Linguistically, Hopi is related to the four southern Arizona tribes. Architectural evidence also supports a shared group identity. San Pedro, near Safford, has Hopi style kivas. Hopi kivas are rectangular in shape. The evolution of kivas happened when people came to Hopi. According to oral tradition, the era of the round kiva was over and the square kiva meant the migration was at an end.

Officials of the University of Colorado Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 17 individuals of Native American ancestry. Officials of the University of Colorado Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 20 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of

the death rite or ceremony. Lastly, officials of the University of Colorado Museum have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Steve Lekson, Curator of Anthropology, University of Colorado Museum, Henderson Building, Campus Box 218, Boulder, CO 80309-0218, telephone (303) 492-6671, before January 8, 2010. Repatriation of the human remains and associated funerary objects to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; Hopi Tribe of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

The University of Colorado Museum is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: October 29, 2009.

Richard C. Waldbauer,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29298 Filed 12–08–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Southwest Museum of the American Indian at the Autry National Center of the American West, Los Angeles, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the Southwest Museum of the American Indian at the Autry National Center of the American West, Los Angeles, CA. The human remains were removed from Clark County, NV.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Southwest Museum of the American Indian at the Autry National Center of the American West professional staff in consultation with representatives of the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada, representing the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, consisting of the Inter-Tribal Council of Nevada, a non-Federally recognized Indian group, and the following Federally-recognized Indian tribes: Battle Mountain Shoshone Tribe (Constituent band of the Te-Moak Tribe of Western Shoshone Indians of Nevada); Bridgeport Paiute Indian Colony of California; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Ely Shoshone Tribe of Nevada; Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada; Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; Moapa Band of Paiutes of the Moapa River Indian Reservation, Nevada; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California; Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; Reno-Sparks Indian Colony, Nevada; Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada; South Fork Band (Constituent band of the Te-Moak Tribe of Western Shoshone Indians of Nevada); Susanville Indian Rancheria, California; Te-Moak Tribe of Western Shoshone Indians of Nevada; Washoe Tribe of Nevada and California; and Yomba Shoshone Tribe of the Yomba Reservation, Nevada.

At an unknown time, human remains representing a minimum of one individual were removed from a cave near the Moapa reservation, in Clark County, NV. On May 23, 1939, Charles E. Cornelius donated the human remains to the Southwest Museum. No known individual was identified. No associated funerary objects are present.

The burial location in a cave suggests the human remains are Native American. Museum officials date the human remains from at least the 19th century. Literature infers that since the 19th century, Southern Paiute burial practices changed from cremation to burials in caves or crevasses as a result of colonization. Both current literature and consultation with the Great Basin Inter-Tribal NAGPRA Coalition indicate that Paiutes have used caves for burials. Museum officials reasonably believe that the proximity of the burial near the Moapa reservation indicates the human remains are culturally affiliated with the Moapa Band of Paiutes of the Moapa River Indian Reservation, Nevada. This band has continually inhabited the Moapa Valley since at least the 19th century. Pursuant to Resolution No. 7–001, the Moapa Band of Paiutes of the Moapa River Indian Reservation, Nevada is a member of the Great Basin Inter-Tribal NAGPRA Coalition and agrees to have the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada represent their NAGPRA claims and repatriate these human remains on their behalf.

Officials of the Southwest Museum of the American Indian at the Autry National Center of the American West have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Southwest Museum of the American Indian at the Autry National Center of the American West also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact LaLeña Lewark, Senior NAGPRA Coordinator, Southwest

Museum of the American Indian, Autry National Center of the American West, 4700 Western Heritage Way, Los Angeles, CA 90027, telephone (323) 667–2000, ext. 220, or Steven M. Karr, Ph.D., Ahmanson Curator of History and Culture and Interim Executive Director for the Southwest Museum of the American Indian, Autry National Center of the American West, 234 Museum Drive, Los Angeles, CA 90065, telephone (323) 221–2164 ext., ext. 234, before January 8, 2010. Repatriation of the human remains to the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada, representing the Moapa Band of Paiutes of the Moapa River Indian Reservation, Nevada, and the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, may proceed after that date if no additional claimants come forward.

The Southwest Museum of the American Indian at the Autry National Center is responsible for notifying the Moapa Band of Paiutes of the Moapa River Indian Reservation, Nevada; Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; and the Great Basin Inter-Tribal NAGPRA Coalition, a non-Federally recognized Indian coalition, that this notice has been published.

Dated: October 15, 2009.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–29297 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Museum of Man, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the San Diego Museum of Man, San Diego, CA. The human remains and associated funerary objects were removed from Kern, Sacramento, and Tulare Counties, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the San Diego Museum of Man professional staff in consultation with representatives of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California.

In 1958, human remains representing a minimum of four individuals were removed from a burial site on a delta area called the "Meadows" near the mouth of the Snodgrass Slough on an island in the Sacramento River in the vicinity of Walnut Grove, Sacramento County, CA. The human remains and associated funerary objects were collected by Mr. and Mrs. Ken and Shirley Westbrook, and donated to the San Diego Museum of Man on July 10, 1961. No known individuals were identified. The 13 associated funerary objects are 1 pestle, 1 bone awl, 3 stone projectile point fragments, and 8 fired clay fragments.

The remains of two of the individuals consist of partial skulls with associated mandibles. Originally, the other two individuals were determined to be two bone awls, but were subsequently identified as human remains. As noted by the donors, the site had been disturbed and the remains of a great number of individuals seemed to be represented. According to the Museum of Man records, the human remains and associated funerary objects are believed to date to prehistoric or pre-contact time. The Santa Rosa Indian Community of the Santa Rosa Rancheria, Tachi Yokut Tribe, has provided the museum with information consisting of oral stories, territory and language family maps, and written ethnographical information about the Yokuts and their inter-relationships with surrounding communities, which also covers the territory where the human remains and associated funerary objects were discovered, and provides a determination of more likely than not of cultural affiliation to the human remains and associated funerary objects.

On an unknown date, human remains representing a minimum of seven individuals were removed from a burial mound "at the Indian village site" near the east shore of Tulare Lake at the junction of the Elk Bayou and Tule Rivers, a quarter mile east of the Kings County border, five miles from the town of Corcoran, in Tulare County, CA. The human remains and associated funerary objects were collected by Mr. David Folsom, and donated to the museum on November 13, 1954. No known individuals were identified. The 59 associated funerary objects are 2 strands of glass trade beads, 1 strand of shell disk beads, 1 strand of steatite disk beads, 2 strands of olivella shell beads, 4 tubular shell beads, 1 shell tube, 1 steatite ceremonial stone, 1 abalone shell dish, 1 pismo clam shell bead, 2 abalone shell disk beads, 3 abalone shell ornaments, 3 abalone shell pendants, 1 bird claw, 1 clay bead, 1 bird bone ear ornament, 1 plummet stone, 3 stone projectile points, 1 obsidian drill, 2 stone blades, 2 slate blades, 23 fragments of a steatite bowl (or bowls), and 2 miscellaneous steatite objects. There are eight tubular shell beads currently missing in the collection.

Museum records indicate that the burial mound consisted of complete skeletons, but only the skulls and funerary objects associated with the burials were collected by the donor. According to the donor, "the burial mound is called the "plague pit" by the local inhabitants due to a story that in historic times, there was a plague among the Native American people of the area which killed large numbers of them in a short period of time. Their bodies were hurriedly thrown into a large common grave which is supposed to be the mound." The donor also states that "the beads were found in the area below the skulls, indicating that they were necklaces, and other artifacts were placed on the bodies or near them." Records indicate that the glass trade beads found associated with the burials indicates that they are historic burials and that the location of the site indicates that these are Yokut Indian burials. The Santa Rosa Indian Community of the Santa Rosa Rancheria, Tachi Yokut Tribe, has provided the museum with information consisting of oral stories, territory and language family maps, and written ethnographical information about the Yokuts and their inter-relationships with surrounding communities, which also covers the territory where the human remains and associated funerary objects were discovered, and supports a determination of more likely than not of cultural affiliation to the human remains and associated funerary objects.

In 1956, human remains representing a minimum of one individual were removed from a burial located two miles north of the town of Pond on Central Valley Highway, in Kern County, CA. In 1972, the human remains were gifted as part of a collection to the San Diego Museum of Man by Dr. Carl L. Hubbs of the Scripps Institute of Oceanography. No known individual was identified. No associated funerary objects are present.

The burial was recorded as being in a sitting position and was exposed by land leveling, about two feet below the surface. The pelvis bone was permeated with gypsum or salt. Museum records indicate that the cultural affiliation of the human remains is southern/central Yokuts, and indicates the age as prehistoric. The Santa Rosa Indian Community of the Santa Rosa Rancheria, Tachi Yokut Tribe, has provided the museum with information consisting of oral stories, territory and language family maps, and written ethnographical information about the Yokuts and their inter-relationships with surrounding communities, which also covers the territory where the human remains were discovered, and provides a determination of more likely than not of cultural affiliation to the human remains.

Officials of the San Diego Museum of Man have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 12 individuals of Native American ancestry. Officials of the San Diego Museum of Man also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 72 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the San Diego Museum of Man have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Philip Hoog, Archaeology and NAGPRA Coordinator, San Diego Museum of Man, 1350 El Prado, Balboa Park, San Diego, CA 92101, telephone (619) 239–2001, before January 8, 2010. Repatriation of the human remains and associated funerary objects to the Santa Rosa Indian Community of the Santa Rosa Rancheria, California may proceed after that date if no additional claimants come forward.

The San Diego Museum of Man is responsible for notifying the Santa Rosa Indian Community of the Santa Rosa Rancheria, California that this notice has been published.

Dated: October 15, 2009.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–29295 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Metropolitan Park District of the Toledo Area, Toledo, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and an associated funerary object in the control of the Metropolitan Park District of the Toledo Area, Toledo, OH. The human remains and associated funerary object were removed from the Audubon Islands State Nature Preserve, Lucas County, OH.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Metropolitan Park District of the Toledo Area professional staff in consultation with the Lucas County Coroner's Office, Center for Historic and Military Archaeology at Heidelberg College, and in consultation with representatives of the Absentee-Shawnee Tribe of Indians of Oklahoma; Delaware Nation, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Ottawa Tribe of Oklahoma; Shawnee Tribe, Oklahoma; Wyandotte Nation, Oklahoma; and the American Indian Intertribal Association, a non-Federally recognized Indian group.

In 2007, human remains representing a minimum of one individual were removed from Audubon Islands State Nature Preserve, Lucas County, OH, by Dan Graham. The Lucas County Coroner's Office brought the human remains to the park. No known individual was identified. The one associated funerary item is an immature raccoon skull jaw.

The Lucas County Coroner's Office identified the human remains as possibly Native American based on context, antiquity and an anterior-posterior flattening in the subtrochanteric region of the femur that is typical of historic/ancient Native Americans.

A nearby 18th century Ottawa grave demonstrates that this part of the island may have been occupied and used as a burial area by the Ottawa until around the time of the 1795 Treaty of Greenville. Audubon Island is located in the lower Maumee Valley in northern Ohio. Some Ottawa bands had taken up residence in the lower Maumee Valley by A.D. 1740–1750. Following Pontiac's siege of Detroit in the summer of 1763, some of the Ottawa bands from that area also resettled to the lower Maumee Valley. In 1764, Captain Thomas Morris met an Ottawa delegation at the foot of the Maumee Rapids, adjacent to Audubon Island. Between 1783 and 1794, Audubon Island was known as Col. McKee's Island, and was farmed as part of Alexander McKee's Department of Indian Affairs post at the foot of the Maumee Rapids. Several other Euro-Canadian traders occupied lands in the area, presumably with the consent of the local Ottawa.

In 1795, many of the Great Lakes-Ohio Valley tribes signed the Treaty of Greenville, which produced several land cessions, including a 12–square-mile reserve surrounding the foot of the Maumee Rapids and Audubon Island. Occupation of Audubon Island by the Ohio Ottawa appears to have ceased at that time, at which point some of them moved to Walpole Island, Canada. Between 1807 and 1817, the United States established four small reservations for the Ottawa along the lower Maumee River. Audubon Island lies between two of these reservations. In 1831 to1833, the four reservations were finally ceded to the United States in return for lands in present-day Franklin County, KS. In 1867, the Kansas reservation organization was dissolved and the Ottawa sold their individual allotments and moved to Oklahoma. Descendants of the Ottawa that occupied Audubon Island are members of the Little River Band of Ottawa Indians, Michigan and Ottawa Tribe of Oklahoma.

Officials of the Metropolitan Park District of the Toledo Area have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native

American ancestry. Officials of the Metropolitan Park District of the Toledo Area also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Metropolitan Park District of the Toledo Area have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary object and the Little River Band of Ottawa Indians, Michigan, and Ottawa Tribe of Oklahoma.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact Rebecca Finch, Metropolitan Park District of the Toledo Area, 5100 West Central Ave., Toledo, OH 43615, telephone (419) 407–9848, before January 8, 2010. Repatriation of the human remains and associated funerary object to the Little River Band of Ottawa Indians, Michigan, and Ottawa Tribe of Oklahoma may proceed after that date if no additional claimants come forward.

Metropolitan Park District of the Toledo Area is responsible for notifying the Absentee-Shawnee Tribe of Indians of Oklahoma; Delaware Nation, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Ottawa Tribe of Oklahoma; Shawnee Tribe, Oklahoma; Wyandotte Nation, Oklahoma; and the American Indian Intertribal Association, a non-Federally recognized Indian group, that this notice has been published.

Dated: November 9, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29294 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Amherst College Museum of Natural History, Amherst College, Amherst, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the Amherst College Museum of Natural History (formerly the Pratt Museum of Natural History), Amherst College, Amherst, MA. The human remains and associated funerary objects were removed from Cumberland County, ME.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains and an inventory of the associated funerary objects were made by the staff of the Amherst College Museum of Natural History and its agents, in consultation with the Wabanaki Intertribal Repatriation Committee, a non-Federally recognized Indian group, representing the Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine.

In 1909, human remains representing a minimum of one individual were excavated from a coastal shell midden on Flagg Island, Cumberland County, ME, by Professor Frederic B. Loomis and his associates. The human remains have been in the possession of the Amherst College Museum of Natural History since that date. No known individual was identified. The museum holds 33 cultural objects that were also removed from Flagg Island middens in the same season. It is not known whether or not these objects come from the same burial or the same site as the human remains. Based on their provenience and date of removal, however, the museum reasonably believes the cultural items could be associated funerary objects. The 33 associated funerary objects are 19 bone awls, 7 bone tools, 5 hollow bone tools, and 2 blunt horn tools.

The remains of this one individual are represented by approximately 54 bones or bone fragments. No cranial or pelvic elements are present and neither femur includes a proximal end. Therefore, no data relating to sex or age estimation can be gathered. Based on size and long-bone epiphyseal closure, however, this individual was most likely an adult.

A document in the Amherst College Archives, Pratt Museum Papers, titled "Field Record of Specimens from 'Sawyer's Island First Digging,' a Paleo-Indian Site", gives the provenience for these materials. This ledger records the general location (Flagg Island, Maine), approximate date (July or August, 1909), and specimen numbers of both the human remains and cultural items. Loomis interpreted the material to be Algonquin and the people of the middens to be related to the present-day Abnakis of Maine, (see Loomis & Young, *American Journal of Science*, v. 34, p. 41). Loomis concluded that the middens were built between 200 to 400 years prior to European contact, A.D. 1627, (see Loomis, *American Journal of Science*, v. 31, p. 227). According to Dr. John Stubbs, Jr., Peabody Museum of Archeology and Ethnology, the presence of pottery fragments found within the Flagg Island midden suggests the human remains and cultural items are most likely less than 2,700 years old. The Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine, represented by the Wabanaki Intertribal Repatriation Committee, a non-Federally recognized Indian group, are widely recognized as having a shared cultural relationship with the people of the Ceramic Period of Maine (2,000 B.P. to European contact).

Officials of the Amherst College Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Amherst College Museum of Natural History have also determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 33 objects described above are reasonably believed to have been placed with or near the human remains at the time of death or later possibly as part of a death rite or ceremony. Lastly, officials of the Amherst College Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Federally-recognized Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine, which are represented by the Wabanaki Intertribal

Repatriation Committee, a non-Federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Tekla A. Harms, Repatriation Coordinator & Professor of Geology, Department of Geology, Amherst College, Amherst, MA 01002, telephone (413) 542–2711, before January 8, 2010. Repatriation of the human remains and associated funerary objects to the Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine may proceed after that date if no additional claimants come forward.

The Amherst College Museum of Natural History is responsible for notifying the Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Maine that this notice has been published.

Dated: November 9, 2009.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29293 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Warren Anatomical Museum, Harvard University, Boston, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession and control of the Warren Anatomical Museum, Harvard University, Boston, MA. The human remains were removed from Connecticut.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Peabody Museum of Archaeology and Ethnology and Warren Anatomical Museum professional staff in consultation with representatives of the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut.

At an unknown date, human remains representing one individual were removed from Connecticut by an unknown individual. These human remains were donated by Charles H. Stedman to the Boston Society for Medical Improvement before 1847. The collection of the Boston Society for Medical Improvement was transferred to the Warren Anatomical Museum in 1871. No known individual was identified. No associated funerary objects are present.

Osteological characteristics indicate that these human remains are Native American. Museum documentation describes the human remains as, "one of the Uncas Tribe...Connecticut." Uncas was a well-known 17th century leader of the Mohegan Tribe. The specific cultural designation "Uncas Tribe" suggests the human remains date to the historic period, 17th Century or later. While other Native American tribes were also present in Connecticut during these periods, the attribution "Uncas" focuses the likelihood of cultural affiliation with the Mohegan Tribe. Based on this information, there is a shared group identity between the human remains and the Mohegan Tribe of Indians of Connecticut.

Officials of the Peabody Museum of Archaeology and Ethnology and Warren Anatomical Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Peabody Museum of Archaeology and Ethnology and Warren Anatomical Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Mohegan Tribe of Indians of Connecticut.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Patricia Capone, Repatriation Coordinator, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Ave., Cambridge, MA 02138, telephone (617) 496–3702, before January 8, 2010. Repatriation of the human remains to the Mohegan Tribe of Indians of Connecticut may proceed after that date if no additional claimants come forward.

The Peabody Museum of Archaeology and Ethnology and Warren Anatomical Museum are responsible for notifying the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut that this notice has been published.

Dated: October 29, 2009.

Richard C. Waldbauer,

Acting Manager, National NAGPRA Program.

[FR Doc. E9–29292 Filed 12–8–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore; South Wellfleet, MA; Cape Cod National Seashore Advisory Commission

ACTION: Two Hundredth Seventy-First Notice of Meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, Section 10) of a meeting of the Cape Cod National Seashore Advisory Commission.

DATES: The meeting of the Cape Cod National Seashore Advisory Commission will be held on January 11, 2010 at 1 p.m.

ADDRESSES: The Commission members will meet in the meeting room at Headquarters, 99 Marconi Station, Wellfleet, Massachusetts.

SUPPLEMENTARY INFORMATION: The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The regular business meeting is being held to discuss the following:

1. Adoption of Agenda.
2. Approval of Minutes of Previous Meeting (November 16, 2009).
3. Reports of Officers.
4. Reports of Subcommittees.
5. Superintendent's Report.
   - Update on Dune Shacks.
   - Improved Properties/Town Bylaws.
   - Herring River Wetland Restoration.
   - Wind Turbines/Cell Towers.
   - Highlands Center Update.
   - Alternate Transportation funding.
   - Other construction projects.
   - Land Protection.
6. Old Business.
7. New Business—Ocean initiatives.
8. Date and agenda for next meeting.
9. Public comment and

10. Adjournment.

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: November 30, 2009.

George E. Price, Jr.,

Superintendent.

[FR Doc. E9–29310 Filed 12–8–09; 8:45 am]

BILLING CODE 4310–WV–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 21, 2009. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 24, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ARIZONA

Maricopa County

Buckeye Union High School A–Wing, 902 E. Eason Ave., Buckeye, 09001160

CALIFORNIA

Sacramento County

SMUD Headquarters Building, 6301 S. St., Sacramento, 09001161

IDAHO

Blaine County

Rialto, Hotel, The, 201 S. Main St., Hailey, 09001162

Kootenai County

Mooney-Dahlberg Farmstead, 5803 Riverview Dr., Coeur d'Alene, 09001163

KANSAS

Marshall County

Transue Brothers Blacksmith & Wagon Shop, 309 Main St., Summerfield, 09001164

Montgomery County

Independence Junior High School, (Public Schools of Kansas MPS) 300 W. Locust St., Independence, 09001165

Republic County

Cossaart Barn, (Agriculture-Related Resources of Kansas) 3040 Birch Rd., Narka, 09001166

Sedgwick County

Fairmount Apartments, (Residential Resources of Wichita, Sedgwick County, Kansas 1870–1957) 1702 N. Fairmont Ave., Wichita, 09001167

Fairview Apartments, (Residential Resources of Wichita, Sedgwick County, Kansas 1870–1957) 206 E. 18th St., Wichita, 09001168

Shawnee County

Topeka Council of Colored Women's Clubs Building, 1149 SW Lincoln, Topeka, 09001169

Wabaunsee County

East Stone Arch Bridge—Lake Wabaunsee, (Masonry Arch Bridges of Kansas TR) E. Flint Hills Dr., 9 mi. S. of KS 4, Eskridge, 09001170

Southeast Stone Arch Bridge—Lake Wabaunsee, (Masonry Arch Bridges of Kansas TR) E. Flint Hills Dr. 2.2 mi. S. of KS 4, Eskridge, 09001171

MARYLAND

Baltimore County

Dumbarton Historic District, Roughly bounded by Park Heights Ave., Slade Ave., Seven Mile La., and Old Court Rd., Pikesville, 09001172

Baltimore Independent City

Union Baptist Church, 1219 Druid Hill Ave., Baltimore City, 09001173

MASSACHUSETTS

Worcester County

Thayer, Benjamin, House, 200 Farm St., Blackstone, 09001174

MISSOURI

St. Louis County

Cragwold, 1455 Cragwold Rd., Kirkwood, 09001175

MONTANA

Beaverhead County

Browne's Bridge, (Montana's Historic Steel Truss Bridges) Browne's Bridge Fishing Access Site, Glen, 09001179

Cascade County

Hardy Bridge, (Montana's Historic Steel Truss Bridges) Milepost 6 on Old US 91, Cascade, 09001180

Lewis and Clark County

Missouri River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 11 on Old US 91, Wolf Creek, 09001181

Madison County

Browne's Bridge, (Montana's Historic Steel Truss Bridges) Browne's Bridge Fishing Access Site, Glen, 09001179

Mineral County

Natural Pier Bridge, (Montana's Historic Steel Truss Bridges) Milepost 1 on S. Frontage Rd., Alberton, 09001182

Scenic Bridge, (Montana's Historic Steel Truss Bridges) Milepost 0 on Old US 10 W., Tarkio, 09001183

Park County

Carbella Bridge, (Montana's Historic Steel Truss Bridges) Milepost 0 on Tom Miner Rd. near jct of US 89, Gardiner, 09001184

Powell County

Little Blackfoot River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 0 on County Rd. 186 near jct. of US 12, Avon, 09001185

Prairie County

Powder River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 6 on I–94 (Old US 10), Terry, 09001186

Yellowstone River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 1 on I–94 (Old US 10), Fallon, 09001187

Treasure County

Big Horn River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 2 on MT 104 (Old US 10), Custer, 09001188

Yellowstone County

Big Horn River Bridge, (Montana's Historic Steel Truss Bridges) Milepost 2 on MT 104 (Old US 10), Custer, 09001188

NEW JERSEY

Essex County

Interstate Hosiery Mills, Inc. Mill Building, 110 N. Fulton St., Bloomfield, 09001176

Union County

Summit Playhouse, 10 New England Ave., Summit, 09001177

NORTH CAROLINA

Lincoln County

Lincolnton Recreation Department Youth Center,119 E. Pine St., Lincolnton, 09001178

WEST VIRGINIA

Berkeley County

Vanmetre, Thomas, House, 3093 Golf Course Rd., Martinsburg, 09001189

Cabell County

Barnett Hospital and Nursing School, 1201 7th Ave., Huntington, 09001190

Hampshire County

Fort Van Meter, River Rd., Romney, 09001191

Preston County

Gribble, A.W., Farm, Loop Rd., Pisgah, 09001192

Randolph County

First Ward School, S. Davis Ave. and 13th St., Elkins, 09001193
Riverside School, Block No. 1, River St., Elkins, 09001194

Tucker County

Meyer, Herman August, House, 287 Thomas Ave., Davis, 09001195

Upshur County

Downtown Buckhannon Historic District, Portions of E. and W. Main, N. and S. Florida, Locust, N. and S. Kanawha and Spring Sts., Buckhannon, 09001196

Webster County

Camp Caesar, 4868 Webster Rd., Cowen, 09001197

WISCONSIN

Oneida County

Yawkey, William H., Boathouse, 7090 Woodson St., Hazelhurst, 09001198

[FR Doc. E9–29268 Filed 12–8–09; 8:45 am]
BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b, c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to apprise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from September 28, to October 2, 2009.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St. NW., Washington, DC 20240; in person (by appointment), 1201 Eye St. NW., 8th floor, Washington DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov*.

Dated: December 3, 2009.

Dr. Alexandra Lord,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

KEY: State, County, Property Name, Address/Boundary, City, Vicinity, Reference Number, Action, Date, Multiple Name

ARKANSAS

Crawford County

Butterfield Overland Mail Route Lee Creek Road Segment, Lee Creek Rd. W. of AR 220, Cedarville vicinity, 09000770, LISTED, 9/29/09
Butterfield Overland Mail Route Lucian Wood Road Segment, Lucian Wood Road between jct of Armer La. and Cedarville Rd. and AR 220, Cedarville vicinity, 09000771, LISTED, 9/29/09

COLORADO

Denver County

Bastien's Restaurant, 3503 E. Colfax Ave., Denver, 09000774, LISTED, 9/30/09 (Commercial Resources of the East Colfax Avenue Corridor)
Walters, Manuella C., Duplex, 1728 & 1732 Gilpin St., Denver, 09000775, LISTED, 9/30/09

FLORIDA

Flagler County

Washington Oaks Historic District, 6402 Oceanshore Blvd., Palm Coast vicinity, 09000400, LISTED, 9/30/09

Lake County

Mount Dora Historic District, Roughly 3rd Ave., 11 Ave., Clayton St., Helen St., Mount Dora, 09000777, LISTED, 10/01/09 (Mount Dora, FL)

St. Johns County

North City Historic District, Roughly bounded by Castillo Dr., San Marcos Ave., Old Mission, US 1, Saint Augustine, 09000778, LISTED, 10/01/09

GEORGIA

Clarke County

Jackson Street Cemetery, S. Jackson St., University of Georgia campus, Athens, 09000779, LISTED, 10/02/09

ILLINOIS

Cook County

Dilg, Herbert A., House, 8544 Callie, Morton Grove, 09000781, LISTED, 9/30/09

Lake County

Westover Road Non-Commissioned Officers' Housing Historic District, 339–355 Westover Rd., Highwood, 08000399, LISTED, 10/01/09

KANSAS

Douglas County

United Presbyterian Center, 1204 Oread Ave., Lawrence, 09000350, LISTED, 9/29/09

MARYLAND

Anne Arundel County

Robinson House, 102 Evon Ct., Severna Park, 09000782, LISTED, 9/30/09

MISSISSIPPI

LeFlore County

Itta Bena Historic District, Roughly bounded by Cemetery St. to the N., Lake Shore Dr. to the E., Lake Side St. to the S., Dewey St. to the W., Itta Bena, 09000785, LISTED, 9/30/09

MISSOURI

Cole County

Moreau Park Historic District, 3714 Old Wardsville Rd., Jefferson City vicinity, 09000786, LISTED, 9/30/09

St. Louis County

Moorlands Addition Apartment District, Roughly bounded by Clayton Rd., Glenridge Ave., Wydown Blvd. and (both sides) Westwood Dr., Clayton, 09000787, LISTED, 9/30/09

MONTANA

Carbon County

Smith Mine Historic District, MT 308, Bearcreek vicinity, 09000788, LISTED, 9/30/09

NEW YORK

Livingston County

Boyd & Parker Park and Groveland Ambuscade, US 20A; Gray Hill Rd., Cuylerville vicinity, 07000757, LISTED, 10/01/09

PUERTO RICO

Ponce Municipality

Casa Paoli, 14 Mayor St., Ponce, 09000769, LISTED, 10/01/09

San Juan Municipality

San Antonio Railroad Bridge, Spanning San Antonio Channel at PR 1 E. of San Juan Islet, San Juan vicinity, 09000789, LISTED, 9/30/09 (Historic Bridges of Puerto Rico MPS)

SOUTH CAROLINA

Horry County

Kingston Presbyterian Church, 800 3rd Ave., Conway, 08000759, LISTED, 9/28/09

Spartanburg County

Duncan, Bishop William Wallace, House, 300 Howard St., Spartanburg, 76001712, LISTED, ADDITIONAL DOCUMENTATION APPROVED, 10/02/09

TEXAS

Dallas County

Fidelity Union Life Insurance Building, 1511 Bryan and 1507 Pacific Ave., Dallas, 09000306, LISTED, 9/29/09

VIRGINIA

Amherst County

Galt's Mill Complex, 1133 Galt's Mill Rd., Madison Heights, 09000791, LISTED, 9/30/09

Buena Vista Independent City

Buena Vista Downtown Historic District, 2000 & 2100 blocks of Magnolia Ave. and adjacent blocks, Buena Vista, 09000792, LISTED, 9/30/09

Dinwiddie County

Zehmer Farm, 9818 Jack Zehmer Rd., McKenney vicinity, 09000793, LISTED, 9/30/09

Newport News Independent City

Whittaker Memorial Hospital, 1003 Twenty-Eighth St., Newport News, 09000794, LISTED, 9/30/09

Northampton County

Eastville Historic District, Area includes VA Rt. 13, Old Town Neck Dr., Courthouse Rd., Willow Oak Rd., Rockefellow La., and Stumptown Dr., Eastville vicinity, 09000795, LISTED, 10/01/09

Richmond Independent City

Woodland Heights Historic District, Bounded by James River, W. 24th St., Bainbridge St. and Forest Hill Ave., and W. 32nd and 34th Sts., Richmond, 09000796, LISTED, 9/30/09

WISCONSIN

Dodge County

Fountain Inn, 203 Front St., Beaver Dam, 09000797, LISTED, 9/30/09

[FR Doc. E9–29267 Filed 12–8–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2009–N245; 81440–1113–0000–F3]

Proposed Safe Harbor Agreement for California Red-Legged Frog, Least Bell's Vireo, and Southwestern Willow Flycatcher, on Lands Owned or Managed or Both by the Ojai Valley Land Conservancy Within the Ventura River Watershed, Ventura County, CA

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application and proposed safe harbor agreement.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application for an enhancement of survival permit for the federally threatened California red-legged frog (*Rana aurora draytonii*) and federally endangered least Bell's vireo (*Vireo bellii pusillus*) and southwestern willow flycatcher (*Empidonax traillii extimus*) under the Endangered Species Act of 1973, as amended (Act), from the Ojai Valley Land Conservancy (Applicant). This permit application includes a proposed safe harbor agreement (Agreement) between the Applicant and the Service. The Agreement and permit application are available for public comment.

DATES: In order to ensure we are able to consider your comments, send them to us on or before January 8, 2010.

ADDRESSES: Use one of the following methods to send us your comments.

- *Mail your comments to:* Field Supervisor; U.S. Fish and Wildlife Service; Ventura Fish and Wildlife Office; 2493 Portola Road, Suite B; Ventura, CA 93003.
- *Fax your comments to:* (805) 644–3958.
- *E-mail your comments to: fw8SHAOVLC@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Eric Morrissette, Safe Harbor Coordinator, Ventura Fish and Wildlife Office (see **ADDRESSES**), telephone (805) 644–1766.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the documents for review by contacting the individual named in the **FOR FURTHER INFORMATION CONTACT** section. You also may make an appointment to view the documents at the Ventura Fish and Wildlife Office (see **ADDRESSES**) during normal business hours.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Background

Under a safe harbor agreement, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the Act (16 U.S.C. 1531 *et seq.*). Safe harbor agreements, and the subsequent permits that are issued under section 10(a)(1)(A) of the Act, encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners that they will not be subjected to increased land use restrictions as a result of efforts to attract or increase the numbers or distribution of a listed species on their property. Application requirements and issuance criteria for permits through safe harbor agreements are found in 50 CFR 17.22(c).

We have worked with the Applicant to develop this proposed Agreement for the conservation of the California red-legged frog, least Bell's vireo, and southwestern willow flycatcher on the properties subject to the Agreement (Enrolled Properties), which are owned or managed by the Applicant. The Enrolled Properties include: (1) The Ventura River—Rancho El Nido Preserve, (2) the Ojai Meadows Preserve, (3) the Ventura River—Confluence Preserve, and (4) the San Antonio Creek Preserve, all in Ventura County, California. Within the 1,687 acres of land within the Enrolled Properties, habitat for the California red-legged frog, least Bell's vireo, and southwestern willow flycatcher will be restored, enhanced, and managed under a written agreement between the Applicant and Service. We expect that the activities proposed in the Agreement will result in an increase in suitable habitat for these species and provide for their increase in number and expansion into additional areas that are currently not occupied, thus resulting in a net conservation benefit for the three species.

This Agreement provides for the restoration, enhancement, and management of aquatic, riparian, and upland habitat suitable for the California red-legged frog, least Bell's vireo, and southwestern willow flycatcher on the Enrolled Properties. The proposed duration of the Agreement is 30 years, and the proposed term of the enhancement of survival permit is 30 years. The Agreement fully describes the proposed management activities to be undertaken by the Applicant and the net conservation benefits expected to be gained for the California red-legged frog, least Bell's vireo, and southwestern willow flycatcher.

Upon approval of this Agreement, and consistent with the Service's Safe Harbor Policy published in the **Federal Register** on June 17, 1999 (64 FR 32717), the Service would issue a permit to the Applicant authorizing take of the California red-legged frog, the least Bell's vireo, and the southwestern willow flycatcher incidental to the implementation of the management activities specified in the Agreement; incidental to other lawful uses of the Enrolled Properties, including normal, routine land management activities; and incidental to the return to pre-Agreement conditions (baseline).

Management activities included in the Agreement will provide for the restoration, enhancement, and

management of native riparian habitats within the Enrolled Properties. The objective of such activities is to enhance populations of California red-legged frogs, least Bell's vireos, and southwestern willow flycatchers by increasing the amount and quality of suitable habitat on the Enrolled Properties. Take of California red-legged frogs, least Bell's vireos, and southwestern willow flycatchers incidental to the aforementioned activities is unlikely; however, it is possible that in the course of such activities or other lawful activities on the enrolled property, the Applicant could incidentally take California red-legged frog, least Bell's vireo, and southwestern willow flycatcher, thereby necessitating take authority under the permit.

Pre-Agreement conditions (baseline) have been determined for each enrolled property based on the occurrence of California red-legged frog, least Bell's vireo, and southwestern willow flycatcher and the extent of suitable habitat as provided in the Agreement. The Applicant must maintain baseline on an enrolled property in order to receive coverage regarding incidental take of California red-legged frogs, least Bell's vireos, and southwestern willow flycatchers. The Agreement and requested permit would allow the Applicant to return to baseline conditions after the end of the term of the Agreement and prior to the expiration of the 30-year permit, if so desired by the Applicant.

Public Review and Comments

The Service has made a preliminary determination that the proposed Agreement and permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). We explain the basis for this determination in an Environmental Action Statement, which also is available for public review.

Individuals wishing copies of the permit application, copies of our draft Environmental Action Statement, and copies of the Agreement, including a map of the proposed permit area, should contact the Ventura Fish and Wildlife Office (see **ADDRESSES**).

If you wish to comment on the permit application or the Agreement, you may submit your comments to the address listed in the **ADDRESSES** section of this document. Comments and materials received, including names and addresses of respondents, will be available for public review, by appointment, during normal business hours at the address in the **ADDRESSES** section above and will become part of the public record, under section 10(c) of the Act. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name or address or both, you must state this prominently at the beginning of your comment. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety.

We will evaluate this permit application, associated documents, and comments we receive to determine whether the permit application meets the requirements of section 10(a) of the Act and NEPA regulations. If we determine that the requirements are met, we will sign the proposed Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to the Applicant for take of the California red-legged frog, the least Bell's vireo, and the southwestern willow flycatcher incidental to otherwise lawful activities in accordance with the terms of the Agreement. We will not make our final decision until after the end of the 30-day comment period and will fully consider all comments we receive during the comment period.

The Service provides this notice under section 10(c) of the Act and under implementing regulations for NEPA (40 CFR 1506.6).

Dated: December 2, 2009.

Diane K. Noda,

Field Supervisor, Ventura Fish and Wildlife Office.

[FR Doc. E9–29354 Filed 12–8–09; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–636]

In the Matter of Certain Laser Imageable Lithographic Printing Plates; Issuance of a Limited Exclusion Order and Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order directed to infringing laser imageable lithographic printing plates.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (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 this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on March 13, 2008, based on a complaint filed by Presstek, Inc. of Hudson, New Hampshire ("Presstek"). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laser imageable lithographic printing plates that infringe certain claims of United States Patent Nos. 5,339,737 ("the '737 patent") and 5,487,338 ("the '338 patent") and United States Trademark Registration No. 1,711,005 ("the '005 trademark"). All assertions relating to the '005 trademark were subsequently terminated from the investigation. Certain respondents were also terminated during the course of the investigation. The following respondents remain in the investigation: VIM Technologies, Ltd. of Kibbutz Hanita, Israel; Hanita Coatings RCA, Ltd. of Kibbutz Hanita, Israel; Guaranteed Service & Supplies, Inc. of West Bend, Wisconsin; AteCe Canada of Toronto, Ontario, Canada; Recognition Systems, Inc. of Port Washington, New York; and Spicers Paper, Inc. of Santa Fe Springs, California (collectively, "Respondents").

On July 24, 2009, the ALJ issued a final initial determination ("ID") finding the domestic industry requirement

satisfied, finding a violation of section 337 and containing a recommended determination on remedy and bonding. The ALJ recommended that, in the event the Commission finds a violation of section 337, the Commission should issue a limited exclusion order directed to all of Respondents' accused products found to infringe the '737 and '338 patents. ID at 101–104. The ALJ further recommended that if the Commission imposes a remedy following a finding of violation, Respondents should be required to post a bond of 100 percent of the entered value of accused products imported during the Presidential review period. *Id.*

Respondents filed a combined petition for review of the ID, and Presstek and the Commission Investigative Attorney ("IA") filed oppositions thereto. On September 24, 2009, the Commission determined to review certain aspects of the ID relating to claim construction and to modify the ID by supplementing the claim construction analysis. 74 FR 49890 (Sept. 29, 2009). The Commission also requested written submissions on the issues of remedy, the public interest and bonding, and further requested submissions of proposed remedial orders. *Id.*

On October 5, 2009, Respondents filed a collective brief on the issues for which the Commission requested written submissions. Presstek and the IA filed their briefs on those same issues on October 6, 2009, and on October 13, 2009, Presstek filed a response to Respondents' brief.

Having reviewed the record in this investigation, including the ID and the parties' written submissions, the Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of laser imageable lithographic printing plates that infringe one or more of claims 1, 10 and 27 of the '737 patent or claims 20, 21 and 23 of the '338 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondents.

The Commission further determines that the public interest factors enumerated in section 337(d) (19 U.S.C. 1337(d)) do not preclude issuance of the limited exclusion order. Finally, the Commission determines that no bond is required to permit temporary importation during the period of Presidential review (19 U.S.C. 1337(j)) of the laser imageable lithographic printing plates that are subject to the order. The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.50 of the Commission's Rules of Practice and Procedure, 19 CFR 210.50.

By order of the Commission.

Issued: November 30, 2009.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E9–29287 Filed 12–8–09; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–693]

In the Matter of Certain Foldable Stools; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 6, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of B & R Plastics, Inc. of Denver, Colorado. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foldable stools by reason of infringement of U.S. Patent No. D460,566. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: T. Spence Chubb, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2575.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2009).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 3, 2009, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foldable stools by reason of infringement of the claim of U.S. Patent No. D460,566, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

B & R Plastics, Inc., 4550 Kingston Street, Denver, CO 80239.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Ningbo ZhongTian Co., Ltd., 23F/B Hai Hong Building No. 12, Huai Shu Xiang, Ningbo, China.

Ningbo Ningfeng Import and Export Co. Ltd., 23/F Hai Hong Building No. 12, Huaishu Xiang, Ningbo, Zhejiang, China.

Kikkerland Design, Inc., 423–427 West 127th Street, New York, NY 10027.

abc Distributing Inc., 2800 Lakeside Drive, Bannockburn, IL 60015.

Always Something Brilliant, 6720 East 47th Avenue Drive, Denver, CO 80216.

Amazon.com, Inc., 1200 12th Ave. South, Ste. 1200, Seattle, WA 98144–2734.

Bed Bath & Beyond Inc., 650 Liberty Avenue, Union, NJ 07083, Buy.com

Inc., 85 Enterprise Suite 100, Aliso Viejo, CA 92656.

Crate & Barrel, Inc., 1250 Techny Road, Northbrook, IL 60062,

Home Depot Inc., 2455 Paces Ferry Road, NW., Atlanta, GA 30339.

The Afternoon, Westroads Mall, 10000 California Street, Ste 3525, Omaha, NE 68114.

The Container Store, Inc., 500 Freeport Parkway, Coppell, TX 75019.

QVC, Inc., 1200 Wilson Drive, West Chester, PA 19380.

(c) The Commission investigative attorney, party to this investigation, is T. Spence Chubb, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 4, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–29352 Filed 12–8–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–0100]

Office of Community Oriented Policing Services; Agency Information Collection Activities: Extension of a Previously Approved Collection; Comments Requested

ACTION: 30-Day Notice of Information. Collection Under Review: COPS Hiring Recovery Program (CHRP) Progress Report.

The Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The extension of a previously approved information collection is published to obtain comments from the public and affected agencies.

The purpose of this notice is to allow for 30 days for public comment until January 8, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Rebekah Whiteaker, Department of Justice Office of Community Oriented Policing Services, 1100 Vermont Avenue, NW., Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the extension of a previously approved collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the extension of a previously approved collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a previously approved collection; comments requested.

(2) *Title of the Form/Collection:* CHRP Progress Report.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Law enforcement and partner public safety agencies that are recipients of COPS Hiring Recovery Program grants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that approximately 1046 report respondents can complete the report in an average of 10 minutes per calendar quarter.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 697.333 total burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 4, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E9–29343 Filed 12–8–09; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—American Society of Mechanical Engineers

Notice is hereby given that, on November 13, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), American Society of Mechanical Engineers ("ASME") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or

changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, since July 15, 2009, "ASME" has published four new standards and initiated eight new standards activities, within the general nature and scope of ASME's standards development activities, as specified in its original notification. More detail regarding these changes can be found at *www.asme.org*.

On September 15, 2004, ASME filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 13, 2004 (69 FR 60895).

The last notification was filed with the Department on July 20, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 21, 2009 (74 FR 42329).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E9–29261 Filed 12–8–09; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act Of 1993—Pistoia Alliance, Inc.

Notice is hereby given that, on November 4, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act") Pistoia Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Symyx, Sunnyvale, CA; CCDC (Cambridge Crystallographic Data Centre), Cambridge, Cambridgeshire, UNITED KINGDOM; and Boehringer Ingelheim International GmBH, Ingelheim am Rhein, GERMANY have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Pistoia Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistoia Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on August 19, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 17, 2009 (74 FR 47823).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E9–29262 Filed 12–8–09; 8:45 am]

BILLING CODE 4410–11–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before January 8, 2010 to be assured of consideration.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on September 28, 2009 (74 FR 49406 and 49407). No comments were received. NARA has submitted the described information collection to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (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 the use of information technology; and (e) whether small businesses are affected by these collections. In this notice, NARA is soliciting comments concerning the following information collection:

1. *Title:* Returned Request Form, Reply to Request Involving Relief Agencies, Walk-In Request for OPM Records or Information.

OMB Number: 3095–0037.

Agency Form Number: NA Forms 13022, 13064, 13068.

Type of Review: Regular.

Affected Public: Former Federal civilian employees, their authorized representatives, state and local governments, and businesses.

Estimated Number of Respondents: 32,060.

Estimated Time per Response: 5 Minutes.

Frequency of Response: On occasion, when individuals desire to acquire information from Federal civilian employee personnel or medical records.

Estimated Total Annual Burden Hours: 2,671 hours.

Abstract: In accordance with rules issued by the Office of Personnel Management, the National Personnel Records Center (NPRC) of the National Archives and Records Administration (NARA) administers Official Personnel Folders (OPF) and Employee Medical Folders (EMF) of former Federal civilian employees. When former Federal civilian employees and other authorized individuals request information from or copies of documents in OPF or EMF, they must provide in forms or in letters certain information about the employee and the nature of the request. The NA Form 13022, Returned Request Form, is used to request additional information about the former Federal employee. The NA Form 13064, Reply to Request Involving Relief Agencies, is used to request additional information about the former relief agency employee. The NA Form 13068, Walk-In Request for OPM Records or Information, is used by

members of the public, with proper authorization, to request a copy of a Personnel or Medical record.

2. *Title:* Volunteer Service Application.

OMB Number: 3095–0060.

Agency Form Number: NA Form 6045.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 500.

Estimated Time per Response: 25 minutes.

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 208 hours.

Abstract: NARA uses volunteer resources to enhance its services to the public and to further its mission of providing ready access to essential evidence. Volunteers assist in outreach and public programs and provide technical and research support for administrative, archival, library, and curatorial staff. NARA uses a standard way to recruit volunteers and assess the qualifications of potential volunteers. The NA Form 6045, Volunteer Service Application, is used by members of the public to signal their interest in being a NARA volunteer and to identify their qualifications for this work.

Dated: December 4, 2009.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E9–29454 Filed 12–8–09; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Nixon Presidential Historical Materials: Opening of Materials

AGENCY: National Archives and Records Administration.

ACTION: Notice of Opening of Additional Materials.

SUMMARY: This notice announces the opening of additional Nixon Presidential Historical Materials by the Richard Nixon Presidential Library and Museum, a division of the National Archives and Records Administration. Notice is hereby given that, in accordance with section 104 of Title I of the Presidential Recordings and Materials Preservation Act (PRMPA, 44 U.S.C. 2111 note) and 1275.42(b) of the PRMPA Regulations implementing the Act (36 CFR Part 1275), the Agency has identified, inventoried, and prepared for public access additional textual materials and sound recordings from among the Nixon Presidential Historical Materials.

DATES: The Richard Nixon Presidential Library and Museum intends to make the materials described in this notice available to the public on Monday, January 11, 2010 at the National Archives building in College Park, MD (Archives 11) beginning at 11 a.m. (EDT), with the exception of the White House Central Files of Alexander Haig and Frederic V. Malek which will be made available at the Richard Nixon Library and Museum's primary location in Yorba Linda, CA beginning at 9 a.m. (PDT). In accordance with 36 CFR 1275.44, any person who believes it necessary to file a claim of legal right or privilege concerning access to these materials must notify the Archivist of the United States in writing of the claimed right, privilege, or defense before January 8, 2010.

ADDRESSES: Besides its primary location at 18001 Yorba Linda Blvd., Yorba Linda, California, the Richard Nixon Presidential Library and Museum, a division of the National Archives, has facilities in the Archives II Building at 8601 Adelphi Road, College Park, Maryland. Researchers at either facility must have a NARA researcher card, which they may obtain when they arrive at the facility. Petitions asserting a legal or constitutional right or privilege that would prevent or limit public access to the materials must be sent to the Archivist of the United States, National Archives at College Park, 8601 Adelphi Road, College Park, Maryland 20740–6001.

FOR FURTHER INFORMATION CONTACT: Timothy Naftali, Director, Richard Nixon Presidential Library and Museum, 714–983–9121 or 301–837–3117.

SUPPLEMENTARY INFORMATION: The following materials will be made available in accordance with this notice:

1. Previously restricted textual materials. Volume: 3.25 cubic feet. A number of textual materials which were previously withheld from public access have been reviewed for release and/or declassified under the mandatory review provisions of Executive Order 12958, as amended, or in accordance with 36 CFR 1275.56 (Public Access regulations). The materials are from integral file segments for the White House Special Files, Staff Member and Office Files; White House Central Files, Subject Files; the National Security Council (NSC Files and NSC Institutional Files); Nixon White House tape recordings; and the Henry A. Kissinger (HAK) Office Files, including HAK telephone conversation transcripts.

2. White House Central Files, Staff Member and Office Files. Volume: 56 cubic feet. The White House Central Files Unit was a permanent organization within the White House complex that maintained a central filing and retrieval system for the records of the President and his staff. The Staff Member and Office Files consist of materials that were transferred to the Central Files but were not incorporated into the Subject Files. The following file groups will be made available: Frank Gannon; Alexander Haig; Allen C. Hall; Frederic V. Malek; White House Conference on Food, Nutrition and Health.

3. White House Central Files, Name Files: Volume: 0.75 cubic feet. The Name Files were used for routine materials filed alphabetically by the name of the correspondent; copies of documents in the Name Files were usually filed by subject in the Subject Files. The following Name Files will be made available: Brewster, D.; Disney; Thomas J. Dodd (Sen.); Hoos; Saro; and Sero.

4. White House Central Files, Subject Files. Volume: 4.5 cubic feet. The White House Central Files Unit was a permanent organization within the White House complex that maintained a central filing and retrieval system for the records of the President and his staff. The Subject Files were arranged according to subject matter and were based on an alphanumerical file scheme of 61 primary categories. Listed below are the integral files segments from the White House Central Files, Subject Files in this opening:

GI Gifts [partial]
ME Messages [partial]
FG 166 National Capital Housing Authority
FG 167 National Capital Planning Commission
FG 168 National Commission on the Cause & Prevention of Violence
FG 169 National Commission on Consumer Finance
FG 233 Veterans Administration
PR Public Relations [partial]

5. White House Central Files, Oversize Attachment Files. Volume: 8.5 cubic feet. The White House Central Files Unit was a permanent organization within the White House complex that maintained a central filing and retrieval system for the records of the President and his staff. The Oversize Attachment Files were a means of filing and organizing materials that were too bulky or odd-sized to be placed in a file folder. Listed below are the oversize attachments from the White House

Central Files, Oversize Attachment Files in this opening:

OAs (920, 2776, 2935, 3469, 3852, 3990, 4133, 4192, 4249, 4488, 4903, 5975, 7519, 7841, 8153, 8960, 9264, 9586, 10112, 10741, 11372, 11716, 11720, 12447, 12484, 12642, 12660, 13656, 14332, and 14398)

6. White House Central Files, On-the-Shelf Oversize Attachment Files. Volume: 11.8 cubic feet. The White House Central Files Unit was a permanent organization within the White House complex that maintained a central filing and retrieval system for the records of the President and his staff. The On-the-Shelf Oversize Attachment Files were a means of filing and organizing materials that were too bulky or odd-sized to be placed in a regular box. Listed below are the oversize attachments from the White House Central Files, On-the-Shelf Oversize Attachment Files in this opening:

On-the-Shelf OAs (5, 6, 9, 10, 13, 18, 25, 26, 29, 34, 35, 38, 46, 51, 52, 57, 61, 62, 64, 70, 71, 72, 74, 75, 76, 80, 85, 87, 88, 89, 92, 93, 94, 98, 103, 104, 106, 107, 108, 109, 114, 116, 117, 119, 121, 127, 128, 134, 153, 156, 164, 166, 171, 175, 184, 186, 187, 188, 191, 194, 202, 205, 207, 215, 219, 223, 226, 230, 244, 248, 249, 250, 251, 256, 257, 258, 259, 260, 261, 262, 263, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 291, 292, 293, 294, 295, 297, 298, 299, 1883)

7. Exit Interviews. Volume: 0.10 cubic feet. The Office of Presidential Papers and Archives, a unit of the National Archives and Records Service functioning within the White House complex, conducted exit interviews with many departing staff members. These interviews document the staff member's functions and the ways these functions are documented in their records. The following Exit Interviews will be made available: Neal Ball; Frank Gannon; and Ronald H. Walker.

8. White House Communications Agency Sound Recordings. Volume: 12 hours. The White House Communications Agency (WHCA) was a permanent organization within the White House Military Office responsible for preparing audio, motion picture, film and photographic records of White House events. The WHCA Sound Recordings record the public utterances of President Nixon as well as selected speeches and remarks by other members of the Nixon Administration. A number of WHCA Sound Recordings which were previously withheld from public access have been reviewed for release in accordance with 36 CFR 1275.56 (Public Access regulations) and include the following:

P–700103 (Greetings/Hassan)
P–690808 (Toasts/Ceausescu)
P–700912 (Business briefing, 9/24/70)
P–710622 (Remarks/Black tie dinner, 06/22/1971)
P–711020 (Toasts/Tito)
P–711206 (Toasts/Trudeau)
P–720405 (Toasts/Michener)
P–701111 (Remarks/Ash Council)
B–049 (Greetings/Agnew/Singapore/70)
B–050 (Greetings/Agnew/Indonesia/70)
B–053 (Greetings/Agnew/Australia/70)
P–720221 (Remarks/GOP Governors/Reagan/Holton/Milliken)
P–710406 (Remarks/Illinois GOP/Percy, 4/8/71)
P–710631 (Remarks/Chowder and Marching/Kemp)
P–710701 (Toasts/Velasco)
H–189 (Briefing/Ehrlichman/Portland and Seattle Students)
P–690716 (Bi-partisan Leadership Breakfast/Boggs/Mansfield, 7/22/69)
P–701222 (Remarks/Moynihan, 12/21/1970)

Dated: December 4, 2009.

David Ferriero,

Archivist of the United States.

[FR Doc. E9–29453 Filed 12–8–09; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; Request for Comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before January 8, 2010. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted

to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Animal Plant and Inspection Service (N1–463–10–2, 1 item, 1 temporary item). Master files associated with an electronic information system used to track financial transactions, such as fee processing and collection services.

2. Department of Agriculture, Forest Service (N1–95–09–2, 3 items, 3 temporary items). Master files associated with electronic information systems that support administrative functions that relate to programs to deal with fires and other disasters.

3. Department of the Air Force, Air Force Personnel Center (N1–AFU–10–1, 2 items, 2 temporary items). Case files and an electronic tracking system relating to claims by veterans for compensation for combat-related disability.

4. Department of the Army, Agency-wide (N1–AU–09–34, 1 item, 1 temporary item). Master files of an electronic information system that contains data concerning civilian employees and contractors deployed to a theater of operations, including identifying information, contact information, and duty assignment.

5. Department of Defense, National Geospatial-Intelligence Agency (N1–537–09–3, 14 items, 13 temporary items). Records of the Office of the Inspector General, including files relating to audits, inspections, evaluations, and investigations as well as submissions prepared for inclusion in Department of Defense reports to Congress and agency reports of accomplishments. Proposed for permanent retention are annual budget reports to Congress.

6. Department of Education, Office of the Secretary (N1–441–08–10, 2 items, 1 temporary item). Notes and drafts relating to speeches, meetings, briefing papers, and similar records of the Secretary, Deputy Secretary, and Under Secretary. Speeches, briefing papers, daily schedules, policy statements, and similar documents are proposed for permanent retention.

7. Department of Homeland Security, Office of Inspector General (N1–563–09–10, 13 items, 11 temporary items). Records of the Office of Inspector General (OIG), including such records as financial audit and inspection reports and related work papers, memorandums of agreement, correspondence files of OIG staff other than the Inspector General, performance measurement files, policy and procedures files, and quality review records. Proposed for permanent retention are performance audit and inspection reports and organizational charts approved by the Inspector General.

8. Department of Homeland Security, U.S. Citizenship and Immigration Services (N1–566–09–6, 3 items, 3 temporary items). Forms and other records used to evaluate the eligibility and suitability of U.S. citizens who seek to adopt a child abroad.

9. Department of the Interior, U.S. Geological Survey (N1–57–08–5, 48 items, 27 temporary items). Digital cartographic data, cartographic materials which do not support standard products, orthophotographs and maps, cartographic reference materials, geographic names committee records, facilitative records of the Federal Geographic Data Committee, and miscellaneous mapping records. Proposed for permanent retention are such records as master files of the Digital Geospatial Data Architecture system, National Elevation, Hydrography, Boundary, Structures, and Transportation datasets, digital orthophotographic imagery and orthophotographic products, Board of Geographic Names committee records and Geographic Names Information System master files, substantive records of the Federal Geographic Data Committee including standards and policy documents, master files and standard map products of the National Atlas of the United States of America®, and master files of The National Map.

10. Department of Justice, Environment and Natural Resources Division (N1–60–09–37, 7 items, 7 temporary items). Content and management records associated with the Division's internal Web site.

11. Department of Justice, Executive Office for U.S. Attorneys (N1–60–09–19, 4 items, 2 temporary items). U.S. Attorneys procedures, including administrative procedures and attorney pay plans. The United States Attorneys' Manual and Bulletins are proposed for permanent retention.

12. Department of Justice, Office of the Inspector General (N1–60–09–24, 5 items, 4 temporary items). Records of the Office of General Counsel, including litigation case files, informal advice and opinions, work files, and subject files. Proposed for permanent retention are formal legal opinions and memoranda.

13. Department of Justice, Federal Bureau of Investigation (N1–65–09–32, 2 items, 2 temporary items). Master files and audit files associated with an electronic information system used to track child prostitution investigations.

14. Department of Transportation, Federal Highway Administration (N1–406–09–17, 14 items, 13 temporary items). Administrative records of the Federal-Aid Divisions (field offices) including correspondence files, administrative files, audit case files, budget files, delegations of authority, and financial management files. Proposed for permanent retention are documentation and supporting papers pertaining to changes in the mission, functions, and organizational structure of the Divisions.

15. Department of Transportation, Federal Highway Administration (N1–406–09–18, 19 items, 19 temporary items). Civil rights records of the Federal-Aid Divisions (field offices) including administrative files, affirmative action plans, equal employment opportunity training plan files, contract compliance reviews, Title VI reviews and complaints, and internal discrimination complaints.

16. Department of Transportation, Federal Highway Administration (N1–406–09–21, 9 items, 9 temporary items). Legal services records of the Federal-Aid Divisions (field offices) including administrative files, civil rights files, contract files, suspension and disbarment files, legislation files, litigation files, and tort files.

17. Department of the Treasury, Internal Revenue Service (N1–58–09–61, 3 items, 3 temporary items). Master files, inputs, and system documentation associated with an electronic information system used to issue employee identification cards.

18. Department of the Treasury, Internal Revenue Service (N1–58–09–62, 4 items, 4 temporary items). Master files, outputs, and system documentation associated with an electronic information system used to identify qualified candidates for executive level positions in the agency.

19. Department of the Treasury, Internal Revenue Service (N1–58–09–63, 3 items, 3 temporary items). Master files, outputs, and system documentation associated with an electronic information system used to validate the addresses of taxpayers' spouses.

20. Department of the Treasury, Internal Revenue Service (N1–58–09–73, 3 items, 3 temporary items). Master files, outputs, and system documentation associated with an electronic information system used by agency agents to request the assistance of specialists in resolving taxpayer cases.

21. Department of the Treasury, Internal Revenue Service (N1–58–09–74, 3 items, 3 temporary items). Master files, outputs, and system documentation associated with an electronic information system used to track innocent spouse relief cases.

22. Department of the Treasury, Internal Revenue Service (N1–58–09–76, 3 items, 3 temporary items). Master files, outputs, and system documentation associated with an electronic information system used to create and distribute taxpayer settlement notices.

23. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Assistance (N1–286–09–4, 1 item, 1 temporary item). Master files of an electronic information system used to track deployment abroad of civilian personnel.

24. Export-Import Bank of the United States, Chief Information Office (N1–275–09–8, 1 item, 1 temporary item). Master files of an electronic information system used to facilitate processing of financial applications.

25. Institute of Museum and Library Services, Agency-wide (N1–288–09–1, 1 item, 1 temporary item). Master files of an electronic information system that contains data about projects funded by the agency.

26. Institute of Museum and Library Services, Agency-wide (N1–288–09–2, 2 items, 2 temporary items). Master files and outputs of an electronic information system that relates to the review of applications for grants and awards.

Dated: December 4, 2009.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. E9–29455 Filed 12–8–09; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2008–0066; DOCKET NO. 52–017]

Virginia Electric and Power Company D/B/A Dominion Virginia Power and Old Dominion Electric Cooperative Combined License Application for North Anna Unit 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.71(e)(3)(iii) [10 CFR 50.71(e)(3)(iii)], for the North Anna Unit 3 Combined License (COL) Application, Docket Number 52–017, submitted by Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion), and Old Dominion Electric Cooperative (ODEC), for the proposed facility to be located in Louisa County, Virginia. In accordance with 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action is a one-time schedule exemption from the requirements of 10 CFR 50.71(e)(3)(iii). During the period from the docketing of a COL application until the Commission makes a finding under 10 CFR 52.103(g) pertaining to facility operation, the applicant must, pursuant to 10 CFR 50.71(e)(3)(iii), submit an annual update to the final safety analysis report (FSAR), a part of the application. The proposed exemption would allow the applicant to submit the FSAR update scheduled for 2009 by June 30, 2010, and to submit the subsequent FSAR update in 2011. The FSAR update schedule could not be changed absent the exemption. The NRC is authorized to grant the exemption pursuant to 10 CFR 50.12. The proposed action is in accordance with the applicant's request dated November 17, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML093240090).

Need for the Proposed Action

The proposed action is needed to provide the applicant sufficient time to fully incorporate into the FSAR update the most recent revision (Revision 6) of the Economic Simplified Boiling Water Reactor (ESBWR) Design Control Document (DCD) which was submitted to the NRC on August 31, 2009. The ESBWR design, referenced by the North Anna Unit 3 COL application, is currently undergoing NRC review for design certification and Revision 6 of the DCD was a comprehensive revision. The NRC expectation is that the FSAR update will fully incorporate Revision 6 of the DCD in an acceptable manner. The applicant has requested a one-time exemption from the schedule specified in 10 CFR 50.71(e)(3)(iii) to fully incorporate Revision 6 of the ESBWR DCD into the FSAR update.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that there are no environmental impacts associated with the proposed exemption. The proposed exemption is solely administrative in nature in that it pertains to the schedule for submittal to the NRC of revisions to an application for a COL under 10 CFR Part 52 which has not been granted.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have any foreseeable impacts to land, air, or water resources, including impacts to biota. In addition, there are also no known socioeconomic or environmental justice impacts associated with the proposed action. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The proposed action does not involve the use of any different resources than those previously considered in the Draft Supplemental Environmental Impact Statement (SEIS) related to the North Anna Unit 3 Combined License Application dated December 19, 2008.

Agencies and Persons Consulted

On November 30, 2009, the staff consulted with officials at the Commonwealth of Virginia, Virginia Department of Environmental Quality regarding the environmental impact of the proposed action. The representatives of the Commonwealth had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the applicant's letter dated November 17, 2009. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 2nd day of December 2009.

For the Nuclear Regulatory Commission.

Thomas A. Kevern,

Senior Project Manager, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E9–29324 Filed 12–8–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[IA–09–025; NRC–2009–0548]

In the Matter of Daniel Culver; Order Prohibiting Involvement in NRC-Licensed Activities

I

Daniel Culver (Mr. Culver) was previously employed as a maintenance supervisor at Exelon Generating Company, LLC's (Exelon or licensee) Peach Bottom Atomic Power Station (Peach Bottom or the facility). Exelon holds License Nos. DPR–44 and DPR–56 issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 50 on October 25, 1973, and July 2, 1974, respectively. The license authorizes the operation of Peach Bottom Units 2 and 3 in accordance with the conditions specified therein. The facility is located on the licensee's site in Delta, Pennsylvania. Mr. Culver worked for Exelon from June 11, 2007, to July 29, 2008.

II

In a letter dated June 5, 2009, the NRC provided Mr. Culver the results of an investigation initiated by the NRC Office of Investigations (OI). The letter informed Mr. Culver that the NRC was considering escalated enforcement action against him for an apparent violation due to his failure to provide complete and accurate information to Exelon when completing a Personal History Questionnaire (PHQ) for unescorted access to Peach Bottom. Specifically, the NRC determined that Mr. Culver had deliberately provided incomplete and inaccurate information regarding: (1) The character of his military service, (2) his history of conduct in the military, and (3) the nature of his military discharge. The NRC offered Mr. Culver a choice to attend a Predecisional Enforcement Conference (PEC) or to request Alternate Dispute Resolution (ADR) to resolve any disagreement over: (1) whether a violation occurred, and (2) the appropriate enforcement action. At his request, a PEC was held between Mr. Culver and the NRC on July 17, 2009. During the PEC, Mr. Culver presented information about the reasons he failed to provide certain information on the PHQ and why he did not believe he acted deliberately:

(1) The character of his military service—Mr. Culver listed his US Navy (USN) rank as Machinist Mate 1 (MM1) on the PHQ, however, the NRC investigation identified that he had served as a MM2 and had been demoted to a MM3 prior to his discharge, as a result of a non-judicial punishment (NJP) related to a misconduct incident. At the PEC, Mr. Culver stated that listing his naval rank as MM1 was a typographical error, and the result of attempting to complete the PHQ and other in-processing paperwork quickly so as to begin working.

(2) His history of conduct in the military—Mr. Culver was subject to an NJP during his USN service; however, the NRC investigation identified that he failed to report the NJP as required on the PHQ, even though the PHQ specifies that all arrests, including NJPs, must be listed. At the PEC, Mr. Culver stated that he had read on the PHQ that he was required to report all arrests, but had failed to read the subsequent explanation of the circumstances that constitute an arrest, including NJP. Therefore, he failed to recognize that the NJP had to be disclosed. He also stated that he had received counsel in the USN that he did not have to disclose the NJP unless he applied for a government job.

(3) The nature of his military discharge—Mr. Culver was released from the USN under a "General Discharge, Under Honorable Conditions," however, the NRC investigation identified that he listed his discharge type on the PHQ as "Honorable." At the PEC, Mr. Culver stated that, in his previous experience with applying for jobs, potential employers asked him to only state if he had received either an Honorable or a Dishonorable discharge because most did not understand the distinction with a General discharge. Consequently, on the Exelon PHQ, he listed his discharge as "Honorable," which he felt to be the closest fit to "General."

During the PEC, Mr. Culver also discussed certain information in the Application for Employment with Exelon that he submitted on April 12, 2007. Specifically, Mr. Culver provided information regarding why he listed a certain individual as his supervisor on the employment application, even though that individual was not Mr. Culver's supervisor at the time he submitted his application.

III

The NRC has concluded that Mr. Culver violated 10 CFR 50.5(a)(2), by deliberately submitting to a licensee (Exelon) information that he knew to be incomplete or inaccurate in some respect material to the NRC. The NRC concluded that Mr. Culver's actions were deliberate in that his stated reasons for providing the inaccurate information did not comport with the evidence gathered during the OI investigation:

(1) The character of his military service—Mr. Culver stated that listing his naval rank as MM1 was a typographical error; however, he completed the PHQ by hand. Additionally, the NRC investigation identified that Mr. Culver's Exelon job application and submitted resume also did not accurately reflect his MM3 naval rank. At the PEC, Mr. Culver informed the NRC that he had subsequently provided Exelon a corrected copy of his resume. However, based on the evidence obtained during the OI investigation, the NRC concluded that Exelon was provided no such correction.

(2) His history of misconduct in the military—Mr. Culver stated that he had failed to recognize that his NJP had to be disclosed, along with any arrests, on the PHQ. However, the PHQ provided an explanation of what constituted an arrest, which included military NJP. Additionally, the NRC considered that Mr. Culver had served in the USN for more than four years and, as such, should have been aware of the consequences of his NJP.

(3) The nature of his military discharge—Mr. Culver stated that he had listed his discharge on the PHQ as "Honorable" because he had expected that Exelon, like other previous potential employers, was only interested in knowing if his discharge was "Honorable" or "Dishonorable." However, the NRC investigation identified that the PHQ requested that an applicant list the "Type of Discharge" and did not limit the options to only "Honorable" or "Dishonorable." Additionally, the PHQ provided additional space for the applicant to provide additional information "if TYPE of Discharge is anything BUT 'Honorable.'"

Additionally, the NRC has concluded that Mr. Culver provided incomplete information on the employment application he submitted to Exelon on April 12, 2007. Specifically, Mr. Culver cited his USN service under "Employment History," and listed a particular Leading Petty Officer as his supervisor. However, the NRC has determined that this individual only temporarily acted as Leading Petty Officer while Mr. Culver and he served together, and that the individual was not Mr. Culver's supervisor at the time of his application for employment with Exelon. Further, when Exelon's background investigation contractor contacted the individual to verify Mr. Culver's service, the individual stated that Mr. Culver was eligible for re-enlistment and did not have a history of disciplinary action. However, Mr. Culver had received the NJP and, as a result, was not eligible to re-enlist. The NRC concludes that Mr. Culver provided incomplete information in his application when he failed to identify his current supervisor and instead listed as his supervisor an individual under whom he served on only an interim basis. This individual did not state that he was aware Mr. Culver had received disciplinary action that rendered him ineligible to re-enlist in the USN, information that should have been known to any individual in the USN who was actually supervising Mr. Culver.

10 CFR 73.56(b)(1) requires, in part, that licensees establish and maintain an access authorization program granting individuals unescorted access to protected and vital areas with the objective of providing high assurance that individuals granted unescorted access are trustworthy and reliable. Mr. Culver's deliberate submittal of incomplete and inaccurate information regarding his military service impacted Exelon's ability to determine his suitability for unescorted access to Peach Bottom.

As a result, I do not have the necessary assurance that Mr. Culver, should he engage in NRC-licensed activities under any other NRC license, would perform NRC-licensed activities safely and in accordance with NRC requirements. Therefore, the public health, safety, and interest require that Mr. Culver be prohibited from any involvement in NRC-licensed activities for a period of three years from the date of this Order.

IV

Accordingly, pursuant to sections 103, 161b, 161i, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR 30.10, and 10 CFR 150.20, *it is hereby ordered that:*

1. Daniel Culver is prohibited for three years from the date of this Order from engaging in activities licensed by the NRC. Activities licensed by the NRC are those activities licensees are authorized to conduct pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 CFR 150.20.

2. If Daniel Culver is currently involved with another licensee in NRC-licensed activities, he must immediately cease those activities, and inform the NRC of the name, address, and telephone number of the employer, and provide a copy of this order to the employer.

3. Daniel Culver shall, within 20 days following acceptance of his first employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined in Paragraph IV.1 above, provide notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities.

The Director, OE, may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Culver of good cause.

V

In accordance with 10 CFR 2.202, Mr. Culver must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of its issuance. In addition, Mr. Culver and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in

accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, web-based submission form. In order to serve documents through EIE, users will be required to install a web browser plug-in from the NRC Web site. Further information on the web-based submission form, including the installation of the web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a person other than Mr. Culver requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

If a hearing is requested by Mr. Culver or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order's publication in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received.

Dated this 1st day of December 2009.

For the Nuclear Regulatory Commission.

Roy P. Zimmerman,

Director, Office of Enforcement.

[FR Doc. E9–29325 Filed 12–8–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 050–133; NRC–2009–0541]

Pacific Gas and Electric, Humboldt Bay Power Plant, Unit 3; Environmental Assessment and Finding of No Significant Impact for an Exemption From Certain Control and Tracking Requirements in 10 CFR Part 20 Appendix G Section III.E

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from certain control and tracking requirements in 10 CFR part 20 appendix G section III.E for Facility Operating License No. DPR–7 issued to Pacific Gas and Electric (PG&E or the licensee), for Humboldt Bay Power Plant (HBPP) Unit 3, located in Humboldt County, California.

Environmental Assessment

Identification of Proposed Action

The proposed action is in accordance with the licensee's application for an exemption dated September 4, 2009. The licensee has requested an exemption from certain control and tracking requirements in 10 CFR part 20 appendix G section III.E, which require the licensee to investigate, and file a report with the NRC, if shipments of low-level radioactive waste are not acknowledged by the intended recipient within 20 days after transfer to the shipper.

The proposed action would grant an exemption to extend the time period that can elapse during shipments of low-level radioactive waste before the licensee is required to investigate and file a report with the NRC. Specifically, the exemption would extend the time period for the licensee to receive acknowledgment that the low-level radioactive waste shipment has been received by the intended recipient from 20 days to 45 days.

The Need for the Proposed Action

PG&E is in the process of decommissioning HBPP Unit 3. During the decommissioning process, large volumes of slightly contaminated debris are generated and require disposal. PG&E transports low-level radioactive waste from HBPP Unit 3 to distant locations such as a waste disposal facility operated by Energy Solutions in Clive, Utah, and waste processors in Tennessee.

The licensee's request to extend the 20-day investigation and reporting requirements for shipments of low-level radioactive waste to 45 days is based on historical data derived from experience at Southern California Edison Company's San Onofre Nuclear Generating Station (SONGS). That experience indicates that rail transportation time to waste disposal facilities frequently exceeded the 20-day reporting requirement. A review of the SONGS data indicates that transportation time for shipments by rail or truck/rail took over 16 days on average and, on occasion, took up to 57 days. HBPP is in a more remote location than SONGS and is not near a railhead. Shipping from HBPP may require a combination of truck/rail, barge/rail or barge/truck shipments. These mixed-mode shipments will be comprised of truck and barge shipments from HBPP to inland locations in California or nearby states, followed by rail shipments to the waste disposal facilities or processors. The additional step of transloading material at a remote railyard (*e.g.*, unloading and loading, waiting for the train to depart) is expected to add to shipping delays that exceed the time of shipments from SONGS.

The licensee affirms that the low-level radioactive waste shipments will always be tracked throughout transportation until they arrive at their intended destination. The licensee believes, and the staff agrees, that the need to investigate, trace, and report to the NRC on the shipment of low-level waste packages not reaching their destination within 20 days does not serve the underlying purpose of the rule. Therefore, the NRC staff finds that granting an exemption to extend the time period from 20 days to 45 days for mixed-mode shipments of low-level radioactive waste will not result in an undue hazard to life or property.

Environmental Impacts of the Proposed Action

The NRC has reviewed the licensee's proposed exemption request and concluded that the proposed exemption is procedural and administrative in nature.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not involve any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Agencies and Persons Contacted

In accordance with NRC policy, on November 2, 2009, the staff consulted with a State of California official in the Radiologic Health Services, State Department of Health Services, regarding the environmental impact of the proposed action. The state official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

Dated at Rockville, Maryland this 1st day of December 2009.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E9–29327 Filed 12–8–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0536]

Proposed Generic Communication; NRC Regulatory Issue Summary 2009–XX; Monitoring the Status of Regulated Activities During a Pandemic

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of opportunity for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to issue

this regulatory issue summary (RIS) to inform addressees of the NRC's desire for information on the evolving pandemic situations at licensee sites and the impact of a pandemic situation on operational decisions and requests for regulatory relief. The NRC intends to use this information to align NRC resources to be prepared to address potential safety and operational issues at affected licensee sites, and to support decision-making within the NRC. The NRC, therefore, is soliciting licensees to voluntarily provide information regarding the above.

The NRC is also sharing this RIS with the Agreement States via a separate communication and is encouraging the Agreement States to share it with their licensees.

This RIS is available through the NRC's Agencywide Documents Access and Management System (ADAMS) under accession number ML093210234.

DATES: Comment period expires January 25, 2010. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSES: Submit written comments to the Chief, Rulemaking and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Mail Stop TWB–05–B01M, Washington, DC 20555–0001, and cite the publication date and page number of this **Federal Register** notice.

FOR FURTHER INFORMATION CONTACT: Thomas Alexion at 301–415–1326 or by e-mail at *Thomas.Alexion@NRC.gov* or Joseph Golla at 301–415–1002 or by e-mail at *Joe.Golla@NRC.gov*.

SUPPLEMENTARY INFORMATION:

NRC Regulatory Issue Summary 2009–XX; Monitoring the Status of Regulated Activities During a Pandemic

Addressees

All holders of operating licenses for nuclear power reactors and research and test reactors (RTRs) under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities," except those that have ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

All U.S. Nuclear Regulatory Commission (NRC) fuel cycle facilities licensed under 10 CFR Part 40 or 70 and gaseous diffusion plants certified under 10 CFR Part 76.

All 10 CFR Part 72 specific licensees and certificate holders and holders of operating licenses for nuclear power reactors who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel that are not 10 CFR Part 72 specific licensees.

All holders of radioactive materials licenses under the provisions of 10 CFR Parts 30, 40, and 70, regarding Rules of General Applicability to Domestic Licensing of Byproduct, Source, and Special Nuclear Material with Category 1 and 2 sources.

Intent

The NRC is issuing this regulatory issue summary (RIS) to inform addressees of the NRC's desire for information on the evolving pandemic situations at licensee sites and the impact of a pandemic situation on operational decisions and requests for regulatory relief. The NRC intends to use this information to align NRC resources to be prepared to address potential safety and operational issues at affected licensee sites, and to support decision-making within the NRC. The NRC, therefore, is soliciting licensees to voluntarily provide information regarding the above.

The NRC is also sharing this RIS with the Agreement States via a separate communication and is encouraging the Agreement States to share it with their licensees.

Background

The NRC's overarching mission is to license and regulate the nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment.

Across the spectrum of government operations, there has been a concerted effort to prepare for and respond to pandemic outbreaks, including the H1N1 influenza virus. All government agencies have or are preparing pandemic plans to ensure the operation of the government during a pandemic. Part of this preparation and planning is an effort by the federal government to ensure the U.S. infrastructure is maintained to the fullest extent possible.

The Homeland Security Council, in the *National Framework for 2009–H1N1 Influenza Preparedness and Response*, described surveillance as the first of the pillars of preparedness and further defined the term to mean "enhanced efforts to achieve timely and accurate situational awareness of evolving disease and the impact on critical sectors to inform policy and operational decisions." Under that definition, the NRC is in a "situational awareness" mode at all times when there is a threat of a pandemic, because: (1) Of the agency's need to be ready to respond quickly to any emergency that could threaten the agency's mission or the nuclear activities that it regulates, and (2) impacts to the electric grid may have an impact on plant safety.

Summary of Issues

The NRC is interested in maintaining situational awareness of licensees' ability to cope with the challenges associated with a pandemic. This information will serve two functions:

1. The NRC must be prepared to respond quickly if a safety or security event develops.
2. The NRC is obligated to keep its stakeholders informed.

Information of Interest

The NRC is interested in maintaining situational awareness of the status of its regulated activities during a pandemic and requests that licensees voluntarily inform the staff of any potential impacts on those activities. Accordingly, answers to the following two questions should be considered during routine business contacts with NRC staff (*e.g.*, during routine communications with the NRC licensing project manager or resident inspector or during inspections conducted by the NRC), or as licensees desire to report information:

1. Does the licensee anticipate operational challenges at the facility or in the conduct of activities in the next 48 hours in the following areas as a result of the pandemic?
   a. Safety.
   b. Security.
   c. Safeguards.
   d. Emergency preparedness.
2. Does the licensee anticipate the need to request regulatory action as a result of the pandemic in the next 48 hours?

Responses to these questions will be voluntary. If either question results in a "yes" answer, the NRC expects the licensee to provide additional information specific to the needs of the licensee, as soon as possible. In such cases, the appropriate NRC staff will follow-up with the licensee. It should be noted that this RIS does not eliminate the need for licensees to meet the reporting requirements contained in applicable regulations. Further, there are no information collection expectations other than information that is typically exchanged through routine business activities or is already required by NRC regulations. The information provided will enable the NRC to

effectively respond to licensees with potential challenges.

For materials licensees that have less frequent contact with NRC, the NRC regional offices are establishing an e-mail address that can be used to voluntarily submit the information discussed above. Materials licensees will receive a separate communication, by e-mail or phone, identifying the appropriate e-mail address for submitting information concerning potential pandemic impacts.

NRC recognizes that during a pandemic, licensees' resources may be strained. Therefore, NRC understands that licensees will provide information to the best of their ability, given the circumstances.

Backfit Discussion

This RIS requests that addressees voluntarily provide information as appropriate to assist the NRC staff in managing the impacts of a pandemic on regulated activities. This effort by the NRC is a part of the continuing federal effort in pandemic planning, and it supports situational awareness of potential issues at NRC-licensed facilities.

The staff is not imposing any new positions nor is it imposing any new regulatory requirements on licensees. Any information provided by a licensee is strictly voluntary. No action is required on the part of any licensee; therefore, this document does not constitute a backfit under applicable backfit regulations. Consequently, the staff did not perform a backfit analysis.

Federal Register Notification

To be done after the public comment period.

Paperwork Reduction Act Statement

This RIS does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing information collection requirements were approved by the Office of Management and Budget, control numbers 3150–0011 and 3150–0012.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a current valid Office of Management and Budget control number.

Contacts

Technical Contacts—Office of Nuclear Reactor Regulation (NRR)

Joseph Golla, NRR, (301) 415–1002,
E-mail: *joseph.golla@nrc.gov.*
Thomas Alexion, NRR, (301) 415–1326,
E-mail: *thomas.alexion@nrc.gov.*

Technical Contacts—Office of Nuclear Material Safety and Safeguards (NMSS)

Steven Ward, NMSS, (301) 492–3426,
E-mail: *steven.ward@nrc.gov.*
Kevin Witt, NMSS, (301) 492–3323,
E-mail: *kevin.witt@nrc.gov.*

Technical Material Contacts—Office of Federal and State Materials and Environmental Management Programs (FSME) and the Regions

Duncan White, FSME, (301) 415–2598,
E-mail: *duncan.white@nrc.gov.*
John Kinneman, Region I, (610) 337–5274,
E-mail: *john.kinneman@nrc.gov.*
Steven Reynolds, Region III, (630) 829–9800,
E-mail: *steven.reynolds@nrc.gov.*
Art Howell, Region IV, (817) 860–8106,
E-mail: *art.howell@nrc.gov.*

End of Draft Regulatory Issue Summary

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* If you do not have access to ADAMS or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209 or 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 30th day of November 2009.

For the Nuclear Regulatory Commission.

Martin C. Murphy,

Chief, Generic Communications Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. E9–29326 Filed 12–8–09; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Administrative Appeals

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval of information collection.

SUMMARY: The Pension Benefit Guaranty Corporation ("PBGC") intends to request the Office of Management and Budget ("OMB") to extend approval, under the Paperwork Reduction Act, of a collection of information under its regulation on Rules for Administrative Review of Agency Decisions. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments should be submitted by February 8, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the Web site instructions for submitting comments.

E-mail: paperwork.comments@pbgc.gov.

Fax: 202–326–4224.

Mail or Hand Delivery: Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

PBGC will make all comments available on its Web site, *http://www.pbgc.gov.*

Copies of the collection of information may also be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC at the above address or by visiting the Disclosure Division or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.) PBGC's regulation on Administrative Appeals may be accessed on PBGC's Web site at *http://www.pbgc.gov.*

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, or Donald McCabe, Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (For TTY and TDD, call 800–877–8339 and request connection to 202–326–4024).

SUPPLEMENTARY INFORMATION: PBGC's regulation on Rules for Administrative Review of Agency Decisions (29 CFR part 4003) prescribes rules governing the issuance of initial determinations by PBGC and the procedures for requesting and obtaining administrative review of initial determinations. Certain types of initial determinations are subject to administrative appeals, which are

covered in subpart D of the regulation. Subpart D prescribes rules on who may file appeals, when and where to file appeals, contents of appeals, and other matters relating to appeals.

Most appeals filed with PBGC are filed by individuals (participants, beneficiaries, and alternate payees) in connection with benefit entitlement or amounts. A small number of appeals are filed by employers in connection with other matters, such as plan coverage under ERISA section 4021 or employer liability under ERISA sections 4062(b)(1), 4063, or 4064. Appeals may be filed by hand, mail, commercial delivery service, fax or e-mail. For appeals of benefit determinations, PBGC has optional forms for filing appeals and requests for extensions of time to appeal.

OMB has approved the administrative appeals collection of information under control number 1212–0061 through January 31, 2010. PBGC intends to request that OMB extend approval of this collection of information for three years. 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.

PBGC estimates that an average of 900 appellants per year will respond to this collection of information. PBGC further estimates that the average annual burden of this collection of information is 0.71 hours and $52 per appellant, with an average total annual burden of 643 hours and $46,680.

PBGC is soliciting public comments to—

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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.

Issued in Washington, DC, this 3rd day of December 2009.

John H. Hanley,

Director, Legislative and Regulatary Department, Pension Benefit Guaranty Carparatian.

[FR Doc. E9–29315 Filed 12–8–09; 8:45 am]

BILLING CODE 7708–01–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0194; Form RI 92–22]

Proposed Collection; Comment Request for an Extension of a Currently Approved Information Collection:

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of an existing information collection. "Annuity Supplement Earnings Report" (OMB Control No. 3206–0194; Form RI 92–22), is used each year to obtain the earned income of each Federal Employees Retirement System (FERS) annuitant receiving an annuity supplement. The annuity supplement is paid to eligible FERS annuitants who are not retired on disability and are not yet age 62. The supplement approximates the portion of a full career Social Security benefit earned while under FERS and ends at age 62. Like Social Security benefits, the annuity supplement is subject to an earnings limitation.

Comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

We estimate 700 RI 92–22 forms are completed annually. Each form requires approximately 15 minutes to complete. The annual estimated burden is 175 hours.

For copies of this proposal, contact Cyrus S. Benson on (202) 606–4808, FAX (202) 606–0910 or via E-mail to *Cyrus.Benson@opm.gov*. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION CONTACT: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–29314 Filed 12–8–09; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Notice of Extension of Federal Long Term Care Insurance Program Special Decision Period for Current Enrollees

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of extension of federal long term care insurance program special decision period for current enrollees.

SUMMARY: The U.S. Office of Personnel Management (OPM) is announcing an extension of the limited Special Decision Period for current enrollees in the Federal Long Term Care Insurance Program (FLTCIP) who have the automatic compound inflation option. The initial deadline for changes under the Special Decision Period was December 14, 2009. It has been extended through February 15, 2010 for some enrollees with automatic compound inflation and through March 15, 2010 for other enrollees who are being individually notified by mail of the extension of their Special Decision Period. Both sets of enrollees are subject to premium increases if they retain their current coverage. Abbreviated underwriting requirements have also been extended. The effective date of premium increases for automatic compound inflation option enrollees

has been extended from January 1, 2010 to March 1, 2010.

DATES: The Special Decision Period for FLTCIP enrollees with the automatic compound inflation option began October 1, 2009 and has been extended through February 15, 2010 for some enrollees and through March 15, 2010 for other enrollees. The latter group will be individually notified by mail regarding an error in the initial information packet they received from Long Term Care Partners pertaining to premium changes and available options. They are being provided a second information packet and additional time to make their decisions. The effective date of premium increases for enrollees with the automatic compound inflation option has been extended from January 1, 2010 to March 1, 2010. There are no changes to the Special Decision Period and effective dates for enrollees with the future purchase option.

FOR FURTHER INFORMATION CONTACT: Enrollees may call 1–800–LTC–FEDS (1–800–582–3337) (TTY: 1–800–843–3557) or visit *www.ltcfeds.com*. For purposes of this **Federal Register** notice only, the contact at OPM is John Cutler, Senior Policy Analyst, Strategic Human Resources Policy Division, at *john.cutler@opm.gov* or (202) 606–0004.

SUPPLEMENTARY INFORMATION: On October 1, 2009, OPM published a **Federal Register** Notice announcing a limited Special Decision Period for current enrollees in the Federal Employees Long Term Care Insurance Program. That notice may be found at 74 FR 50845: *http://edocket.access.gpo.gov/2009/pdf/E9–23727.pdf*.

The limited Special Decision Period is solely for current enrollees. Provisions in the October 1, 2009 **Federal Register** notice pertaining to underwriting, billing age, and premiums (other than the changes noted below) remain the same, as do other provisions in that Notice. For example, enrollees who make coverage changes outside of the Special Decision Period may be subject to full underwriting, as specified in § 875.403, and different premium calculation rules.

Underwriting requirements: Underwriting requirements remain unchanged, except that for a special decision period coverage change to become effective, the active workforce member must be actively at work at least one day during the calendar month immediately before the coverage effective date. For example, for an effective date of March 1, 2010, the active workforce member must be actively at work at least one day during the month of February 2010.

Effective date of changes to premium: The effective date of premium increases for enrollees with the automatic compound inflation option will be March 1, 2010, or the first day of the month following approval of the request, whichever is later. However, if coverage changes result in a premium decrease, the premium decrease will be effective January 1, 2010. Billing will be adjusted retroactively as needed for coverage decreases requested after January 1, 2010.

For enrollees with the future purchase option who choose to accept the regular biennial future purchase option offer or to change their coverage, the effective date of any changes remains January 1, 2010.

Effective date of changes to coverage: The effective dates of coverage changes specified in the **Federal Register** notice issued October 1, 2009 remain unchanged. Coverage changes that do not require underwriting will be effective January 1, 2010, regardless of when the enrollee submits the Special Decision Period request. Coverage changes requiring underwriting will be effective January 1, 2010, or the first day of the month following approval of the request, whichever is later.

Authority: 5 U.S.C. 9008; 5 CFR 875.402.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–29359 Filed 12–8–09; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2010–14 and CP2010–13; Order No. 351]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add a bilateral agreement with Canada Post to the Competitive Product List. A related contract affects the delivery of inbound surface parcel post and Xpresspost. This notice addresses procedural steps associated with these filings.

DATES: Comments are due: December 14, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at http://www.prc.gov. Commenters who cannot submit their views electronically should contact the person identified in "FOR FURTHER INFORMATION CONTACT" by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or stephen.sharfman@prc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

On November 25, 2009, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (Bilateral Agreement) to the Competitive Product List.[1] The Postal Service asserts that the Bilateral Agreement is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2010–14.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for inbound competitive services as reflected in the Bilateral Agreement. More specifically, the Bilateral Agreement, which has been assigned Docket No. CP2010–13, governs the exchange of Inbound Parcel Post from Canada.

Existing agreement. The Postal Service acknowledges an existing bilateral agreement with Canada Post for inbound competitive services, which is set to expire at the end of calendar year 2009. *Id.* at 3. The Postal Service asserts that the proposed MCS language in Docket No. MC2010–14 "resembles the language" for the existing bilateral agreement and that the differences "reflect changes to certain operational details" including a reclassification of Canada Post's "Xpresspost-USA" product from a market dominant product to a competitive product. *Id.* The Commission reviewed and approved that bilateral agreement in Docket Nos. CP2009–9 and MC2009–8. The Commission had previously approved the "Xpresspost-USA" product as a market dominant product

[1] Request of United States Postal Service to Add Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Agreement, November 25, 2009 (Request).

in Docket No. MC2009–7.[2] Qualifying that approval, however, the Commission noted that "Xpresspost exhibits characteristics of a competitive product." *Id.* at 7.

Request. In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors' Decision including proposed Mail Classification Schedule (MCS) language, a management analysis of the Bilateral Agreement; certification of compliance with 39 U.S.C. 3633(a) and certification of the Governors' vote;[3] (2) a Statement of Supporting Justification as required by 39 CFR 3020.32;[4] (3) a redacted version of the agreement[5]; and (4) an application for non-public treatment of pricing and supporting documents filed under seal.[6] Request at 2.

The Bilateral Agreement covers parcels arriving in the United States by surface transportation rather than air. Governors' Decision No. 09–16.[7] The Bilateral Agreement also covers Xpresspost, a Canadian service for documents, packets, and light-weight packages. *Id.* The Bilateral Agreement allows Canada Post to tender surface parcels and Xpresspost to the Postal Service at negotiated prices rather than the default prices set by the Universal Postal Union. *Id.*

In the Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, asserts that "[t]he addition of the [Bilateral] Agreement as a competitive product will enable the Commission to verify that the agreement covers its attributable costs and enables competitive products, as a whole, to make a positive contribution to coverage of institutional costs." Request, Attachment 2. Joseph Moeller, Manager, Regulatory Reporting and Cost Analysis, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *Id.*, Attachment 1. He observes that the Bilateral Agreement "should not impair the ability of competitive products on the whole to cover an appropriate share of institutional costs." *Id.*

[2] Docket No. MC2009–7, Order Concerning Bilateral Agreement with Canada Post for Inbound Market Dominant Services, December 31, 2008.

[3] Attachment 1 to the Request.

[4] Attachment 2 to the Request.

[5] Attachment 3 to the Request.

[6] Attachment 4 to the Request. The Postal Service erroneously noted in its Request that an Attachment 5 which contained the application for non-public treatment was filed. The application for non-public treatment is Attachment 4; there is no Attachment 5.

[7] See Attachment 1 to the Request.

II. Notice of Filing

The Commission establishes Docket Nos. MC2010–14 and CP2010–13 for consideration of the Request pertaining to the proposed Canada Post-United States Postal Service Contractual Bilateral Agreement product and the related Bilateral Agreement, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than December 14, 2009. The public portions of these filings can be accessed via the Commission's Web site (http://www.prc.gov).

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2010–14 and CP2010–13 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 14, 2009.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Judith M. Grady,

Acting Secretary.

[FR Doc. E9–29308 Filed 12–8–09; 8:45 am]

BILLING CODE 7710–FW–S

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2010–13 and CP2010–12; Order No. 347]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Inbound International Expedited Services 1 to the Competitive Product List. The Postal Service has also filed a related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments are due: December 10, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Commenters who cannot submit their views electronically should contact the person identified in "FOR FURTHER INFORMATION CONTACT" by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On November 20, 2009, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Inbound International Expedited Services 1 to the Competitive Product List.[1] The Postal Service asserts that Inbound International Expedited Services 1 is a competitive product within the meaning of 39 U.S.C. 3632(b)(3).

The Postal Service states that prices and classifications underlying these rates are supported by Governors' Decision No. 08–5.[2] *Id.* at 1–2. This Request has been assigned Docket No. MC2010–13.

The Postal Service states that Governors' Decision No. 08–5 establishes the prices for Inbound International Expedited Services 1 and the changes in classification "not of general applicability" necessary to implement those prices. *Id.* at 1.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that it has entered into a contractual bilateral agreement governing bilateral rates for Express Mail Service (EMS) with China Post Group, the public postal operator in the People's Republic of China. The Postal Service states that the supporting financial materials included in this

[1] Request to Add Inbound International Expedited Services 1 to the Competitive Product List, and Notice of United States Postal Service of Filing China Post Group-United States Postal Service Contractual Bilateral Agreement (Under Seal), November 20, 2009 (Request).

[2] Governors' Decision No. 08–5, April 1, 2008, established prices for the inbound services offered under Express Mail International bilateral/multilateral agreements.

filing indicate that the inbound EMS rates comply with the requirements of 39 U.S.C. 3633(a). *Id.* at 2. The rates as established in the bilateral agreement are assigned Docket No. CP2010–12.

Request. In support of its Request, the Postal Service filed the following materials: (1) An application for non-public treatment of pricing and supporting documents filed under seal;[3] (2) a redacted version of Governors' Decision No. 08–5 establishing prices and classifications for services offered under EMS bilateral/multilateral agreements; Mail Classification Schedule (MCS) language applicable to Inbound EMS bilateral /multilateral agreements; formulas for inbound prices under EMS bilateral/multilateral agreements; and an analysis of the formulas, certification of the Governors' vote, and certification of compliance with 39 U.S.C. 3633(3)(a);[4] (3) a redacted version of the China Post Group bilateral agreement;[5] (4) certification of prices for the bilateral agreement;[6] and (5) a Statement of Supporting Justification as required by 39 CFR 3020.32.[7]

On June 1, 2008, the Postal Service filed notice of Governors' Decision No. 08–5 in Docket Nos. CP2008–6 and CP2008–7.[8] Those dockets gave notice of a competitive negotiated service agreement with China Post Group covering EMS prices.[9] In Order No. 84, the Commission added the China Post Agreement as a product not of general applicability to the competitive product list as Inbound International Expedited Services 1.[10] The Postal Service states the agreement became effective on July 15, 2008, and continued in effect until July 14, 2009. Request at 3. The Postal Service entered into a new agreement with the China Post Group on November 16, 2009. The Postal Service now requests to restore the Inbound International Expedited Services 1 product to the Competitive Product List.

Related contract. The bilateral agreement establishes alternative, negotiated rates to China Post Group for inbound EMS, instead of the EMS 2 product rates that would otherwise be applicable.[11] The Postal Service notes that the inbound portion of the bilateral agreement fits within the MCS language included as Attachment A to Governors' Decision No. 08–5. The agreement becomes effective upon completion of all necessary regulatory reviews, but in no case earlier than January 1, 2010. The agreement continues in effect until terminated, which may occur upon 30 days' notice by either party. The negotiated prices are subject to change based upon contingencies included in the agreement. Request at 4. If rates change, the Postal Service will offer China Post Group EMS rates reflecting an adjusted rate. *Id.*

The Postal Service states that the new agreement is functionally similar to the prior contract reviewed by the Commission except for different rates that may be applicable to certain flows in the new agreement. *Id.* at 5. It notes the instant agreement exhibits the same cost and market characteristics as the previous agreement. The Postal Service describes minor changes in the instant agreement which include changes in standard clauses due to the Commission's confidentiality rules and other internal issues. *Id.*

In the Statement of Supporting Justification, Kang Zhang, General Manager, Business Development, Asia/Pacific, Global Business Development, asserts that "[t]he addition of the [Bilateral] Agreement as a competitive product will enable the Commission to verify that each contract covers its attributable costs and enables competitive products, as a whole, to make a positive contribution to coverage of institutional costs." He further states that as a result, "no issue of subsidization of competitive products by market dominant products arises." *Id.*, Attachment 5.

Joseph Moeller, Manager, Regulatory Reporting and Cost Analysis, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *Id.*, Attachment 4. He asserts that the prices for the China Post Group bilateral agreement "should cover its attributable costs and preclude the subsidization of competitive products by market dominant products." *Id.* The Postal Service filed much of the supporting materials, including the specific bilateral agreement, under seal. *Id.* at 5. In its Request, the Postal Service maintains that certain portions of the contract, the rates, descriptions of the rates, and related financial information should remain under seal. *Id.*, Attachment 1.

II. Notice of Filings

The Commission establishes Docket Nos. MC2010–13 and CP2010–12 for consideration of the Request pertaining to the proposed Inbound International Expedited Services 1 product, the China Post Group bilateral agreement, and the related rates and classifications, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than December 10, 2009. The public portions of these filings can be accessed via the Commission's Web site *http://www.prc.gov.*

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2010–13 and CP2010–12 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 10, 2009.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Judith M. Grady,

Acting Secretary.

[FR Doc. E9–29307 Filed 12–8–09; 8:45 am]

BILLING CODE 7710–FW–S

[3] Attachment 1 to the Request.

[4] Attachment 2 to the Request.

[5] Attachment 3 to the Request.

[6] Attachment 4 to the Request.

[7] Attachment 5 to the Request.

[8] *See* Docket Nos. CP2008–6 and CP2008–7, Notice and Order Concerning Prices Under Express Mail International Bilateral/Multilateral Agreements, June 3, 2008. The Commission consolidated Docket No. CP2008–6 with Docket No. CP2008–7 in this order.

[9] *See* Docket No. CP2008–7, Notice of United States Postal Service of Filing an Agreement for Inbound Express Mail International (EMS) Prices, May 20, 2008.

[10] Docket No. CP2008–7, Order Concerning the China Post Group Inbound EMS Agreement, June 27, 2008 (Order No. 84).

[11] The Postal Service states that in absence of this negotiated agreement, EMS rates for calendar year 2010 as reviewed by the Commission in Docket No. CP2009–57 would apply. *See* Docket No. CP2009–57, PRC Order No. 281, Order Concerning Filing of Changes in Rates for Inbound International Expedited Services 2, August 19, 2009.

POSTAL SERVICE

International Product Change—Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add the Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Products List pursuant to 39 U.S.C. 3642.

DATES: December 9, 2009.

FOR FURTHER INFORMATION CONTACT: Margaret M. Falwell, 703–292–3576.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that on November 25, 2009, it filed with the Postal Regulatory Commission a Request to Add Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Agreement. Documents are available under Docket Nos. MC2010–14 and CP2010–13 on the Postal Regulatory Commission's Web site, *http://www.prc.gov*.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E9–29384 Filed 12–8–09; 8:45 am]

BILLING CODE P

POSTAL SERVICE

Privacy Act of 1974, Data Comparison Program—Postal Service and Public Sex Offender Registries

AGENCY: Postal Service™.

ACTION: Notice of Data Comparison Program—Postal Service and public sex offender registries via the Dru Sjodin National Sex Offender Public Web site maintained by the Department of Justice.

SUMMARY: The United States Postal Service® (Postal Service) plans to conduct an ongoing data comparison program to identify any current Postal Service employees who are required by law to register on a public registry of sex offenders. These registries contain information about individuals who are statutorily required to register, having committed offenses of sexual violence against adults or children, certain other crimes against victims who are minors, or other comparable offenses. Under the guidelines created by the Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act), the Dru Sjodin National Sex Offender Public Web site (NSOPW) was created and coordinated by the U.S. Department of Justice (DOJ) as a cooperative effort between the agencies hosting public sexual offender registries and the Federal government. The NSOPW is a search tool allowing a user to submit a single national query to obtain information about sex offenders through a number of search options. The Postal Service has procured software that enables it to conduct multiple simultaneous queries of the NSOPW via a secure line to the DOJ NSOPW. The software queries the public registries for each employee and returns a match, if found, to a secured database. No Postal Service employee information is ever shared with the DOJ or stored outside of the Postal Service's control. The Postal Service will compare its payroll database of current employees against public records using the NSOPW search tool. The Postal Service is undertaking this initiative to ascertain the suitability of individuals for certain positions or employment and to protect the integrity of its brand.

DATES: The comparison program will become effective no sooner than 30 days after notice of the comparison program is published in the **Federal Register** and sent to the DOJ, Congress, and the Office of Management and Budget (OMB). The comparison program will be ongoing.

ADDRESSES: Written comments on this proposal should be mailed or delivered to the Records Office, Postal Service, 475 L'Enfant Plaza, SW., Room 5846, Washington, DC 20260–5353. Copies of all written comments will be available at the above address for public inspection and photocopying between 8 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jane Eyre at 202–268–2608.

SUPPLEMENTARY INFORMATION: The Postal Service seeks to provide the public with accurate and efficient mail delivery to the more than 144 million businesses and residences in this country. Given the public nature of the Postal Service, published standards of conduct for Postal Service employees prohibit any employee from engaging in criminal, dishonest, or similar prejudicial conduct. The Postal Service plans to extract records for each current employee (first and last name, city of residence, state, and ZIP™ Code) from its Privacy Act System of Records (USPS 100.400), Personnel Compensation and Payroll Records, and will compare the records with public sex offender records using the NSOPW search tool maintained by the DOJ under the authority of the Walsh Act. The NSOPW search tool accesses databases of public information about individuals who have been required as a matter of law to register on a sexual offender public registry. This comparison program does not constitute a computer matching program, subject to the provisions of the Privacy Act, because the Postal Service is comparing data in its own Privacy Act Systems of Records with publicly available records. Records will not be disclosed to any other agency for purposes of this comparison. Nevertheless, the Postal Service is providing public notice of the proposed program and will conduct the program in the manner described below to ensure that the interests of postal employees are fully protected.

After extensively verifying the accuracy of the information, the Postal Service will use the data to determine whether the reported offenses may impact an individual's suitability for certain positions or employment and to protect the integrity of the Postal Service's brand. The Postal Service will analyze each occurrence on a case-by-case basis to determine the appropriate action to take, if any. In this regard, the Postal Service will consider the seriousness of the offense, the date of the offense, the nature of the employee's position with the Postal Service, and any other factors that may be relevant to the individual case.

The Postal Service will make extensive efforts to ensure that the data is accurate. Postal Inspectors will review the match report in order to verify that the person identified via the NSOPW is in fact a Postal Service employee. A postal inspector will then determine whether the person is properly included on the public registry by reviewing the relevant facts about the offense from information furnished by relevant law enforcement agencies, such as the arresting agency. The postal inspector will refer instances where the employee failed to provide any required notice of the offense to Postal Service management, or other instances considered employee misconduct, to the Office of Inspector General (OIG). The inspector or OIG special agent will prepare an investigative memorandum or report of investigation, respectively, which will be sent to the individual employee's installation head. The installation head will ensure that a case-by-case analysis is conducted regarding the appropriate action to be taken. The Postal Service will provide at least 30 days advance notice prior to the initiation of any adverse action against

a matched individual (unless the Postal Service determines that public health or safety may be affected or threatened pursuant to 5 U.S.C. 552a(p)(3)).

The privacy of employees will be safeguarded and protected. The Postal Service will manage all data in strict accordance with the Privacy Act of 1974. Data extracted from the relevant Postal Service System of Records (USPS 100.400) for comparison will not be shared with the DOJ, state agencies, territories, Indian Nations, or any other person or organization, except as authorized by the Privacy Act or required by the Freedom of Information Act. Any verified data that is maintained will be managed within the parameters of the Privacy Act System of Records USPS 700.000, Inspection Service Investigative File System (last published April 29, 2005 (Volume 70, Number 82)); and, for cases referred to the OIG, data that is maintained will also be managed within the parameters of Privacy Act System of Records USPS 700.300, Inspector General Investigative Records (last published June 14, 2006 (Volume 71, Number 114)).

Key privacy features of the data comparison program include the following:

- Requiring that the identity of matched individuals be verified and that the relevant facts of the offense be confirmed;
- Requiring appropriate security controls for the comparison;
- Providing protections for employees who appear as an initial match but who are not subsequently verified as belonging on the state registry of offenders; and
- Requiring the Postal Service to complete the verification and provide at least 30 days advance notice prior to the initiation of any adverse action against a matched individual (unless the Postal Service determines that public health and safety may be affected or threatened pursuant to 5 U.S.C. 552a(p)(3), or as otherwise provided by 5 U.S.C. 7513(b), relevant collective bargaining provisions, and Postal Service regulations).

Neva Watson,

Attorney, Legislative.

[FR Doc. E9–29383 Filed 12–8–09; 8:45 am]

BILLING CODE 7710–12–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Aeronautics Science and Technology Subcommittee; Committee on Technology; National Science and Technology Council

ACTION: Notice of Meeting—Public input is requested on development of the draft National Aeronautics Research, Development, Test and Evaluation (RDT&E) Infrastructure Plan.

SUMMARY: The Aeronautics Science and Technology Subcommittee (ASTS) of the National Science and Technology Council's (NSTC) Committee on Technology will hold a public meeting to discuss the development of the National Aeronautics RDT&E Infrastructure Plan. Executive Order (E.O.) 13419—National Aeronautics Research and Development—signed December 20, 2006, calls for the development of this plan. The plan is guided by both the National Aeronautics Research and Development (R&D) Policy and the National Plan for Aeronautics Research and Development and Related Infrastructure that were developed by the NSTC in consonance with E.O. 13419. The draft National Aeronautics RDT&E Infrastructure Plan is to be completed in 2010.

Dates and Addresses: The meeting will be held in conjunction with the 48th AIAA Aerospace Sciences Meeting at the Orlando World Center Marriott, 8701 World Center Drive, Orlando, Florida 32821 on Thursday, January 7, 2010, from 1 p.m. to 3:30 p.m. in the Crystal Ballroom A. Information regarding the 48th AIAA Aerospace Sciences Meeting is available at the *http://www.aiaa.org* Web site. Note: Persons solely attending this ASTS public meeting do not need to register for the AIAA Conference and Exhibit to attend this public meeting. There will be no admission charge for persons solely attending the public meeting. Seating is limited and will be on a first come, first served basis.

FOR FURTHER INFORMATION CONTACT: Additional information and links to E.O. 13419, the National Aeronautics R&D Policy, the National Plan for Aeronautics Research and Development and Related Infrastructure, and the Technical Appendix—National Plan for Aeronautics Research and Development and Related Infrastructure are available by visiting the Office of Science and Technology Policy's NSTC Web site at: *http://www.ostp.gov/nstc/aeroplans* or by calling 202–456–6012.

SUPPLEMENTARY INFORMATION: E.O. 13419 and the National Aeronautics R&D Policy call for executive departments and agencies conducting aeronautics R&D to engage industry, academia and other non-Federal stakeholders in support of government planning and performance of aeronautics R&D. At this meeting, ASTS members will discuss the proposed structure and draft content (to date) of the National Aeronautics RDT&E Infrastructure Plan and receive input to help inform further development of the draft National Aeronautics RDT&E Infrastructure Plan. The desired outcome of the meeting is to obtain facts and information from individuals on the RDT&E infrastructure requirements to support the national aeronautics R&D goals and objectives related to: Mobility; national defense; aviation safety; and energy and the environment.

M. David Hodge,

Operations Manager, OSTP.

[FR Doc. E9–29317 Filed 12–8–09; 8:45 am]

BILLING CODE 3170–W9–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Public Access Policies for Science and Technology Funding Agencies Across the Federal Government

AGENCY: Office of Science and Technology Policy (OSTP), Executive Office of the President.

ACTION: Notice; request for public comment.

SUMMARY: With this notice, the Office of Science and Technology Policy (OSTP) within the Executive Office of the President, requests input from the community regarding enhancing public access to archived publications resulting from research funded by Federal science and technology agencies. This RFI will be active from December 10, 2009 to January 7, 2010. Respondents are invited to respond online via the Public Access Policy Forum at *http://www.whitehouse.gov/open*, or may submit responses via electronic mail. Responses will be re-posted on the online forum. Instructions and a timetable for daily blog topics during this period are described at *http://www.whitehouse.gov/open*.

DATES: Comments must be received by January 7, 2010.

ADDRESSES: Submit comments by one of the following methods:

Public Access Policy Forum: http://www.whitehouse.gov/open.

Via E-mail: publicaccess@ostp.gov.

Mail: Office of Science and Technology Policy, *Attn:* Open

Government Recommendations, 725 17th Street, Washington, DC 20502.

Comments submitted in response to this notice could be made available to the public online or by alternative means. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you submit an e-mail comment, your e-mail address will be captured automatically and included as part of the comment that is placed in the public docket and made available on the Internet.

FOR FURTHER INFORMATION CONTACT: Dr. Diane DiEuliis, Assistant Director, Life Sciences, Office of Science and Technology Policy, *Attn:* Open Government, 725 17th Street, NW., Washington, DC 20502, 202–456–6059.

SUPPLEMENTARY INFORMATION:

I. Background

On his first day in office, the President issued a *Memorandum on Transparency and Open Government* that called for an "unprecedented level of openness in government" and the rapid disclosure of one of our nation's great assets—information. Moreover, the Administration is dedicated to maximizing the return on Federal investments made in R&D. Consistent with this policy, the Administration is exploring ways to leverage Federal investments to increase access to information that promises to stimulate scientific and technological innovation and competitiveness. The results of government-funded research can take many forms, including data sets, technical reports, and peer-reviewed scholarly publications, among others. This RFI focuses on approaches that would enhance the public's access to scholarly publications resulting from research conducted by employees of a Federal agency or from research funded by a Federal agency.

Increasing public access to scholarly publications resulting from federally funded research may enhance the return on federal investment in research in the following ways:

(a) More timely, easier, and less costly access to scholarly publications resulting from federally funded research for commercial and noncommercial scientists has the potential to promote advances in science and technology, thereby enhancing the return on federal investment in research;

(b) Creating an easily searchable permanent electronic archive of scholarly publications resulting from federally funded research has the potential to allow cross-referencing, continuous long-term access, and retrieval of information whose initial value may only be theoretical, but may eventually have important applications;

(c) Ensuring that the federal agencies that support this research can access the published results has the potential to promote improved cross-government coordination of government funding, and thus improved management of the federal research investments;

(d) More timely, easier, and less costly access to scholarly publications resulting from federally funded research for educators and students, and "end users" of research, such as clinicians, patients, farmers, engineers, and practitioners in virtually all sectors of the economy, has the potential to promote the diffusion of knowledge.

The Executive Branch is considering ways to enhance public access to peer reviewed papers arising from all federal science and technology agencies. One potential model, implemented by the National Institutes of Health (NIH) pursuant to Division G, Title II, Section 218 of Pub. L. 110–161 (*http://publicaccess.nih.gov/*) requires that all investigators funded by the NIH submit an electronic version of their final, peer-reviewed manuscript upon acceptance for publication no later than 12 months after the official date of publication. Articles collected under the NIH Public Access Policy are archived in PubMed Central and linked to related scientific information contained in other NIH databases. More information about PubMed Central is available: *http://www.pubmedcentral.nih.gov/about/faq.html.*

The NIH model has a variety of features that can be evaluated, and there are other ways to offer the public enhanced access to peer-reviewed scholarly publications. The best models may influenced by agency mission, the culture and rate of scientific development of the discipline, funding to develop archival capabilities, and research funding mechanisms.

II. Invitation To Comment

Input is welcome on any aspect of expanding public access to peer reviewed publications arising from federal research. Questions that individuals may wish to address include, but are not limited to, the following (please respond to questions individually):

1. How do authors, primary and secondary publishers, libraries, universities, and the federal government contribute to the development and dissemination of peer reviewed papers arising from federal funds now, and how might this change under a public access policy?

2. What characteristics of a public access policy would best accommodate the needs and interests of authors, primary and secondary publishers, libraries, universities, the federal government, users of scientific literature, and the public?

3. Who are the users of peer-reviewed publications arising from federal research? How do they access and use these papers now, and how might they if these papers were more accessible? Would others use these papers if they were more accessible, and for what purpose?

4. How best could federal agencies enhance public access to the peer-reviewed papers that arise from their research funds? What measures could agencies use to gauge whether there is increased return on federal investment gained by expanded access?

5. What features does a public access policy need to have to ensure compliance?

6. What version of the paper should be made public under a public access policy (e.g., the author's peer reviewed manuscript or the final published version)? What are the relative advantages and disadvantages to different versions of a scientific paper?

7. At what point in time should peer-reviewed papers be made public via a public access policy relative to the date a publisher releases the final version? Are there empirical data to support an optimal length of time? Should the delay period be the same or vary for levels of access (*e.g.*, final peer reviewed manuscript or final published article, access under fair use versus alternative license), for federal agencies and scientific disciplines?

8. How should peer-reviewed papers arising from federal investment be made publiclyavailable? In what format should the data be submitted in order to make it easy to search, find, and retrieve and to make it easy for others to link to it? Are there existing digital standards for archiving and interoperability to maximize public benefit? How are these anticipated to change?

9. Access demands not only availability, but also meaningful usability. How can the federal government make its collections of peer-reviewed papers more useful to the American public? By what metrics (*e.g.*, number of articles or visitors) should the Federal government measure success of its public access collections? What are the best examples of usability in the private sector (both domestic and international)? And, what makes them exceptional? Should those who access

papers be given the opportunity to comment or provide feedback?

Dated: December 3, 2009.

M. David Hodge,

Operations Manager.

[FR Doc. E9–29322 Filed 12–8–09; 8:45 am]

BILLING CODE 3170–W7–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29066; File No. 812–13640]

PNC Bank, National Association; Notice of Application

December 3, 2009.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 ("Act") granting an exemption from section 18(f)(1) of the Act.

APPLICANT: PNC Bank, National Association ("PNC Bank").

SUMMARY OF THE APPLICATION: Applicant requests an order that that would permit certain registered open-end management investment companies to participate as borrowers in loan facilities to be administered by PNC Bank.

FILING DATES: The application was filed on March 11, 2009, and amended on November 30, 2009.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 28, 2009 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, PNC Bank, National Association, One PNC Plaza, 21st Floor, 249 Fifth Avenue, Pittsburgh, PA 15222.

FOR FURTHER INFORMATION CONTACT: Lewis B. Reich, Senior Counsel, at (202) 551–6919, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations

1. PNC Bank, a wholly-owned indirect subsidiary of The PNC Financial Services Group, Inc. ("PNC Financial"), is a national banking association with its principal office in Pittsburgh, Pennsylvania. PNC Financial is one of the largest diversified financial services companies in the United States based on assets, with businesses engaged in retail banking, corporate and institutional banking, asset management, and global fund processing services. PNC Bank has extensive experience and expertise as an administrator of asset-backed commercial paper programs, having administered the commercial paper program of Market Street Funding LLC ("Market Street"), a limited purpose securitization entity, since 1995.

2. Market Street is organized as a Delaware limited liability company and is exempt from registration under the Act in reliance on section 3(c)(7) of the Act. All of the membership interests of Market Street are owned by Market Street Holding Corporation ("MSHC"). All of the capital stock of MSHC is owned by Amacar Investments, LLC, an entity unaffiliated with PNC Financial. As of September 30, 2009, Market Street's purchase commitments totaled approximately $6.0 billion, and its outstanding loans and other assets totaled approximately $3.3 billion.

3. PNC Bank requests relief to permit any registered open-end management investment company or series thereof to participate from time to time as a borrower ("Borrowing Fund") in a loan facility to be administered by PNC Bank ("Loan Facility"). Market Street, which would be the principal source of financing for each Loan Facility, will issue commercial paper and will utilize liquidity support provided by highly rated financial institutions that are "banks" within the meaning of section 2(a)(5) of the Act ("Liquidity Providers"). Market Street issues unsecured commercial paper with maturities of up to 270 days ("Promissory Notes") to fund uncommitted purchases of and uncommitted loans secured by various types of financial assets.

4. The Promissory Notes issued by Market Street are sold only to institutional investors that are "accredited investors" as defined in rule 501(a) of Regulation D under the Securities Act of 1933 (the "Securities Act") or to "qualified institutional buyers" as defined in rule 144A under the Securities Act. PNC Bank, which has extensive experience as an administrator of asset-backed commercial paper programs, will perform the administrative functions for Market Street. PNC Bank will negotiate the business arrangements on behalf of Market Street, including loan amounts, interest rates, and fees. PNC Bank will act as agent for Market Street and the related Liquidity Providers under the agreements executed with each Borrowing Fund and in such capacity will exercise rights and enforce remedies on behalf of Market Street and Liquidity Providers.

5. As security for a loan, Borrowing Funds will pledge assets ("Pledged Assets") for the benefit of Market Street and the applicable Liquidity Provider. The Pledged Assets will meet eligibility criteria set by Market Street that will be consistent with the Borrowing Fund's investment objectives and policies. For each loan transaction, PNC Bank will evaluate: (a) The type and nature of a Borrowing Fund's Pledged Assets to determine whether they meet Market Street's standards for collateral; (b) the operations and history of the Borrowing Fund; and (c) the financial position and operations of the Borrowing Fund's investment adviser.

6. Applicant states that Market Street would make loans to a Borrowing Fund on an uncommitted basis and the applicable Liquidity Provider would be obligated to make loans to the Borrowing Fund in the event Market Street was unable or unwilling to make such loans. Market Street will have the right in its sole discretion to require the Liquidity Providers to acquire outstanding loans made by Market Street to a Borrowing Fund at an agreed-upon amount determined pursuant to the formula set forth in the related agreements. Applicant states that these liquidity support arrangements provide additional assurances to the holders of Promissory Notes that they will be paid at maturity, as well as protection for Borrowing Funds.

7. Applicant states that Market Street currently provides financing for assets originated by customers of PNC Bank and their affiliates as sellers of those assets to Market Street. The assets purchased by Market Street include financial assets and securities backed by financial assets. Some transactions are

structured as loans to the sellers, secured by the assets being financed, or as agreements to acquire future cash flows from asset interests. In addition to purchasing interests in pools of assets directly, Market Street has purchased publicly registered, rule 144A eligible or privately placed asset-backed securities in open market or privately negotiated transactions. Market Street finances its purchase of asset pools primarily through the issuance of its Promissory Notes. All loans made by Market Street to the Borrowing Funds are not expected to be in the aggregate more than 20% of Market Street's outstanding loans and other assets.

8. Applicant represents that the revolving credit and security agreement of a Loan Facility, which will be negotiated by the parties, will contain representations, warranties, covenants and events of default that are customary for secured loan transactions involving registered open-end management investment companies, as well as such other terms that are specific to a particular Borrowing Fund and the conduct of its business. A Borrowing Fund will have the right at any time to prepay any outstanding loans under its Loan Facility on certain monthly or quarterly dates without any premium or penalty. The Pledged Assets of a Borrowing Fund will be available solely to secure the repayment of the loans and other outstanding obligations of that Borrowing Fund under the Loan Facility. Applicant further states that a Borrowing Fund would have the same rights and remedies under state and federal law with respect to a Loan Facility from Market Street that it would have with respect to a comparable loan from a bank. PNC Bank also states that the arrangements with the Liquidity Providers protect Borrowing Funds by providing an alternative source of financing in the event Market Street is unable to continue lending funds.

9. Before a Loan Facility is established, a Borrowing Fund must represent, in writing, to PNC Bank, Market Street and the Liquidity Providers that: (a) Its policies permit borrowing and, if applicable, the use of leverage; (b) all borrowing transactions pursuant to the Loan Facility will be subject to the requirements of the Act, the rules and regulations thereunder, and any other applicable interpretations or guidance from the Commission or its staff; and (c) each borrowing transaction will be conducted in accordance with all applicable representations and conditions of the application. Before a Borrowing Fund may participate in a Loan Facility, its board of directors or trustees ("Board"), including a majority of the directors or trustees that are not "interested persons" within the meaning of section 2(a)(19) of the Act ("Disinterested Directors"), will determine that its participation is consistent with the Borrowing Fund's investment objectives and policies and in the best interests of the Borrowing Fund and its shareholders. Each Borrowing Fund's Board, including a majority of the Disinterested Directors, will also adopt procedures for evaluating and making certain determinations concerning the terms of each loan transaction between the Borrowing Fund and Market Street.

10. PNC Bank states that the proposed Loan Facilities would enable Borrowing Funds to borrow money from Market Street at lower cost than obtaining comparable loans from a bank. PNC Bank states that Market Street's cost of funds is lower than that of banks, and this advantage will be passed on to the Borrowing Funds.[1]

Applicant's Legal Analysis

1. Section 18(f)(1) of the Act prohibits an open-end investment company from issuing any senior security except that a company is permitted to borrow from any bank, if immediately after the borrowing, there is an asset coverage of at least 300% for all borrowings of the company.[2] Section 2(a)(5) defines "bank" as a depository institution, a branch or agency of a foreign bank, a member bank of the Federal Reserve System, a banking institution or other trust company that, as a substantial portion of its business, receives deposits or exercises fiduciary powers similar to those permitted to national banks. Applicant states that while Market Street engages in many of the same business activities as banks, it is not a "bank" under this definition.

2. Section 6(c) of the Act permits the Commission to exempt any person or transaction or any class or classes of persons or transactions from any provision or provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. PNC Bank requests exemptive relief from section 18(f)(1) solely to the extent necessary to allow a Borrowing Fund to borrow from Market Street. PNC Bank believes that permitting the Borrowing Funds to borrow from Market Street is fully consistent with the purposes and policies of section 18(f)(1) and would not implicate the concerns underlying that provision.

3. PNC Bank states that section 18(f) of the Act reflects Congressional concern about excessive borrowing and the issuance of senior securities by open-end investment companies because these practices could unduly increase the speculative character and investment risk of junior securities. PNC Bank notes that Borrowing Funds would remain subject to the 300% asset coverage requirement in section 18(f)(1) of the Act for all borrowings, including those from Market Street. PNC Bank further represents that Market Street's loans will not impose any restrictions on a Borrowing Fund's shareholders that are different from those imposed by a collateralized bank loan. Finally, PNC Bank argues that permitting a Borrowing Fund to borrow from Market Street rather than a bank is expected to reduce its costs of borrowing, which should decrease the risk that a Borrowing Fund's borrowing costs will exceed the return from securities purchased with borrowed money and lessen any related incentive to purchase more speculative portfolio securities to cover those costs.

4. PNC Bank states that section 18(f) of the Act also limited open-end investment companies to borrowing from traditional institutional lending sources out of a Congressional concern that public holders of senior securities might be unaware that they were much riskier instruments than senior securities issued by operating companies. Senior securities of investment companies typically were secured by assets that were subject to wide fluctuations in value. Further, common shareholders could redeem at any time, which also might affect an open-end investment company's ability to repay its outstanding debt.

5. PNC Bank argues that the Loan Facilities do not involve the type of senior security holder that section 18(f)(1) of the Act was designed to protect and that the structure of the Loan Facilities and Market Street provide sufficient protection to the parties that face any risk of loss by lending to an open-end investment company. Market Street is administered by PNC Bank, which applicant states has expertise in administering loans collateralized by financial instruments that equals or exceeds the expertise of

[1] The rate at which a Liquidity Provider would make a loan to a Borrowing Fund would not be as favorable as that of Market Street, but would be comparable to the rates on secured lines of credit from banks. PNC Bank anticipates that Market Street, rather than a Liquidity Provider, will be the lender to the Borrowing Funds under a Loan Facility, absent extenuating circumstances.

[2] Under section 18(g) of the Act, the term "senior security" includes any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness.

most banks. The Liquidity Providers are banks as defined by the Act and thus not the type of potential senior security holder that Congress believed needed protection. PNC Bank states that the Promissory Notes are general obligations of Market Street and loans to Borrowing Funds are not expected to exceed 20% of Market Street's outstanding assets and loans to any individual Borrowing Fund are not expected to exceed 10% of Market Street's assets. Any risk of loss on the Promissory Notes posed by loans to registered open-end investment companies is further reduced by PNC Bank's expertise, Market Street's ability to sell the loans under the Loan Facilities to the Liquidity Providers, Market Street's external liquidity and credit enhancement sources and the capital of Market Street.

6. Applicant states that section 18(f) also reflects a concern that complex capital structures may permit insiders to manipulate the allocation of expenses and profits; facilitate control of the investment company by junior security shareholders with little investment; and make it difficult for investors in the investment company to understand what their stock is worth. PNC Bank states that borrowing from Market Street would not facilitate pyramiding of control or manipulative reallocation of expenses and profits. Further, PNC Bank believes that borrowings from Market Street would not be any more difficult for shareholders of a Borrowing Fund to understand than bank borrowings.

7. Applicant also states that section 18(f) reflects a concern that existed when the Act was adopted that borrowings by open-end investment companies could be used to invest in securities without being subject to limitations of the Board of Governors of the Federal Reserve System (the "FRB") on the amount of credit that could be used for these purposes ("margin requirements"). Under Regulations U and T under the Securities Exchange Act of 1934, in effect prior to enactment of the Act, only borrowings for such purposes made by a domestic bank or broker-dealer were subject to margin requirements. Regulation U as currently in effect imposes restrictions on banks and lenders other than broker-dealers that extend credit to borrowers for the purpose of purchasing or carrying margin stock. If Market Street makes loans to a Borrowing Fund in excess of the threshold amounts under Regulation U, Market Street will register with the FRB as a nonbank lender and would be subject to the same credit restrictions as a bank under Regulation U.

8. Finally, applicant believes the requested relief will benefit Borrowing Funds by providing them with an alternative, lower-cost source of financing. For all of these reasons and in light of the protections afforded by the conditions set forth below, PNC Bank believes that permitting Borrowing Funds to borrow from Market Street would be in the best interests of the Borrowing Funds and their shareholders, appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicant's Conditions

The applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. All Borrowing Funds will comply with the asset coverage requirements in section 18(f)(1) of the Act, including with respect to all borrowings from Market Street.

2. A loan by Market Street to a Borrowing Fund will be at an interest rate equal to Market Street's cost of funds (i.e., the weighted average Promissory Note rate plus dealer commissions).

3. Before a Borrowing Fund may participate in a Loan Facility, the Borrowing Fund's Board, including a majority of the Disinterested Directors, will determine that participation in the Loan Facility is consistent with the Borrowing Fund's investment objectives and policies and is in the best interests of the Borrowing Fund and its shareholders. In addition, a Borrowing Fund will disclose in its statement of additional information all material facts about its participation in the Loan Facility.

4. Before a Borrowing Fund may participate in a Loan Facility, its Board, including a majority of the Disinterested Directors, will adopt procedures governing the Borrowing Fund's participation in the Loan Facility ("Procedures"). In addition to any other provisions the Board may find necessary or appropriate to be included in the Procedures, the Procedures will require that, before a Borrowing Fund may enter into loan transactions with Market Street, the Board, including a majority of the Disinterested Directors, will determine that:

a. The borrowing is in the best interests of the Borrowing Fund and its shareholders;

b. The borrowing and pledge of assets are consistent with the Borrowing Fund's investment objectives and policies;

c. The total anticipated cost of the Loan Facility (including fees and interest) does not exceed the total anticipated costs of comparable financing alternatives that are available to the Borrowing Fund;

d. The asset eligibility criteria for the Loan Facility are consistent with the Borrowing Fund's investment objectives and policies; and

e. The Borrowing Fund's investments, consistent with the asset eligibility criteria and any other requirements of participating in the Loan Facility, will be in the best interests of the Borrowing Fund and its shareholders.

5. If Market Street determines (a) to require the Liquidity Providers to acquire from Market Street outstanding loans made to a Borrowing Fund, or (b) not to extend additional loans to a Borrowing Fund, the Board of the Borrowing Fund, including a majority of the Disinterested Directors, will be notified promptly. As soon as practicable, the Board, including a majority of the Disinterested Directors, must determine whether it is in the best interests of the Borrowing Fund and its shareholders to continue to participate in the Loan Facility or to terminate the Borrowing Fund's participation in the Loan Facility in accordance with its terms.

6. At each regular quarterly meeting, the Board, including a majority of the Disinterested Directors, will (a) review a Borrowing Fund's loan transactions under its Loan Facility during the preceding quarter, including the terms of each transaction, and (b) determine whether the transactions were effected in compliance with the Procedures and the terms and conditions of the order. At least annually, the Board, including a majority of the Disinterested Directors, will (a) with respect to a Borrowing Fund's continued participation in a Loan Facility, make the determinations required in condition 3 above, and (b) approve such changes to the Procedures as it deems necessary or appropriate.

7. A Borrowing Fund will maintain and preserve permanently in an easily accessible place a written copy of the Procedures and any modifications to the Procedures. The Borrowing Fund will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any transaction with a Loan Facility occurred, the first two years in an easily accessible place, a written record of each transaction setting forth a description of the terms of the transaction, including the amount, maturity, and the rate of interest on the loan, and all information upon which the determinations required by these conditions were made.

8. The applicant will not enter into a Loan Facility with any Borrowing Fund if, at the time of such transaction, the

applicant, Market Street or any Liquidity Provider is an affiliated person of that Borrowing Fund, within the meaning of section 2(a)(3) of the Act, or an affiliated person of any affiliated person of that Borrowing Fund.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29321 Filed 12–8–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61100; File No. SR–ISE–2009–100]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Amounts that Direct Edge ECN, in Its Capacity as an Introducing Broker for Non-ISE Members, Passes Through to Such Non-ISE Members

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2009, the International Securities Exchange, LLC (the "Exchange" or the "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 ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the amounts that Direct Edge ECN ("DECN"), in its capacity as an introducing broker for non-ISE Members, passes through to such non-ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization 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

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On November 30, 2009, the ISE filed for immediate effectiveness a proposed rule change to: (i) Amend DECN's fee schedule for ISE Members [3] to reflect pass through charges of other market centers; [4] and (ii) make technical changes to the fee schedule.[5] The changes made pursuant to SR–ISE–2009–99 became operative on December 1, 2009.

In its capacity as a member of ISE, DECN currently serves as an introducing broker for the non-ISE Member subscribers of DECN to access EDGX and EDGA. DECN, as an ISE Member and introducing broker, receives rebates and is assessed charges from DECN for transactions it executes on EDGX or EDGA in its capacity as introducing broker for non-ISE Members. Since the amounts of such rebates and charges were changed pursuant to SR–ISE–2009–99, DECN wishes to make corresponding changes to the amounts it passes through to non-ISE Member subscribers of DECN for which it acts as introducing broker. As a result, the per share amounts that non-ISE Member subscribers receive and are charged will be the same as the amounts that ISE Members receive and are charged.

ISE is seeking accelerated approval of this proposed rule change, as well an effective date of December 1, 2009. ISE represents that this proposal will ensure that both ISE Members and non-ISE Members (by virtue of the pass-through described above) will in effect receive and be charged equivalent amounts and that the imposition of such amounts will begin on the same December 1, 2009 start date.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

[4] On October 1, 2009, the Exchange added new fee categories for the INET order type. When a member routes to Nasdaq using the INET order type and removes liquidity on Tapes A or C, the member incurs a fee of $0.0030 on either EDGA or EDGX. Such situation yields Flag "L". The INET order type sweeps the EDGA or EDGX book, and routes the remainder to Nasdaq. If the order is marketable, it removes liquidity from the EDGA or EDGX book, as applicable, first. If the order is non-marketable, the order posts on Nasdaq. With regards to a Member's use of the INET order type for Tapes A or C securities, Members routing an ADV: (i) Less than 5,000,000 shares are currently charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares are currently charged $0.0027 per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares are currently charged $0.0026 per share; and (iv) equal to or greater than 30,000,001 shares are currently charged $0.0025 per share. The rates, in all cases, are calculated for shares removed from Nasdaq. The Exchange believes that these tier-based rates incent Members to sweep the EDGA or EDGX book first and then offer a discounted rate to Nasdaq's rates if the remainder of the order is routed to Nasdaq. These discounted rates arise in part from reduced administrative costs associated with certain volume levels. See Securities Exchange Act Release No. 60769 (October 2, 2009), 74 FR 51903 (October 8, 2009) (SR–ISE–2009–68).

In SR–ISE–2009–99, the Exchange amended its fees in order to reflect changes to the actual transaction fees assessed by away markets. Specifically, the Exchange amended its fees schedule to reflect changes to Nasdaq's best removal tier rate. For example, on November 1, 2009, the best removal tier rate increased on Nasdaq from $0.0027 per share executed to $0.0028 per share executed for Tape A & C securities. See Securities Exchange Act Release No. 60959 (November 6, 2009), 74 FR 58672 (November 13, 2009)(SR–NASDAQ–2009–096). The Exchange amended its fee schedule so that when Nasdaq's best removal tier rate changes, EDGA and EDGX's fees change as well, in lock step. The new language reads as follows:

Subscribers routing an average daily volume ("ADV"): (i) Less than 5,000,000 shares will be charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares will be charged *Nasdaq's best removal tier rate* per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—$0.0001* per share; and (iv) equal to or greater than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—$0.0002* per share. The rates, in all cases, are calculated for shares removed from Nasdaq. (emphasis added)

For the month of December this equates to $0.0028 per share for (ii), above, $0.0027 per share for (iii), above, and $0.0026 per share for (iv), as described above.

[5] In SR–ISE–2009–99, the Exchange made technical changes to the fee schedule. Effective December 1, 2009, the Exchange amended the meaning of several flags. In particular, the N and W flags are no longer used to reflect activity outside of regular market hours. The Exchange adopted flags 3–7 to reflect pre- and post-market activity. See Securities Exchange Act Release No. 60914 (November 2, 2009), 74 FR 57726 (November 9, 2009)(SR–ISE–2009–88). In SR–ISE–2009–99, the Exchange corrected a reference in footnote 1 to the fee schedule to reflect this change. The new language reads as follows:

In addition, subscribers can also qualify for a rebate of $0.0032 per share for all liquidity posted on EDGX if they add or route at least 10,000,000 shares of average daily volume prior to 9:30 AM or after 4:00 PM (includes all flags except 6) AND add a minimum of 75,000,000 shares of average daily volume on EDGX in total, including during both market hours and pre and post-trading hours. (emphasis added)

the objectives of Section 6 of the Act,[6] in general, and furthers the objectives of Section 6(b)(4),[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, this proposal will ensure that dues, fees and other charges imposed on ISE Members are equitably allocated to both ISE Members and non-ISE Members (by virtue of the pass-through described above).

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 unsolicited written comments from members or other interested parties.

III. 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–ISE–2009–100 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–100. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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–2009–100 and should be submitted on or before December 30, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities.

As described more fully above, ISE recently amended DECN's fee schedule for ISE Members to, among other things, indicate that its fees using the INET order type on Tape A and C will change in conjunction with Nasdaq's best removal tier rate and make technical changes to the fee schedule.[10] The fee changes made pursuant to the Member Fee Filing became operative on December 1, 2009. DECN receives rebates and is charged fees for transactions it executes on EGDX or EDGA in its capacity as an introducing broker for its non-ISE member subscribers.

The current proposal, which will apply retroactively to December 1, 2009, will allow DECN to pass through the revised rebates and fees to the non-ISE member subscribers for which it acts an introducing broker. The Commission finds that the proposal is consistent with the Act because it will provide rebates and charge fees to non-ISE member subscribers that are equivalent to those established for ISE member subscribers in the Member Fee Filing.[11]

ISE has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice of filing thereof in the *Federal Register*. As discussed above, the proposal will allow DECN to pass through to non-ISE member subscribers the revised rebate and fees established for ISE member subscribers in the Member Fee Filing, resulting in equivalent rebates and fees for ISE member and non-member subscribers. In addition, because the proposal will apply the revised rebates and fees retroactively to December 1, 2009, the revised rebates and fees will have the same effective date, thereby promoting consistency in the DECN's fee schedule. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–ISE–2009–100) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

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[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(4).

[10] *See* File No. SR–ISE–2009–99 (the "Member Fee Filing").

[11] *Id.*

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61107; File No. SR–FINRA–2009–070]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt NASD Interpretive Material 2210–2 Into the Consolidated Rulebook as FINRA Rule 2211

December 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 20, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. 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

FINRA is proposing to adopt FINRA Rule 2211 (Communications with the Public About Variable Insurance Products) as a replacement for NASD Interpretive Material 2210–2 (Communications with the Public About Variable Life Insurance and Variable Annuities), which would be deleted.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA proposes to update and consolidate the rules governing firm communications with the public about variable insurance products other than institutional sales material. The core of these rules is found in NASD Interpretive Material 2210–2 (Communications with the Public About Variable Life Insurance and Variable Annuities) ("IM–2210–2"). FINRA adopted IM–2210–2 in 1993 and has issued related interpretations in various publications since then. Through the review of communications submitted by firms to FINRA's advertising filings program, the FINRA Advertising Regulation Department ("Department") staff has developed additional interpretations of IM–2210–2.

FINRA proposes to replace IM–2210–2 with new FINRA Rule 2211. Rule 2211 would differ from IM–2210–2 in a number of respects. Certain provisions of IM–2210–2 would be shortened and simplified. Other changes would address areas that have experienced significant changes since IM–2210–2 was first issued, particularly with respect to the use of riders and hypothetical illustrations. Proposed Rule 2211 also would codify some of the Department's interpretations of IM–2210–2 that have developed through FINRA's advertising filings program.

Definitions

Paragraph (a) of the proposed rule would define certain terms used in the proposed rule. The definitions section is not intended to define insurance-related terms in other contexts beyond the scope of this rule.[3]

Product Identification and Liquidity

Proposed paragraphs (b) and (c) would address product identification and liquidity issues raised by variable insurance product communications. These provisions would shorten and simplify the provisions currently contained in paragraphs (a)(1) and (a)(2) of IM–2210–2.

Proposed paragraph (b) would require that all communications clearly identify the type of variable insurance product discussed within the communication and would prohibit communications from representing or implying that a variable insurance product is a mutual fund.

[3] Certain other terms are defined in the text of the rule and others are defined where used below.

Proposed paragraph (c) would prohibit communications from falsely implying that variable insurance products are short-term, liquid investments. Paragraph (c) also would require any presentation regarding liquidity or access to account values to be balanced by a description of the potential effect of all charges, penalties or tax consequences resulting from a redemption or surrender. In addition, any discussion of loans and withdrawals would have to explain their impact on account values, death benefits or other contract benefits, including potential policy lapses. These requirements generally reflect provisions contained in IM–2210–2.[4]

Guarantee Claims and Riders

FINRA recognizes the need to communicate the features of guarantees and riders through sales material; however, it is equally important that these communications discuss guarantees and riders in a fair and balanced manner.

IM–2210–2 addresses claims about guarantees but does not specifically address riders. The proposal would incorporate the concepts concerning guarantee claims in IM–2210–2 and also include specific provisions regarding riders.[5]

Similar to IM–2210–2, proposed paragraph (d)(1) would prohibit firms from exaggerating the relative benefits of a guarantee or an insurance company's financial strength or credit rating. Any presentation of a guarantee would have to provide a balanced discussion of applicable limitations or qualifications. In addition, under proposed paragraph (d)(2), communications regarding guarantees would have to disclose the extent to which the investment return and principal value of an investment option are not guaranteed and will fluctuate.

Proposed paragraph (d)(3) would require communications that discuss a guarantee or rider to explain its costs and limitations, and if applicable, that it is an optional feature of the contract that may not benefit all investors.

Proposed paragraph (d)(4) would apply if a communication includes a guaranteed amount, benefit base, or similar contract accumulation value that is not available for withdrawal in cash. Typically variable insurance contracts reference benefit bases or similar accumulation values in the context of

[4] *See* NASD IM–2210–2(a)(2).

[5] The proposal would define the term "rider" as "an additional provision to a contract or an additional contract that adds or excludes coverage at an identifiable cost." *See* proposed FINRA Rule 2211(a)(6).

guaranteed minimum withdrawal benefit (GMWB) or guaranteed minimum income benefit (GMIB) riders. Investors may be confused as to the nature of these values and believe incorrectly that they reflect the current cash withdrawal value of the investor's underlying investment options. Such communications would have to clearly disclose that the accumulation value is not available in cash or, if applicable, the restrictions to and reductions taken when receiving such value in cash.

Qualified Plans

FINRA has previously expressed concerns with recommendations to purchase a variable annuity through a tax-qualified account, such as an individual retirement account, because a variable annuity does not provide any additional tax deferred treatment of earnings beyond the treatment provided by the tax-qualified retirement plan itself. FINRA recognizes that there may be reasons other than tax deferral to recommend the purchase of a variable annuity through a tax-qualified account. However, FINRA has reminded firms that a registered representative should recommend the purchase of a variable annuity through a tax-qualified account only when other benefits, such as lifetime income payments, family protection through the death benefit or guaranteed fees, support the recommendation.[6]

The same rationale applies to communications concerning a variable insurance product offered through a tax-qualified retirement plan. Accordingly, proposed paragraph (e) would prohibit any such communication from indicating that the tax-deferred treatment of earnings is available only through investment in the contract, and would require disclosure that the variable insurance product does not provide any additional tax-deferred treatment of earnings beyond the treatment of earnings provided by the retirement plan. The proposed requirements are consistent with the review of communications by the Department.

Historical Performance

Proposed paragraph (f) would govern the various types of variable insurance product historical performance that a firm may include in communications. These provisions generally reflect positions that the Department has taken through the filings review program.

Variable Annuity Performance

Proposed paragraph (f)(1) would provide that firms may present historical performance in communications regarding registered variable annuities only in accordance with Rule 482 under the Securities Act of 1933 ("Securities Act") or Rule 34b–1 under the Investment Company Act of 1940, as applicable.

Variable Life Insurance Policy Performance

Proposed paragraph (f)(2) would allow firms to present historical performance information in communications regarding variable life insurance policies, subject to certain conditions. The standards imposed by this paragraph generally reflect standards that the Department previously has published regarding variable life insurance policy performance information.[7] At a minimum, this performance must reflect the deduction of all fees and charges applicable at the investment option level.[8]

Communications that present variable life insurance policy performance also would have to prominently disclose:

- Whether the performance reflects the deduction of additional fees and charges disclosed in the prospectus other than at the investment option level;
- The fees and charges disclosed in the prospectus not deducted from the performance (*e.g.*, life insurance premiums); and
- That if all fees and charges disclosed in the prospectus had been deducted, the performance quoted would have been lower.

Proposed paragraph (f)(2)(C) would require communications that present variable life insurance policy performance to urge investors to obtain a personalized hypothetical illustration. Upon such investor request, a firm would be required to provide an illustration that reflects all applicable fees and charges disclosed in the prospectus, including the cost of insurance. The illustration also would have to conform to the provisions governing assumed rate hypothetical illustrations contained in proposed paragraph (g) discussed below, and would have to be customized to reflect an individual investor's characteristics and preferences.[9]

Presentations of investment option performance in variable life insurance communications would have to be consistent with the standards for the presentation of registered open-end management investment company performance in paragraphs (b)(3), (b)(4), (b)(5), (d), (e) and (g), as applicable, of Securities Act Rule 482. Thus, such performance would have to be accompanied by the same required performance-related disclosures contained in Securities Act Rule 482(b)(3) and (b)(4) (as applicable), and be presented in a manner that satisfies the requirements of Securities Act Rule 482(b)(5). Quotations of performance would have to meet the standards of Securities Act Rule 482(d) (in the case of non-money market funds) or (e) (in the case of money market funds), and would have to be current to the most recent calendar quarter ended prior to the submission of the communication for publication as required by Securities Act Rule 482(g). These proposed requirements reflect current industry practice with respect to communications containing variable life insurance performance.

Pre-Dated Performance

Proposed paragraph (f)(3) would allow, but not require, firms to present the performance of an investment option that occurred during the period prior to its availability through the separate account of a variable insurance product. For example, this provision would allow a firm to show an investment option's entire performance history, even if the investment option became available through the separate account subsequent to its inception. This provision reflects current FINRA policy to permit pre-dated performance,[10] subject to certain conditions.

First, any such presentation would have to meet the requirements of paragraphs (f)(1) and (f)(2), as applicable.

Second, the pre-dated performance could not reflect the performance of a fund that is not available as an investment option through the separate account. Thus, presentation of the performance of a similar "clone" fund

[6] *See* Notice to Members 99–35 (May 1999) (The NASD Reminds Firms Of Their Responsibilities Regarding The Sales Of Variable Annuities).

[7] *See* "Presentation of Variable Life Insurance Performance In Member Communications," *Regulatory & Compliance Alert* (Winter 2001) pp. 3–4.

[8] "Investment option" would be defined as "a registered open-end management investment company (or series thereof) offered through the separate account." *See* proposed FINRA Rule 2211(a)(3). Thus, this provision would require, at a minimum, the deduction of expenses imposed at the underlying fund (sub-account) level, but not the deduction of expenses imposed at the separate account or contract level.

[9] *See* proposed FINRA Rule 2211(a)(5).

[10] *See* IM–2210–2(b)(1). *See also* "Variable Annuity Performance," *Regulatory & Compliance Alert* (Summer 2002) pp. 8–9.

that is not available through the separate account would not be permitted.

Third, for pre-dated performance for registered variable annuities:

- If the investment option had been available through the separate account for more than one year, the pre-dated performance would have to be accompanied by the investment option's performance commencing on the date it became available through the separate account;
- The performance would have to be, or be accompanied by performance that is, net of all expenses that are required to be deducted from standardized performance under Securities Act Rule 482; and
- The communication would have to identify the period during which the pre-dated performance occurred.

Combined Historical Performance

Proposed paragraph (f)(4) would allow, but not require, a firm to present combined performance reflecting a static allocation of multiple investment options. This provision would allow firms to show performance based on a one-time allocation of multiple investment options at the beginning of the illustrated time period, subject to certain conditions.

First, the communication would have to present the individual performance of each investment option included within the combined performance. This performance would have to be consistent with the requirements of paragraphs (f)(1), (f)(2) and (f)(3), as applicable.

Second, the communication would have to disclose the names of the investment options included in the combined performance, the investment percentage allocated to each investment option for purposes of the combined performance calculation, and that the combined historical performance is hypothetical because it is based on assumed investment allocations.

Historical Performance Illustrations

Proposed paragraph (f)(5) would allow, but not require, a firm to present an illustration based on the historical performance of individual investment options or combination of investment options using assumed dollar investments, subject to certain conditions.

First, the illustration would have to be accompanied by historical performance that satisfies the requirements of paragraphs (f)(1), (f)(2), (f)(3) and (f)(4), as applicable. Second, the illustration would have to present dollar values that are net of fees imposed at the investment option level, and for registered variable annuity illustrations, net of all expenses that are required to be deducted from standardized performance under Securities Act Rule 482. Third, the illustration would have to prominently explain that the illustration is based on a hypothetical dollar investment and that it is not intended to predict or project future performance.

Historical Performance of Selected Investment Options

Under proposed paragraph (f)(6), in some cases, a firm may present the performance of one or more investment options without presenting the performance of all investment options available through the separate account. In such situations, the firm would have to disclose that the investment options depicted are not the only ones offered within a product.

Illustrations Based on Assumed Rates of Return

Proposed paragraph (g) would address the use of illustrations that are based on assumed rates of return rather than on investment options' historical performance. Currently, IM–2210–2 provides standards for assumed rate illustrations for communications concerning variable life insurance policies in order to demonstrate how the product operates. Through its review of communications in the filings program, the Department has permitted assumed rate illustrations for variable annuities that demonstrate how the product operates where the communications adhere to the standards set forth in IM–2210–2.[11] Under the proposal, firms could present hypothetical illustrations based on assumed rates of return to demonstrate the way any variable insurance product operates, subject to a number of conditions.

Requirements for All Assumed Rate Illustrations

First, the proposal preserves the requirement that all illustrations must show investment results that are based on an assumed gross annual rate of return of 0%. Second, the illustration would have to be presented in a format that is readily understandable and depicts, at a minimum, year-by-year account values. Third, the illustration would have to clearly label and define all values and disclose the gross and net rates of return depicted.[12]

Fourth, the illustration would have to reflect either an arithmetic average of all investment option expenses or a weighted average of investment option expenses.[13] If a firm chose to use a weighted average, the illustration would have to identify the investment options being used and the investment amount allocated to each option. In addition, if a firm used an illustration that employed a weighted average of expenses with more than one customer, the illustration would have to reflect the current actual weighted average of investment options held by all investors through the separate account.[14]

Fifth, the illustration would have to reflect the maximum guaranteed charges for each assumed gross annual rate of return shown in the illustration.[15] The proposal also would permit illustrations to show each assumed gross annual rate of return net of the variable insurance product's current charges in addition to the maximum guaranteed charges.[16]

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variable life insurance policies (Form N–6) no longer requires a registrant to include a hypothetical illustration, FINRA has proposed to eliminate the current requirement that the methodology and format of hypothetical illustrations be modeled after the required illustrations in the prospectus. See NASD IM–2210–2(b)(5)(A)(i).

[11] Historically, the SEC staff has permitted some assumed rate illustrations in variable annuity prospectuses to illustrate the pay-out phase.

[12] FINRA asserts that because the SEC's registration statement of separate accounts organized as unit investment trusts that offer

[13] The proposal would define "arithmetic average of investment option expenses" as "the number obtained by dividing the sum of all investment option expenses by the number of investment options offered through the separate account." See proposed FINRA Rule 2211(a)(1). The proposal would define "weighted average of investment option expenses" as an average of investment option expenses that is proportional to the allocation of assets to each investment option.

[14] FINRA has permitted firms to reflect a weighted average of fund level expenses in variable life insurance hypothetical illustrations used with more than one customer, subject to certain conditions. The illustration must be accompanied or preceded by a policy prospectus, and the illustration must be accompanied by a general illustration that reflects the arithmetic average of underlying fund expenses. See "Fund Level Expenses in Variable Life Hypothetical Illustrations," *Regulatory & Compliance Alert* (Spring 2002) p. 12. FINRA proposes to alter the requirements applicable to the use of a weighted average of expenses with more than one customer by no longer requiring that they be accompanied by a prospectus, and by requiring the illustration to reflect the current actual weighted average of investment options held by all investors through the separate account.

[15] The proposal would define "maximum guaranteed charges" as "the maximum recurring and non-recurring charges as disclosed in the prospectus of a variable insurance product that all investors incur at the variable insurance contract level. If an illustration is intended to demonstrate the way an optional rider operates, 'maximum guaranteed charges' also includes the maximum recurring and non-recurring charges applicable to the rider. This term includes the cost of insurance for purposes of a communication concerning a variable life insurance policy." See proposed FINRA Rule 2211(a)(4).

[16] IM–2210–2 also permits a firm illustration to reflect a variable insurance product's current

Sixth, the illustration would have to explain prominently that its purpose is to show how the performance of the investment accounts could affect the policy cash value and contract benefits, that the illustration is hypothetical and that it does not project or predict future performance.

Proposed paragraph (g)(7) would allow firms to present in illustrations results based on assumed gross annual rates of return in addition to the 0% return required by paragraph (g)(1). Firms may show either results based on a single assumed positive or negative rate of return, or multiple assumed rates of return reflecting the historical performance of a broad-based securities index. In all cases, assumed rates of return would have to be net of maximum guaranteed charges.[17]

Single Assumed Rates of Return

Proposed paragraph (g)(7)(A) would allow firms to show investment results based on an assumed positive gross annual rate of return of up to 10%.[18] If an illustration assumes that a customer's money is invested in a particular investment option or options, the assumed rate of return would have to be reasonable given the investment option's objectives. For example, generally it would not be reasonable to assume a 10% rate of return if the illustration assumed that the customer invested only in a money market investment option.

Proposed paragraph (g)(7)(B) would allow firms to show investment results based on an assumed negative gross annual rate of return. Typically, firms have requested the ability to present a negative assumed annual gross rate of return to show the benefits of a rider that is intended to protect investors in a down market. If a negative assumed rate of return is used, the illustration also would have to show separate hypothetical results that are based on an assumed positive gross annual rate of return of at least 5% and not more than 10%. The illustration would not have to show investment results that are based on an assumed 0% gross annual rate of return as otherwise required by proposed paragraph (g)(1).

The purpose of requiring the presentation of investment results based on a positive rate of return in addition to the negative return is because, over the long term (despite the recent downturn), market returns have been positive. FINRA does not believe it is useful to show illustrations where the annual rate of return is constantly negative without balancing such an illustration by also showing a positive rate of return.

Multiple Assumed Rates of Return

Proposed paragraph (g)(7)(C) would allow a firm to present an illustration based on multiple assumed rates of return that vary year by year. Currently, the Department allows multiple-rate illustrations based on so-called "random" rates that are determined by the firm. Under proposed paragraph (g)(7)(C), any illustration that used multiple rates of return would have to be based on the actual performance of a broad-based securities market index for the period shown by the illustration. "Random-rate" illustrations would no longer be allowed.

The broad-based securities market index would have to be one that is used as a basis for comparison in discussions of fund performance in prospectuses of available investment options. Thus, for example, if the prospectus for an equity investment option shows the performance of the Standard & Poor's 500 Index as the basis of comparison, the actual performance of this index could be used in an assumed rate illustration.[19] The illustration also would have to disclose the broad-based securities market index used and that the index does not reflect the performance of any investment option. Additionally, the performance of the broad-based securities index would have to be current as of at least the most recent calendar year ended prior to the date of use of the illustration.

FINRA believes that requiring firms to use the actual performance of a broad-based securities market index, rather than so-called "random" rates, is appropriate for two reasons. First, the historical performance of market indices allows investors to see how a variable insurance product would have operated under actual market conditions, rather than under some assumed random series of returns. Second, the use of broad-based securities market indices would enhance comparisons between products, since many illustrations would use the same index.

Use of Rankings

Proposed paragraph (h) would address the use of rankings in variable insurance products communications. This provision would permit firms to include rankings of investment options in advertisements and sales literature, provided that their use is consistent with the standards contained in NASD Interpretive Material 2210–3 (Use of Rankings in Investment Companies Advertisements and Sales Literature).

Investment Analysis Tools

Proposed paragraph (i) would address the use of investment analysis tools in connection with the offer or sale of variable insurance products. Investment analysis tools are interactive technological tools that present the likelihood of various investment outcomes for named investments or investment strategies. Often these tools employ Monte Carlo simulations[20] to project a range of possible outcomes for certain investments. Proposed paragraph (i) would allow the use of such tools, provided that the firm complies with NASD Interpretive Material 2210–6 (Requirements for the Use of Investment Analysis Tools). Illustrations that were created through the use of an investment analysis tool would have to comply with the provisions of proposed paragraph (g), and the investment analysis tool could not project performance based on rates of return that exceed those permitted by proposed paragraph (g). In addition, firms would have to either employ a tool, the results of which reflected the deduction of maximum guaranteed charges, or employ a tool that provided the user with a personalized hypothetical illustration that reflects these charges.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[21] which requires, among other things, that FINRA rules must be 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. FINRA believes that the proposed rule change will help ensure that firm communications about

charges in addition to its maximum guaranteed charges. *See* NASD IM–2210–2(b)(5)(iii).

[17] *See* proposed Rule 2211(g)(5).

[18] FINRA has permitted assumed rates of return of up to 12% per annum, as long as they are accompanied by illustrations showing a 0% assumed rate of return. *See, e.g.*, "Internal Rates of Return in Variable Life Hypothetical Illustrations," *Regulatory & Compliance Alert* (Winter 1998), pp. 31–32. FINRA proposes to decrease the maximum single assumed rate of return to 10% per annum.

[19] Assumed rates of return based on the actual performance of a broad-based securities market index would not be subject to the 10% maximum set forth in paragraph (g)(2). In addition, to the extent a broad-based securities market index reflects negative performance in certain years, the illustration would not be required also to show an assumed positive rate of return as required under paragraph (g)(3).

[20] A Monte Carlo simulation is a method for evaluating particularly complex models.

[21] 15 U.S.C. 78o–3(b)(6).

variable insurance products are fair, balanced and not misleading.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In July 2008, FINRA published *Regulatory Notice* 08–39 (the "Notice") requesting comment on the proposed rule, as well as on certain proposed changes to NASD Interpretive Material 2210–1 (Guidelines to Ensure That Communications With the Public Are Not Misleading).[22] A copy of the Notice is attached as Exhibit 2a.[23] The comment period expired on September 30, 2008. FINRA received 16 comments in response to the Notice. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the comment letters received in response to the Notice are attached as Exhibit 2c.[24] Commenters generally supported the proposed rule change, but had comments on a number of specific provisions. A summary of the comments and FINRA's response is provided below.

Application of Proposed Rule

The proposal would apply to all communications with the public about variable insurance products other than institutional sales material. The CAI[25] opposed applying the proposed rule to correspondence, and requested guidance as to whether the proposal would apply to group variable contracts. The CAI and the ICI also recommended that FINRA amend NASD Rule 2211(d)(1) to make clear that the proposal would not apply to institutional sales material.

FINRA believes that it is appropriate to apply the proposal to all communications that reach retail investors. The current definition of "correspondence" includes any written letter or electronic mail message and any market letter distributed by a firm to (A) one or more existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar-day period. Because correspondence is sent to retail investors, FINRA believes it is important that they receive the same level of protection as investors that view other communication categories, such as advertisements and sales literature.

The proposal would apply to communications concerning group variable contracts, unless otherwise specified. FINRA Rule 0150 provides that business activities relating to exempted securities (which include group variable contracts) are subject to IM–2210–2. FINRA therefore believes it is appropriate to continue to apply the proposal to communications concerning group variable contracts.

FINRA does not believe it is necessary to amend NASD Rule 2211(d)(1). NASD Rule 2211 is not the subject of this rule filing, and the proposal already expressly excepts from its coverage institutional sales material.

Definitions

The CAI recommended that the definitions of "arithmetic average of investment option expenses" and "weighted average of investment option expenses" be revised to clarify that they refer to investment option expenses after reimbursements and waivers of such expenses. While FINRA does not believe it is necessary to revise the definitions, generally the Department currently permits expense averages to be net of waivers and reimbursements. FINRA intends to continue this practice.

New York Insurance suggested revised language for the definition of "cost of insurance" to refer to "the actual mortality charges deducted according to the terms of the contract from premiums, account values or taken as a reduction of investment credits," rather than "the actual cost of life insurance protection for a variable life insurance policy." While FINRA acknowledges that New York Insurance's recommended language is technically correct under normal circumstances, FINRA is concerned that firms may attempt to categorize insurance costs as falling outside the definition if it is too technical. Accordingly, FINRA is retaining the current definition.

The CAI and Transamerica questioned how the definition of "maximum guaranteed charges" would apply to a contract that has optional features that are not riders to the contract. In such a situation, FINRA would expect firms to select the most expensive option in calculating a contract's maximum guaranteed charges.

New York Insurance sought clarification that a personalized hypothetical illustration is a communication with the public for purposes of NASD Rule 2210. Written (including electronic) communications prepared for delivery to a single retail customer are considered to be correspondence under NASD Rules 2210 and 2211 and therefore fall within the definition of communication with the public.[26]

New York Insurance suggested adding "at an identifiable cost" to the end of the definition of "rider." The CAI noted that riders generally are separate from an insurance contract. FINRA has revised the definition of "rider" to reflect these comments.

The CAI recommended that FINRA define "guarantee." Because what constitutes a guarantee will always be based on the facts and circumstances, FINRA believes it best not to define this term within the rule.

Product Identification

Proposed paragraph (b) would prohibit communications from representing or implying that variable insurance products are mutual funds. The CAI, the ICI, and Mutual Trust all argued that firms should be permitted to describe underlying investment options of variable insurance products as mutual funds. CLWLC supported the prohibition, and recommended that the provision be revised to require registered representatives to identify in what ways variable insurance products differ from mutual funds. People's supported the requirement that communications clearly identify the type of product discussed.

IM–2210–2 currently prohibits communications from representing or implying that a variable insurance product or its underlying account is a mutual fund. FINRA has found that investors often are confused about the differences between variable products and mutual funds, and accordingly believes that it is important to maintain this prohibition. The proposal only addresses communications concerning variable insurance products, and does not address sales practices.[27]

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[22] FINRA is proposing separate changes to other rules governing communications with the public, including NASD IM–2210–1 but excluding NASD IM–2210–2. *See Regulatory Notice* 09–55 (Sept. 2009). Accordingly, the proposed changes to NASD IM–2210–1 have been removed from this rule proposal.

[23] The Commission notes that although Exhibit 2a was attached to the rule filing made by FINRA it is not attached to this notice.

[24] The Commission notes that although Exhibit 2c was attached to the rule filing made by FINRA it is not attached to this notice.

[25] Please refer to attached Exhibit 2b for a list of abbreviations assigned to commenters.

[26] *See Notice to Members* 03–38 (July 2003), page 386.

[27] NASD Rule 2821, which the SEC approved in 2007, specifically addresses broker-dealers' compliance and supervisory responsibilities concerning the sale of deferred variable annuities. See *Regulatory Notice* 07–53 (Nov. 2007) (SEC Approves New NASD Rule 2821 Governing Deferred Variable Annuity Transactions).

Accordingly, FINRA does not believe it would be appropriate to modify the proposal to impose sales practice obligations on registered representatives.

Liquidity

The AARP, CLWLC, New York Insurance and People's all supported the prohibition in proposed paragraph (c) on falsely implying that variable insurance products are short-term liquid investments. Mutual Trust opposed this requirement, arguing that some variable insurance products do not have surrender charges.

CLWLC favored the current language in IM–2210–2(a)(2) regarding surrender charges and taxes over the proposed language.[28] CLWLC also argued that communications should be required to disclose that the death benefit offered by many variable products is of little benefit, since it is very unlikely that the aggregate value of sub-account investments net of withdrawals will have declined since the initial investment. In addition, CLWLC recommended that the proposal require disclosure regarding the tax penalty consequences of early withdrawals.

New York Insurance recommended that the provision be revised to require a description of the potential effects of a withdrawal on contract benefits, such as the termination of a no-lapse provision. New York Insurance recommended that the provision's language reference the potential impact on contract benefits as well as death benefits. PIABA recommended requiring a mandatory plain English disclosure in lieu of the proposal's more general language.

In response to these comments, FINRA has revised the last sentence of paragraph (c) to reference the potential impact of early withdrawals on account values, death benefits or other contract benefits, and to specifically reference potential policy lapses. FINRA believes the prohibition of falsely implying that a variable contract is short-term and liquid is reasonable. This provision only prohibits *false* statements; moreover, most variable insurance products are not designed to be short-term, liquid investments.

FINRA does not agree that a variable insurance product's death benefit is of little value, particularly given the recent market downturn. FINRA also believes the proposal already requires disclosure regarding the tax consequences of early withdrawal. While FINRA supports plain English disclosure, FINRA believes that each firm should tailor its disclosure based on the features of the product being promoted.

Guarantee Claims and Riders

Proposed paragraph (d)(1) originally provided that a communication may not exaggerate the relative benefits of a guarantee or an insurer's financial strength or rating, and provided that discussions of guarantees must disclose all material applicable limitations or qualifications. The ICI opposed the requirement to disclose all material applicable limitations and qualifications every time a guarantee is mentioned. PIABA recommended that the proposal require a disclosure that, if an insurance company fails, a guarantee may not be paid.

In response to the ICI's comment, FINRA has revised the second sentence of paragraph (d)(1) to provide, "[p]resentations of guarantees must provide a balanced discussion of applicable limitations and qualifications." FINRA does not believe it is necessary to reference an insurance company's possible failure, as the proposal already prohibits exaggeration of an insurance company's financial strength and rating.

New York Insurance recommended specific language to address discussions of benefit bases or contract accumulation values that are not available for withdrawal in connection with riders. FINRA has added a new paragraph (d)(4) based on the suggested language.

Proposed paragraph (d)(2) originally required communications that discuss guarantees to disclose that the investment return and principal value of the investment option are not guaranteed and will fluctuate. New York Insurance recommended adding "the extent to which" before "the investment return." FINRA has added this language.

Proposed paragraph (d)(3) originally required communications that discussed the circumstances under which a guarantee or rider will benefit the customer to be fair and balanced considering the circumstances under which the guarantee or rider will not benefit the customer. The CAI, NAVA, Transamerica and the ICI all opposed this provision as unclear, unworkable and unnecessary given that Rule 2210 already imposes a fair and balanced standard on all communications. In light of these comments, FINRA has deleted this paragraph.

Proposed paragraph (d)(4) originally provided that any communication that discusses a rider must explain the rider, its costs and limitations, and the fact that the rider is an optional feature of the contract. The CAI opposed this requirement as unnecessary in light of Rule 2210's fair and balanced standard, and commented that the provision should exclude riders that are of an insurance nature that are governed by state law, such as nursing home riders. Princor opposed the provision, arguing that customers should rely on the prospectus. CLWLC supported the provision.

In light of these comments, FINRA has revised this paragraph (now numbered paragraph (d)(3)) to provide that communications that discuss a guarantee or rider must explain its costs and limitations, and if applicable, that it is an optional feature of the contract that may not benefit all investors. FINRA does not agree that this provision should exclude riders governed by state insurance law, since that would exclude all communications concerning riders. FINRA also does not agree that disclosure is unnecessary in communications given that customers can read the prospectus. FINRA always has judged a communication based on the language contained in the communication itself.

Qualified Plans

The CAI, CLWLC, and People's all supported proposed paragraph (e)'s requirements concerning communications that promote investment in a variable insurance product through a tax-qualified plan, subject to certain comments. The CAI argued that this provision is not relevant to a group variable contract. CLWLC argued that the provision should require a firm to perform a suitability analysis before a sale through a qualified plan. PIABA argued that the rule should require a disclosure that insurance products generally are not suitable for IRAs.

While it is true that group variable contracts are sold only through tax-qualified plans, FINRA believes that it is important that a customer understand that the variable insurance product offers no additional tax benefits. NASD Rules 2310 and 2821 already require firms to perform a suitability analysis before recommending a variable insurance product, so FINRA does not

[28] NASD IM–2210–2(a)(2) provides that, "[c]onsidering that variable life insurance and variable annuities frequently involve substantial charges and/or tax penalties for early withdrawals, there must be no representation or implication that these are short-term, liquid investments. Presentations regarding liquidity or ease of access to investment values must be balanced by clear language describing the negative impact of early redemptions. Examples of this negative impact may be the payment of contingent deferred sales loads and tax penalties, and the fact that the investor may receive less than the original invested amount. With respect to variable life insurance, discussions of loans and withdrawals must explain their impact on cash values and death benefits."

believe it would be either necessary or appropriate to impose suitability requirements via this rule. In light of these disclosure and suitability requirements, FINRA also finds it unnecessary to require an additional disclosure that insurance products are generally not suitable for IRAs. With regard to suitability obligations, for instance, FINRA has emphasized that firms recommending that a customer purchase a deferred variable annuity to fund an IRA (or other tax deferred account or vehicle) "must ensure that features other than tax deferral make the purchase of the deferred variable annuity for the IRA (or other tax deferred account or vehicle) appropriate." [29]

Historical Performance

Variable Annuity Performance

Proposed paragraph (f)(1) originally provided that firms may present the historical performance of variable annuities only in accordance with the requirements of Securities Act Rule 482 and Rule 34b–1 under the Investment Company Act of 1940. The ICI supported this provision. The CAI and NAVA requested clarification that this provision does not apply to unregistered variable annuities. The provision has been revised to refer only to registered variable annuities, since Rules 482 and 34b–1 do not apply to unregistered variable annuities.

Variable Life Insurance Policy Performance

Proposed paragraph (f)(2) originally set forth standards for presenting the performance of investment options available through variable life insurance products. Proposed paragraph (f)(2)(C) requires such presentations to urge investors to obtain a personalized hypothetical illustration that reflects all applicable fees and charges disclosed in the prospectus. Proposed paragraph (f)(2)(D) required any presentation of investment option performance to be consistent with the standards for mutual fund performance presentations under Securities Act Rule 482.

The ICI requested clarification that such performance need not be accompanied by a statutory prospectus, since a previous *Regulatory and Compliance Alert* article on this topic required that such performance be accompanied or preceded by a prospectus. PIABA argued that any performance must also be net of all expenses imposed at the insurance contract level. Transamerica commented that paragraph (f)(2)(C) should be revised to specify which fees and charges must be deducted. Transamerica also requested that FINRA reference the specific provisions of Rule 482 with which investment option performance presentations must comply.

Proposed paragraph (f)(2) would not require a firm to accompany the performance of a variable life insurance contract investment option with the contract's prospectus. FINRA does not believe it would be appropriate to require any investment option performance to be net of insurance contract-level expenses, given that policy premiums will vary widely based on the age, health and gender of the insured. Instead, the rule would require the communication to urge investors to obtain a personalized hypothetical illustration that is net of insurance contract-level expenses. FINRA does not believe it is either necessary or appropriate to try to enumerate all insurance-related expenses that must be deducted from a personalized illustration, since they will vary by issuer and contract. Paragraph (f)(2)(D) has been revised specifically to reference the Securities Act Rule 482 standards with which presentations of investment option performance must comply.

Pre-Dated Performance

Proposed paragraph (f)(3) sets forth the requirements for the presentation of the performance of an investment option that occurred during the period prior to its availability through the separate account of a variable insurance product ("pre-dated performance"). Paragraph (f)(3)(A) originally provided that, if the investment option has been available through the separate account for more than one year, the pre-dated performance must be accompanied by performance of the investment option for the period commencing on the date the investment option became available through the separate account.

The CAI argued that this provision should be deleted as redundant, since Securities Act Rule 482 already requires performance beginning when an investment option becomes available through the separate account. The ICI requested clarification that this provision simply requires the presentation of "standardized" performance under Rule 482. The CAI and the ICI also commented that this provision should not apply to the performance of an investment option in variable life insurance sales material, since it is not subject to Rule 482.

The purpose of this provision is to make clear that pre-dated performance that appears in variable annuity sales material is "non-standardized" performance, which must be accompanied by the investment option's standardized performance: that is, an investment option's performance beginning on the date it became available through the separate account. Although, in FINRA's view, this requirement duplicates those under Rule 482, FINRA believes it is useful to remind firms of their obligations to show standardized performance. FINRA believes that variable life insurance sales material is not subject to Rule 482, and accordingly, FINRA has moved this language to new paragraph (f)(3)(C), which sets forth the requirements that apply to pre-dated variable annuity performance.

Proposed paragraph (f)(3)(B) originally required pre-dated performance of variable annuities to be, or be accompanied by performance that is, net of the product's maximum guaranteed charges. The CAI, the ICI, NAVA and Transamerica all objected to the required deduction of maximum guaranteed charges for pre-dated performance on the ground that this standard is inconsistent with Rule 482. Given this concern, FINRA has revised this provision to no longer require the deduction of maximum guaranteed charges. Instead, the proposal now would require in paragraph (f)(3)(C)(ii) that pre-dated variable annuity performance be, or be accompanied by performance that is, net of all expenses required to be deducted from the performance of an investment option pursuant to Rule 482.

Proposed paragraph (f)(3)(C) originally provided that pre-dated performance would be allowed only if there has been no significant change to the investment objectives, strategies or policies of the investment option during the period for which performance is shown. The CAI and ICI objected to this provision, asserting that is inconsistent with SEC policy regarding when investment company past performance may be presented. New York Insurance suggested additional clarifying language. FINRA did not intend to create a standard that differs from SEC policy. Accordingly, this paragraph has been deleted.

Proposed paragraph (f)(3)(D) (now renumbered as paragraph (f)(3)(B)) would prohibit the inclusion of performance of a fund that is not available as an investment option through the separate account. The CAI and the ICI requested clarification that this provision would not prohibit the

[29] SEC Approves New NASD Rule 2821 Governing Deferred Variable Annuity Transactions, *Regulatory Notice* 07–53 (Nov. 2007).

use of feeder fund performance that incorporates a master fund's prior track record if the feeder fund is available for investment through the separate account. So long as SEC rules and interpretations permit the feeder fund to incorporate a master fund's prior track record, this provision would not prohibit the use of such performance.

FINRA also has revised proposed paragraph (f)(3)(E) (now renumbered as paragraph (f)(3)(C)(iii)), which originally required communications to identify the period during which the pre-dated performance occurred and to explain that the performance pre-dates the availability of the investment option through the separate account. Paragraph (f)(3)(C)(iii) now only applies to registered variable annuity pre-dated performance, and requires only that the communication identify the period during which the pre-dated performance occurred.

Combined Historical Performance

Proposed paragraph (f)(4) addresses the presentation of the combined performance of multiple investment options. The CAI requested clarification that this provision would not require "standardized" combined investment option performance for purposes of Rule 482, since the provision already would require presentation of the standardized performance of each individual investment option that is included in the combined performance. FINRA has deleted language in this paragraph to make clear that combined performance would not have to be "standardized" performance for purposes of Rule 482.

New York Insurance suggested additional language to address situations in which combined performance reflects periodic rebalancing of investment option allocations. FINRA did not intend to permit this provision to allow combined performance to reflect periodic rebalancing of investment options. Accordingly, FINRA has added language to make clear that this provision only allows combined performance reflecting a static allocation of multiple investment options.

Historical Performance Illustrations

Proposed paragraph (f)(5) sets forth the requirements for an illustration that uses the historical performance of one or more investment options. Paragraph (f)(5)(A) originally required performance used in historical illustrations to be net of fees imposed at the investment option level, and for variable annuity illustrations, net of maximum guaranteed charges. The CAI, NAVA and Princor objected to the requirement to deduct maximum guaranteed charges for variable annuity historical illustrations, asserting that Rule 482 does not require deduction of such expenses for historical performance. As with paragraph (f)(3), FINRA has revised paragraph (f)(5)(A) to require for variable annuity historical illustrations the deduction of all expenses required to be deducted under Rule 482.

Proposed paragraph (f)(5)(B) originally would have required such illustrations to present year-by-year account values in a tabular or bar-chart format. The CAI and Transamerica objected to this standard, asserting that it differs from the standard for assumed-rate illustrations under proposed paragraph (g)(5). FINRA has eliminated this paragraph.

The ICI suggested that the proposal define the term "illustration" and clarify that it does not apply to step-by-step examples of how guaranteed withdrawal benefits work if such examples resemble similar examples contained in variable annuity prospectuses. Because what qualifies as an illustration will always be based on the facts and circumstances, FINRA does not believe it would be useful or appropriate to define the term "illustration" in the rule. FINRA also believes that the factual scenario presented by the ICI is best resolved through the Department's filings review program.

Illustrations Based on Assumed Rates of Return

General Comments

Paragraph (g) sets forth the requirements for variable insurance product illustrations that employ an assumed rate of return. Regardless of the assumed rate used, like IM–2210–2, the proposal would require the illustration to show results that are net of a product's maximum guaranteed charges. The CAI, the ICI, NAVA, PMLI, Princor and Transamerica all opposed the requirement to deduct a product's maximum guaranteed charges, and argued that the rule should permit assumed rate illustrations to employ a product's current charges instead. Several commenters requested clarification that a firm could show an assumed-rate illustration that deducts a product's current charges if accompanied by an illustration that is net of the maximum guaranteed charges. These commenters noted that IM–2210–2 permits such illustrations.

FINRA believes that it is important to maintain IM–2210–2's requirement to deduct a product's maximum guaranteed charges. The purpose of an assumed rate illustration is to show how the product would perform based on certain assumptions. FINRA believes that an investor should have available an illustration showing what would happen if a product's expenses were increased to the maximum permissible level. FINRA, however, intends to continue to allow illustrations to show results that are net of the current charges if accompanied by results that are net of the maximum guaranteed charges. Accordingly, new proposed paragraph (g)(5) has been added to make this standard clearer.

The CAI requested clarification that the proposal would not require firms to deliver a variable insurance product prospectus with an assumed-rate illustration. The proposal would not require delivery of a prospectus unless separately required by SEC rules.

The term "gross annual rate of return" is used in proposed paragraph (g) to describe a product's hypothetical return prior to the deduction of expenses. New York Insurance recommended that the proposal be modified to add a definition of this term in proposed paragraph (a) to make clear that it is not net of either investment option-level expenses or contract-level expenses. While this description is correct, FINRA does not believe a definition is necessary. The proposal requires results based on any gross rate of return used in an assumed-rate illustration to be net of both the product's maximum guaranteed charges and either an arithmetic or weighted average of its investment option expenses. Accordingly, FINRA believes that these requirements eliminate the need for such a definition.

PIABA commented that illustrations should show results that are net of all charges imposed on a customer, including insurance related charges. The term "maximum guaranteed charges" includes charges for insurance, so FINRA believes the proposal already meets this standard.

Single Assumed Rates of Return

Proposed paragraph (g)(2) (renumbered as paragraph (g)(7)(A)) would cap the maximum positive assumed rate of return that an illustration may employ at 10% per annum. Currently IM–2210–2 allows assumed rate illustrations to employ a positive rate of return of up to 12% per annum. The CAI and NAVA questioned the need to reduce this maximum rate absent a compelling explanation. New York Insurance, on the other hand, commented that the maximum should be further lowered to 8% per annum. The ICI agreed with the 10% cap, but recommended that FINRA monitor

market conditions going forward to see if further changes may be necessary. FINRA believes that historical trends indicate that a 10% cap is sufficiently high to show how a product may operate in the future and is not inclined to raise this cap.

The CAI also argued that paragraph (g)(7)(A) should be modified to allow multiple fixed-rate illustrations, such as allowing 10% per annum for the first 15 years and 6% thereafter. FINRA has proposed a separate provision (paragraph (g)(7)(C)) for multiple-rate illustrations and does not believe it necessary or appropriate to create a rule allowing multiple fixed-rate illustrations.

Proposed paragraph (g)(2) originally stated that positive assumed rates of return had to be "reasonable considering market conditions and the available investment options." The CAI objected to the "reasonableness" standard, since it is impossible for firms to predict whether future market returns will be higher or lower. In light of this concern, FINRA has modified this provision (now contained in paragraph (g)(7)(A)) to require only that an assumed rate of return be reasonable in light of the investment objectives of any particular investment option or options that are named in the illustration.

Lerner recommended that all illustrations be required to use the same low, middle and high gross annual rates of return to promote a level playing field. FINRA does not believe it is either necessary or appropriate to require illustrations to employ the same rates of return, since they may be used to illustrate different time periods and different investment strategies or options.

Proposed paragraph (g)(3) (now renumbered as paragraph (g)(7)(B)) originally would have permitted an illustration to employ a negative assumed gross rate of return, provided that it was accompanied by illustrations showing results based on a 0% gross rate of return and a positive gross rate of return between 5% and 10% per annum. The CAI, Princor and Transamerica all argued that requiring an illustration employing a 0% gross rate of return in addition to an illustration employing a positive gross rate of return was unnecessary. FINRA agrees that showing a positive assumed gross rate of return in addition to a negative assumed gross rate of return is sufficient to balance the illustration, and accordingly the proposal has been revised to delete the 0% assumed rate requirement for negative assumed rate illustrations.

Multiple Assumed Rates of Return

Proposed paragraph (g)(7)(C) would permit for the first time assumed-rate illustrations that employ the returns of a broad-based securities market index. The CAI, the ICI, NAVA and Transamerica all supported this provision, but requested clarification of what the term "broad-based securities market index" means. The CAI and the ICI requested that FINRA substantially delay implementation of this provision assuming the SEC approves it given the lead time firms will need to revise their internal systems. JNSC recommended that this provision be modified to permit the use of the actual returns of various asset classes published by independent third parties. Lerner suggested that FINRA create and publish its own benchmarks to be used in illustrations. New York Insurance opposed this provision because of the risks of relying on historical performance.

FINRA intends the term "broad-based securities market index" to refer to an index that can be used as a basis for comparison to an investment company's own performance in its prospectus. SEC Form N–1A defines the term "broad-based securities market index" as "one that is administered by an organization that is not an affiliated person of the Fund, its investment adviser, or principal underwriter, unless the index is widely recognized and used." [30] The term "broad-based securities market index" as used in paragraph (g)(7)(C) has the same definition. FINRA does intend to give firms sufficient time to adjust their internal systems to comply with this provision. FINRA does not agree that the actual returns of asset classes should be permitted due to the difficulty of verifying such data. FINRA does not wish to create and publish performance benchmarks for assumed-rate illustrations.

While FINRA recognizes New York Insurance's concerns regarding historical performance, FINRA believes that the use of the actual performance of a broad-based securities index will reduce the likelihood that a firm will "game" an illustration by selecting multiple assumed rates that produce the highest possible results for the illustration. FINRA also has added to paragraph (g)(7)(C) a requirement that the performance of the broad-based securities market index must be current as of at least the most recent calendar year ended prior to the date of use of the illustration.

[30] SEC Form N–1A, Item 27(b)(7), Instruction 5, under the Investment Company Act of 1940.

Other Assumed-Rate Illustration Requirements

Proposed paragraph (g)(2) would require that illustrations be presented in a format that is readily understandable and depicts, at a minimum, year-by-year account values. The CAI opposed the requirement to show year-by-year account values, and recommended that the rule permit line graphs to accompany a table. The rule would permit the use of line graphs; however, FINRA believes it is important for investors to see how a product would work on a year-by-year basis.

Proposed paragraph (g)(4) would require an illustration to either reflect an arithmetic average of all investment option expenses, or reflect a weighted average of expenses. If a weighted average is employed, the illustration would have to identify the investment options being used and the amount of investment allocated to each option, and if used with more than one customer, the illustration would have to reflect the current actual weighted average of investment options held by all investors through the separate account.

The AARP supported this standard, but recommended that it require delivery of a prospectus to each investor who receives the illustration. The CAI recommended that the provision be modified so that an illustration used with multiple customers could reflect the weighted average of expenses based on investors in a particular product, if the product employs a separate account used for multiple products. The CAI also requested clarification of what expenses must be deducted if an investor requests an illustration of specific fund or funds, and suggested that other methodologies for calculating expenses be allowed. The CAI, the ICI and Transamerica requested clarification that the current requirement to deliver an illustration based on an arithmetic average of expenses no longer applies with regard to weighted average illustrations used with multiple customers.

FINRA believes that requiring delivery of a prospectus would not assist a customer in understanding an illustration. Instead, FINRA believes that all disclosure necessary for an investor to understand an illustration should appear in the illustration itself. The CAI's comments regarding separate accounts used with multiple products appear to be technical in nature and best resolved through the Department's filings review program rather than through rule language. If a single customer requested an illustration of a particular investment option or options,

the proposal would permit the illustration to be net of weighted average of those options' expenses. FINRA does not favor allowing other methods of calculating expenses, since it could result in misleading or inconsistent illustrations. The proposal would not require delivery of an arithmetic average illustration with a weighted average illustration that complied with the proposal's requirements.

Paragraph (g)(6) (previously numbered paragraph (g)(8)) originally would have required disclosure that the illustration's purpose is to show how performance of the investment accounts could affect the policy cash value and death benefits. The CAI and New York Insurance noted that illustrations also are used to show how performance can affect other contract benefits in addition to the death benefit. FINRA has substituted the term "contract benefits" for "death benefits" in this paragraph.

Investment Analysis Tools

Proposed paragraph (i) would allow firms to use investment analysis tools in connection with the offer and sale of variable insurance products, subject to certain conditions, including the deduction of maximum guaranteed charges from the results based on any assumed rates of return. The CAI argued that this provision should allow a firm to deduct current charges instead of the maximum guaranteed charges. For the same reasons FINRA does not agree with this comment regarding assumed rate illustrations, FINRA is not making this change to paragraph (i).

New York Insurance recommended that the results produced by an investment analysis tool be subject to the assumed-rate illustration limitations of paragraph (g). FINRA agrees that an investment analysis tool should not be a vehicle to evade the requirements otherwise applicable to assumed-rate illustrations. Accordingly, paragraph (i) has been revised to provide that illustrations created through the use of an investment analysis tool must comply with the provisions of paragraph (g) and the tool may not project performance based on rates of return that exceed those permitted by paragraph (g).

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–FINRA–2009–070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–070. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2009–070 and should be submitted on or before December 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon,

Deputy Secretary.

Exhibit 2b

Alphabetical List of Written Comments Regulatory Notice 08–39 (July 2008)

1. Letter from Albert Akerman, David Lerner Associates, Inc. ("Lerner") (September 29, 2008)
2. Letter from Jed Bandes, Mutual Trust Co. of America Securities ("Mutual Trust") (August 14, 2008)
3. Letter from Dennis P. Beirne, People's Securities ("People's") (September 23, 2008)
4. Letter from Franklin L. Best, Jr., Penn Mutual Life Insurance Company ("PMLI") (September 30, 2008)
5. Letter from David Certner, AARP ("AARP") (September 29, 2008)
6. Letter from Michael P. DeGeorge, NAVA, Inc. ("NAVA") (September 30, 2008)
7. Letter from Craig A. Hawley, Jefferson National Securities Corp.("JNS") (September 30, 2008)
8. Letter from William A. Jacobson Esq., Cornell Law School Securities Law Clinic ("CLWLC") (September 30, 2008)
9. Letter from Courtney John, Transamerica Capital, Inc. ("Transamerica") (September 29, 2008)
10. Letter from Dennis P. Lauzon, State of New York Insurance Department ("New York Insurance") (September 30, 2008)
11. Letter from Ronald Nelson ("Nelson") (August 15, 2008)
12. Letter from Chad Oppedal, Princor Financial Services Corp. ("Princor") (September 30, 2008)
13. Letter from H. Mark Saunders ("Saunders") (August 14,2008)
14. Letter from Laurence S. Schultz, Public Investors Arbitration Bar Association ("PIABA") (September 30, 2008)
15. Letter from Sutherland Asbill & Brenan, Committee of Annuity Insurers ("Cal") (September 30, 2008)
16. Letter from Heather Traeger, Investment Company Institute ("ICI") (September 30, 2008)

[31] 17 CFR 200.30–3(a)(12).

17. Letter from Carl B. Wilkerson, ACLI Financial Security ("ACLI") (September 30, 2008)

[FR Doc. E9–29338 Filed 12–8–09; 8:45 am]
BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61087; File No. SR–FINRA–2009–078]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Certain Cross-References Within Certain FINRA Rules

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 13, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to update cross-references within certain FINRA rules to reflect changes adopted in the consolidated FINRA rulebook and to make non-substantive technical changes to certain FINRA and NASD rules.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA 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, FINRA 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. FINRA 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

FINRA is in the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook").[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the Consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would update rule cross-references to reflect changes adopted in the Consolidated FINRA Rulebook. Specifically, the proposed rule change would update FINRA Rule 0150 to reflect the incorporation into the Consolidated FINRA Rulebook of NASD Rule 3330 (Payment Designed to Influence Market Prices, Other than Paid Advertising) as FINRA Rule 5230 (Payments Involving Publications that Influence the Market Price of a Security),[5] NASD Rule 2250 as FINRA Rule 2269 (Disclosure of Participation or Interest in Primary or Secondary Distribution)[6] and certain paragraphs of NASD Rule 2330 (Customers' Securities or Funds) as FINRA Rule 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts).[7]

Similarly, rule cross-references in FINRA Rule 6635 (FINRA Rules) would be updated to reflect the adoption of NASD Rule 2240 as FINRA Rule 2262 (Disclosure of Control Relationship with Issuer),[8] NASD Rule 2250 as FINRA 2269 (Disclosure of Participation or Interest in Primary or Secondary Distribution),[9] certain paragraphs of NASD Rule 2330 (Customers' Securities or Funds) as FINRA Rule 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts)[10] and NASD Rule 3340 as FINRA Rule 5260 (Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts).[11]

The proposed rule change also would amend FINRA Rules 2357 (Communications with the Public and Customers Concerning Index Warrants, Currency Index Warrants and Currency Warrants) and 9551 (Failure to Comply with Public Communication Standards) to reflect the adoption of NASD Rule 2220 as FINRA Rule 2220 (Options Communications) in the Consolidated FINRA Rulebook.[12] Moreover, the proposed rule change would update FINRA Rule 2357 (Communications with the Public and Customers Concerning Index Warrants, Currency Index Warrants and Currency Warrants) to delete references to NASD Rule 2220(c)(5) and (d)(2)(C)(v) as these subparagraphs will not be transferred into the Consolidated FINRA Rulebook as part of FINRA Rule 2220. These subparagraphs were deleted by SR–FINRA–2008–013, which became effective on March 4, 2009.[13]

Additionally, the proposed rule change would make non-substantive technical changes to paragraphs (e) and (f) of NASD Rule 2320 (Best Execution and Interpositioning) to reflect changes approved by the Commission in SR–FINRA–2007–024, which became effective on September 8, 2009,[14] and to

[1] 15 U.S.C. 78s(b)(1).
[2] 17 CFR 240.19b–4.
[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

[5] *See* Securities Exchange Act Release No. 60648 (September 10, 2009), 74 FR 47837 (September 17, 2009) (Order Approving File No. SR–FINRA–2008–048).

[6] See Securities Exchange Act Release No. 60659 (September 11, 2009), 74 FR 48117 (September 21, 2009) (Order Approving File No. SR–FINRA–2009–044).

[7] See Securities Exchange Act Release No. 60701 (September 21, 2009); 74 FR 49425 (September 28, 2009) (Order Approving File No. SR–FINRA–2009–014).

[8] *See* note 6.

[9] *See* note 6.

[10] *See* note 7.

[11] See note 6.

[12] See Securities Exchange Act Release No. 60534 (August 19, 2009), 74 FR 44410 (August 28, 2009) (Order Approving File No. SR–FINRA–2009–036).

[13] See Securities Exchange Act Release No. 58738 (October 6, 2008); 73 FR 60371 (October 10, 2008) (Order Approving File No. SR–FINRA–2008–013).

[14] *See* Securities Exchange Act Release No. 60635 (September 8, 2009); 74 FR 47302 (September 15, 2009) (Order Approving File No. SR–FINRA–2007–024).

FINRA Rule 5122 (Private Placements of Securities Issued by Members). All of the proposed rule changes noted above will become effective on December 14, 2009.

Finally, the proposed rule change would update rule cross-references in FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)) to reflect the incorporation of NASD Rule 2220 into the Consolidated FINRA Rulebook as FINRA Rule 2220 (Options Communications) [15] and the deletion of NYSE Rule 445 (Anti-Money Laundering Compliance Program) [16] and certain paragraphs of NYSE Rule 352 (Guarantees, Sharing in Accounts, and Loan Arrangements) [17] from the FINRA rulebook.

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date for the proposed rule changes to NASD Rule 2320 and FINRA Rules 0150, 2357, 5122, 6635 and 9551 will be December 14, 2009.[18] The implementation date for the proposed rule changes to FINRA Rule 9217 will be December 14, 2009, except the proposed change that would eliminate the reference to NYSE Rule 445 from FINRA Rule 9217, which will be implemented on January 1, 2010.[19]

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[20] which requires, among other things, that FINRA rules must be 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. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[15] *See* note 12.

[16] *See* Securities Exchange Act Release No. 60645 (September 10, 2009), 74 FR 47630 (September 16, 2009) (Order Approving File No. SR–FINRA–2009–039).

[17] *See* note 7.

[18] *See Regulatory Notice* 09–60 (October 2009).

[19] *See* note 18.

[20] 15 U.S.C. 78*o*–3(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and Rule 19b–4(f)(6) thereunder.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2009–078 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–078. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549; on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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 publicly available. All submissions should refer to File Number SR–FINRA–2009–078 and should be submitted on or before December 30, 2009.

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29389 Filed 12–8–09; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61102; File No. SR–ISE–2009–102]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the $1 Strike Program To Allow Low-Strike LEAPS

December 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 24, 2009, the International Securities Exchange, LLC (the "Exchange" or the "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 has filed the proposal as a "non-controversial" proposed rule change pursuant to Section

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the $1 Strike Program. The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.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 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 self-regulatory organization 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 proposed rule change is to expand the $1 Strike Program ("Program") in a limited fashion to allow ISE to list new series in $1 intervals up to $5 in long-term options series ("LEAPS") in up to 200 options classes on individual stocks.[5] Currently, under the Program, ISE may not list LEAPS at $1 strike price intervals for any class selected for the Program. ISE is also restricted from listing any series that would result in strike prices being $0.50 apart, unless the series are part of the $0.50 Strike Program.[6]

ISE believes that this proposed rule change is appropriate and will allow investors to establish options positions that are better tailored to meet their investment objectives, vis-à-vis credit risk, using deep out-of-the-money put options. Deep out-of-the-money put options are viewed as a viable, liquid alternative to OTC-traded credit default swaps ("CDS"). These options do not possess the negative characteristics associated with CDS, namely, lack of transparency, insufficient collateral requirements, and inefficient trade processing. Moreover, deep out-of-the-money put options and CDS are functionally similar, as there is a high correlation between low-strike put prices and CDS spreads.

ISE notes that this proposal is limited in scope, as $1 strikes in LEAPS may only be listed up to $5 and in only up to 200 options classes. As is currently the case, ISE would not list series with $1 intervals within $0.50 of an existing $2.50 strike price in the same series. As a result, ISE does not believe that this proposed rule change will cause a significant increase in quote traffic.

Moreover, as the SEC is aware, ISE has adopted various quote mitigation strategies on an effort to lessen the growth rate of options quotations. When ISE expanded the Program several months ago, ISE included a delisting policy that would be applicable with regard to this proposed expansion.[7] ISE and the other options exchanges amended the Options Listing Procedures Plan ("OLPP") in 2008 to impose a minimum volume threshold of 1,000 contracts national average daily volume per underlying class to qualify for an additional year of LEAP series.[8] Most recently, ISE, along with the other options exchanges, amended the OLPP to adopt objective, exercise price range limitations applicable to equity options classes, options on ETFs and options on trust issued receipts.[9] ISE believes that these price range limitations will have a meaningful quote mitigation impact. Additionally, pursuant to its policy to delist options with ADV of less than 50 contracts, ISE has, since January 2009, delisted 95 options classes.[10]

The margin requirements set forth in Chapter 12 of the Exchange's rules and the position and exercise requirements set forth in Rules 412 and 414 will continue to apply to these new series, and no changes are being proposed to those requirements by this proposed rule change.

ISE has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed by this filing.

The Exchange also proposes to make a non-substantive change to Rule 504 by relocating the provision "A stock shall remain in the $1 Strike Program until otherwise designated by the Exchange" to the end of Supplementary Material .01 to Rule 504.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 ("Exchange Act") for this proposed rule change is the requirement under Section 6(b)(5) of the Exchange Act[11] that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and in general, to protect investors and the public interest. In particular, the proposed rule change will allow the Exchange to list $1 strike prices in LEAPS series for the benefit of investors and as a competitive response to the listing of $1 strike prices in LEAPS series by another exchange.

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 unsolicited 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

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] Under ISE Rule 506, LEAPS expire from 12–39 months from the time they are listed.

[6] *See* Securities Exchange Act Release No. 60696 (September 18, 2009), 74 FR 49053 (September 25, 2009) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Strike Price Intervals of $0.50 for Options on Stocks Trading At or Below $3.00).

[7] The delisting policy includes a provision that states ISE may grant member requests to add strikes and/or maintain strikes in series of options classes traded pursuant to the Program that are eligible for delisting.

[8] *See* SEC Release No. 34–58630 (September 24, 2008), approving Amendment No. 2 to the OLPP.

[9] *See* SEC Release No. 34–60531 (August 19, 2009), approving Amendment No. 3 to the OLPP. This proposed rule change would not be subject to the exercise price range limitations contained in the OLPP.

[10] Members are advised of an Involuntary Delisting through an Information Alert sent via Electronic Mail by the Exchange. An Information Alert announcing the delisting of 21, 33, 28 and 13 options classes as part of the Exchange's delisting program was sent to Members on January 16, 2009, April 13, 2009, July 17, 2009 and October 30, 2009, respectively.

[11] 15 U.S.C. 78f(b)(5).

the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission hereby grants that request.[14] The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it recently approved a proposal from CBOE which is identical to the current proposal in all material respects and on which no comments were received.[15] Therefore, the proposal is operative upon filing.

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–ISE–2009–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–ISE–2009–102. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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 No. SR–ISE–2009–102 and should be submitted on or before December 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29388 Filed 12–8–09; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization 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 Commission has waived this requirement in this case.

[14] 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. *See* 15 U.S.C. 78c(f).

[15] *See* Exchange Act Release No. 60978 (November 10, 2009), 74 FR 59296 (November 17, 2009) (approving SR–CBOE–2009–68).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61106; File No. SR–NYSEAmex-2009–74]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Penny Pilot Through December 31, 2010

December 3, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 26, 2009, NYSE Amex LLC ("NYSE Amex" or the "Exchange") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its option trading rules to (i) extend the Penny Pilot in options classes in certain issues ("Pilot Program") previously approved by the Securities and Exchange Commission ("Commission") through December 31, 2010; and (ii) expand the number of issues included in the Pilot. The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange hereby proposes to extend the time period of the Pilot Program[4] which is currently scheduled to expire on October 31, 2009, through December 31, 2010. Moreover, the Exchange proposes the following changes to its Penny Pilot Program which are consistent with recent changes to the NYSE Arca Penny Pilot Program.[5]

Top 300:

The Exchange also proposes to expand the number of issues included in the Pilot Program. Specifically, NYSE Amex proposes to add the top 300 most actively traded multiply listed options classes that are not yet included in the Pilot Program ("Top 300"). The Exchange proposes to determine the identity of the Top 300 based on national average daily volume over a six month period preceding their addition to the Pilot Program, as set forth below.[6] In determining the identity of the Top 300, the Exchange will exclude options classes with high premiums. Pursuant to Commentary .02 to NYSE Amex Rule 960NY, the Pilot Program issues will be announced to the Exchange's membership via Regulatory Bulletin and published by the Exchange on its Web site.[7] This will bring the total number of options classes traded pursuant to the Pilot Program to 363. NYSE Amex represents that the Exchange has the necessary system capacity to support any additional series listed as part of the Pilot Program.

NYSE Amex believes that it is appropriate to exclude high priced underlying securities, as the benefit to the public from including such issues is minimal because of the high price of at-the-money options.[8] The Exchange believes an appropriate threshold for designation as "high priced" at the time of selection of new issues to be included in the Pilot is $200 per share or a calculated index value of 200. At $200 per share or a calculated index value of 200, strike prices are in $10 increments, so the "at the money" strike is more likely to carry an intrinsic value of $3 or more, and thus not trade in a penny increment. With a greater distance between strikes, there are fewer series that are actively traded. The determination of whether a security is trading above $200 or above a calculated index value of 200 shall be based on the price at the close of trading on the Expiration Friday prior to being added to the Pilot. This approach is consistent with the approach NYSE Amex has taken for high-priced issues when selecting Pilot issues in the past.

Phased Implementation:

The Exchange proposes to phase-in the additional classes to the Pilot Program over four successive quarters. Specifically, the Exchange proposes to add 75 classes on November 2, 2009; February 1, 2010; May 3, 2010; and August 2, 2010. The issues to be added on November 2, 2009 will be based on the most actively traded multiply listed issues for the six month period from April 1, 2009 through September 30, 2009. The issues to be added on February 1, 2010 will be based on the most actively traded multiply listed issues for the six month period from July 1, 2009 through December 31, 2009. The issues to be added on May 3, 2010 will be based on the most actively traded multiply listed issues for the six month period from October 1, 2009 through March 31, 2010. The issues to be added on August 2, 2010 will be based on the most actively traded multiply listed issues for the six month period from January 1, 2010 through June 30, 2010.

Delistings:

Additionally, the Exchange proposes that any Pilot Program issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Pilot, based on trading activity in the previous six months. The replacement issues would be added to the Pilot Program on the second trading day following January 1, 2010 and July 1, 2010.[9]

Report:

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for the ten most active and twenty least active options classes added to the Pilot Program, in addition to continuing to provide data concerning the existing Pilot Program classes. As the Pilot Program matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Pilot Program's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the existing Pilot Program classes. This report will include, but is not limited to: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on the capacity of the Exchange's automated systems; (4) data reflecting the size and depth of markets, and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,[10] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to 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.

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.

[4] See Securities Exchange Act Release No. 34-55162 (January 24, 2007), 72 FR 4738 (February 1, 2007); Securities Exchange Act Release No. 34-56567 (September 27, 2007), 72 FR 56396 (October 3, 2007).

[5] See Securities Exchange Act Release No. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009) (Order Granting Partial Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 3 Thereto, Amending NYSE Arca Rule 6.72 and Expanding the Penny Pilot Program); see *also* Securities Exchange Act Release No. 60833 (October 16, 2009), 74 FR 54617 (October 22, 2009) (notice of filing and immediate effectiveness of SR-NYSEArca-2009-91).

[6] The Exchange will not include options classes in which the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company, or if the issuer is in bankruptcy. For purposes of assessing national average daily volume, the Exchange will use data compiled and disseminated by the Options Clearing Corporation.

[7] The Exchange shall also identify the classes to be added to the Pilot Program, per each phase, in a filing with the Commission.

[8] For instance, as of August 12, 2009, the near term at the money call in GOOG (August 460 Calls) was trading at $6.50 with the underlying at $459.84. The lowest strike price September call trading below $3 (with the underlying at the same price) was the September 500 Call.

[9] The replacement issues will be announced to the Exchange's membership via Regulatory Bulletin and published by the Exchange on its Web site.

[10] 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 with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6)(iii) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing.[15] However, pursuant to Rule 19b–4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Exchange to extend the Penny Pilot Program without interruption and expand the Penny Pilot Program on the same schedule as the other exchanges. Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[17]

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this pre-filing requirement.

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2009–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex-2009–74. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. 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–NYSEAmex–2009–74 and should be submitted on or before December 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29302 Filed 12–8–09; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61101; File No. SR–ISE–2009–99]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amending the Direct Edge ECN Fee Schedule

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Direct Edge ECN's ("DECN") fee schedule for ISE Members [3] to (i) amend its fee schedule to reflect pass through charges of other market centers and (ii) make technical changes to the fee schedule. All of the changes described herein are applicable to ISE Members.

All of the changes described herein are applicable to ISE Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com*.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On October 1, 2009,[4] the Exchange added new fee categories for the INET order type. When a member routes to Nasdaq using the INET order type and removes liquidity on Tapes A or C, the member incurs a fee of $0.0030 on either EDGA or EDGX. Such situation yields Flag "L". The INET order type sweeps the EDGA or EDGX book, and routes the remainder to Nasdaq. If the order is marketable, it removes liquidity from the EDGA or EDGX book, as applicable, first. If the order is non-marketable, the order posts on Nasdaq. With regards to a Member's use of the INET order type for Tapes A or C securities, Members routing an ADV: (i) Less than 5,000,000 shares are currently charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares are currently charged $0.0027 per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares are currently charged $0.0026 per share; and (iv) equal to or greater than 30,000,001 shares are currently charged $0.0025 per share. The rates, in all cases, are calculated for shares removed from Nasdaq. The Exchange believes that these tier-based rates incent Members to sweep the EDGA or EDGX book first and then offer a discounted rate to Nasdaq's rates if the remainder of the order is routed to Nasdaq. These discounted rates arise in part from reduced administrative costs associated with certain volume levels.

The Exchange proposes to amend these fees in order to reflect changes to the actual transaction fees assessed by away markets. Specifically, the Exchange is proposing to amend its fee schedule to reflect changes to Nasdaq's best removal tier rate. For example, on November 1, 2009, the best removal tier rate increased on Nasdaq from $0.0027 per share executed to $0.0028 per share executed for Tape A & C securities.[5] The Exchange now proposes to amend its fee schedule so that when Nasdaq's best removal tier rate changes, EDGA and EDGX's fees change as well, in lock step. The new language is proposed to read as follows:

Subscribers routing an average daily volume ("ADV"): (i) Less than 5,000,000 shares will be charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares will be charged *Nasdaq's best removal tier rate* per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—$0.0001* per share; and (iv) equal to or greater than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—$0.0002* per share. The rates, in all cases, are calculated for shares removed from Nasdaq. (emphasis added)

For the month of December this would equate to $0.0028 per share for (ii), above, $0.0027 per share for (iii), above, and $0.0026 per share for (iv), as described above.

In addition, the Exchange proposes to make technical changes to the fee schedule. Effective November 1, 2009,[6] the Exchange amended the meaning of several flags. In particular, the N and W flags are no longer used to reflect activity outside of regular market hours. The Exchange adopted flags 3–7 to reflect pre- and post-market activity. Therefore, the Exchange proposes to correct a reference in footnote 1 to the fee schedule to reflect this change. The new language is proposed to read as follows: In addition, subscribers can also qualify for a rebate of $0.0032 per share for all liquidity posted on EDGX if they add or route at least 10,000,000 shares of average daily volume prior to 9:30 a.m. or after 4 p.m. (includes all flags except *6*) AND add a minimum of 75,000,000 shares of average daily volume on EDGX in total, including during both market hours and pre and post-trading hours. (emphasis added)

The changes discussed in this filing will become operative on December 1, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[7] in general, and furthers the objectives of Section 6(b)(4),[8] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, providing tier-based rates for Members provide pricing incentives to market participants that route orders to DECN, allowing DECN to remain competitive. This tier-based rate arises in part from reduced administrative costs associated with certain volume levels. ISE notes that DECN operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to DECN. ISE believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to DECN rather than competing venues. Additionally, ISE believes that the proposed rates are equitable in that they apply uniformly to all Members.

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 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 rule change has become effective pursuant to Section 19(b)(3) of the Act[9] and Rule 19b–4(f)(2)[10] thereunder. At any time within 60 days

[4] *See* Securities Exchange Act Release No. 60769 (October 2, 2009), 74 FR 51903 (October 8, 2009) (SR–ISE–2009–68).

[5] *See* Securities Exchange Act Release No. 60959 (November 6, 2009), 74 FR 58672 (November 13, 2009)(SR–NASDAQ–2009–096).

[6] *See* Securities Exchange Act Release No. 60914 (November 2, 2009), 74 FR 57726 (November 9, 2009)(SR–ISE–2009–88).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 19b–4(f)(2).

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–2009–99 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–99. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the 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–2009–99 and should be submitted on or before December 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29241 Filed 12–8–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Delegation of Authority No. 328]

Re-Delegation From the Deputy Secretary of State for Management and Resources of the Authorities of the Inspector General and the Assistant Secretary for International Security and Nonproliferation

By virtue of the authority vested in the Secretary of State by the laws of the United States, including 22 U.S.C. 2651a, and delegated to me by Delegation of Authority 245–1, dated February 13, 2009, I hereby delegate to the following officials, to the extent authorized by law, all authorities vested in the specified positions, including all authorities vested in the Secretary of State that may have been or may be delegated or re-delegated to those positions:

- To Principal Deputy Assistant Secretary Vann Van Diepen, the authorities of the Assistant Secretary for International Security and Nonproliferation.
- To Deputy Inspector General Harold W. Geisel, the authorities of the Inspector General.

Any authorities covered by this delegation may also be exercised by the Secretary, the Deputy Secretary, and the Deputy Secretary for Management and Resources. Nothing in this delegation of authority shall be deemed to supersede any existing delegation of authority, which shall remain in full force and effect.

This delegation shall expire upon the appointment and entry upon duty in each specific case of an individual to serve in the respective position.

This memorandum shall be published in the **Federal Register**.

Dated: November 24, 2009.

Jacob J. Lew,

Deputy Secretary of State for Management and Resources, Department of State.

[FR Doc. E9–29340 Filed 12–8–09; 8:45 am]

BILLING CODE 4710–10–P

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6834]

Review of Unused Presidential Permit: Port of Brownsville (Texas) International Bridges

SUMMARY: More than 12 years ago, the Department of State issued to the Brownsville Navigation District, a Presidential permit for two new international bridges, one for vehicular traffic and one for railroad traffic, between Brownsville, Texas, and Matamoros, Tamaulipas, Mexico. To date, the permit remains unused. The Department and other federal agencies are currently evaluating whether to revoke, modify, or retain as written this long-unused permit given the change of circumstances in the project area, development of nearby projects, inaction by the permittee, and apparent lack of interest in pursuing the corresponding projects in Mexico. The review is not a judgment regarding either the need for a new bridge or the merits of the Brownsville Navigation District's plan, but rather represents a recognition that the project for which this permit was issued has gone unimplemented longer than similar projects and, due to the passage of time, may no longer be viable. The Brownsville Navigation District provided a project status update, which is included in the Supplementary Information section below.

DATES: Interested members of the public are invited to submit written comments regarding this permit review on or before February 8, 2010 to Mr. Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA-BorderAffairs@state.gov*, or by mail at WHA/MEX—Room 3909, Department of State, 2201 C St., NW., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Mr. Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA-BorderAffairs@state.gov*; by phone at 202–647–9894; or by mail at Office of Mexican Affairs—Room 3909, Department of State, 2201 C St., NW, Washington, DC 20520. Information about Presidential permits is available at *http://www.state.gov/p/wha/rt/permit/*.

SUPPLEMENTARY INFORMATION: Executive Order 11423 of August 16, 1968, as amended, authorizes the Secretary of State to issue Presidential permits for the construction, connection, operation, and maintenance of facilities crossing the international borders of the United States, including, but not limited to, bridges and pipelines connecting the United States with Canada or Mexico. In

order to issue a Presidential permit, the Secretary or her delegate must find that a border crossing is in the U.S. national interest. Within the context of appropriate border security, safety, health, and environmental requirements, it is in the U.S. national interest to facilitate the efficient movement of legitimate goods and travelers across U.S. borders.

Since 1968, the Department has issued 21 Presidential permits for non-pipeline border crossings on the U.S.-Mexico border and one for the U.S.-Canada border. Of the 21 U.S.-Mexican border projects that have received permits, most began construction within two to five years. The Presidential permit process, which emphasizes interagency and binational coordination, is designed to ensure that border crossings are built if, and only if, there is clear local, binational, and interagency support for the project and construction is in the U.S. national interest. It is not in the U.S. national interest to commit scarce government resources (*e.g.*, Customs and Border Protection inspectors, highway improvement funds, etc.) as well as private resources (*e.g.*, land, capital, etc.) for border crossing projects that cannot be successfully implemented within a reasonable time period. While the Department may find a project to be in the U.S. national interest under a certain set of circumstances, those circumstances may change over time so that, five or ten years later, the Department may conclude that the project is no longer in the national interest or the relevant agencies may reconsider their recommendations on the Department's initial grant of the permit. The border region is dynamic and fast-changing and it is important that an outdated permit not be used to build a border crossing on a site that is no longer appropriate due to the passage of time (*e.g.*, due to changes in transportation patterns, development patterns, etc.). At the same time, the Department recognizes that, by their nature, border crossing projects are complex, time consuming, and subject to political, financial, regulatory, and logistical setbacks.

In this review, the Department of State seeks public input on whether to revoke, modify, or retain as written the Presidential permit that it issued in 1997 to the Brownsville Navigation District for an international rail and vehicular bridge. Interested members of the public are invited to submit written comments, as set forth above.

The following is the text of a statement that the Brownsville Navigation District submitted on September 1, 2009, to the Department, providing its initial input to this review process.

Begin text.

The Brownsville Navigation District submits to the United States Department of State this statement in support of the Port of Brownsville International Bridges project in response to the August 7, 2009, request by U.S.-Mexico Border Affairs Coordinator Daniel D. Darrach. The Brownsville Navigation District welcomes this opportunity to reaffirm its commitment to the construction and operation of these international bridges. This statement will review the reasons that initially led the Brownsville Navigation District to seek a Presidential permit for the project and it will explain why the need for the bridges remains unchanged. It will recount the steps that the Brownsville Navigation District has taken and will take to implement this project, which is vital to the region.

Background

The Brownsville Navigation District is a political subdivision of the State of Texas. It is guided by a Board of Commissioners whose members are elected by the local citizenry. The Brownsville Navigation District governs the Port of Brownsville.

The Port of Brownsville has been in operation since 1936. The Port is located at the western terminus of the Brownsville Ship Channel, a 1,200-foot-wide waterway that extends 17 miles to the Gulf of Mexico [map omitted]. The Port is both a deep-water seaport, serving world-wide shipping and also the western terminus of the U.S. Inland Waterway System. The Port owns more than 40,000 acres of property, with infrastructure already in place on 5,000 acres. It owns and operates ten transit warehouses totaling more than 720,000 square feet of storage space. In addition, there are 80 acres of surfaced open storage available. The Port has 12 cargo docks, four oil docks and one liquid dock. For 25 years, it has operated the Brownsville & Rio Grande International Railroad, with 48 miles of track. In addition, the Port operates a Free Trade Zone (FTZ #62) that encompasses 2,000 acres of Port property and also has sites at local airports and industrial parks.

The Port of Brownsville provides excellent rail, truck and maritime infrastructure to facilitate the intermodal movement of goods between Mexico and the United States. It is the principal economic engine of the region. It is utilized by more than 270 companies with more than 8,000 employees, making it the region's leading employer. In 2008, it handled more than 1,100 vessels carrying 6.3 million metric tons of cargo. On land, it handled more than 30,000 rail cars, 29,000 overweight trucks and 200,000 other trucks. Its overall economic value was estimated at $2.8 billion, and it generated $130 million in federal taxes and $44 million in state and local taxes. Its importance in an economically distressed area (the second poorest county in the United States) cannot be overstated.

A large percentage of the products passing through the Port of Brownsville either originate in or are destined for Mexico. For example, one of the main commodities is steel that arrives by ship and is then transported across the border to Mexico's industrial heart in Monterrey, Nuevo Leon. In effect, the Port of Brownsville serves as the deep water port for both southern Texas and northeast Mexico; it helps integrate the binational regional economy as far inland as San Antonio and Monterrey, and even beyond.

The Brownsville Navigation District has long believed that the future growth of the Port of Brownsville—and the economic development of the region overall—could be enhanced significantly by creating direct truck and rail connections with Mexico. At the time of the submission of the application for a Presidential permit in 1991, there were serious issues that constrained both modes of transportation.

- Trucks traveling between the Port and the border crossing to Mexico at the Gateway Bridge were obligated to traverse congested urban sectors of Brownsville. Large numbers of loaded trucks were routinely moving through sensitive areas such as school zones, creating worrisome safety issues. Weight freight payload compliance with transportation regulations made the shipment of some products uneconomical. The border crossing and federal inspection facilities at the bridge were also heavily congested.
- Rail traffic between the Port and the railroad crossing at the B&M Bridge was compelled to use a 6-mile stretch of track owned by the Union Pacific Railroad Company. This left all traffic subject to whatever rates UP charged for the use of the line and whatever additional fees it charged for actually crossing the bridge. Port rail traffic also had an issue with access to the UP line; rails cars had to wait until UP worked them into the flow of its traffic to and from other destinations. The UP's disparate rates and fees and the uncertainty of access negatively affected the competitiveness of the Port.

The solution to these problems was to construct new commercial and rail bridges that would link the Port directly with the Mexican market.

Current Situation

Mr. Darrach noted in his letter that the Department's current evaluation process considered "the change in circumstances in each of the project areas, including the development of nearby projects, inaction on the proposed projects, and lack of interest in pursuing the corresponding projects in Mexico." The Brownsville Navigation District would like to respond to each of these points.

In the 12 years since the Department issued the Presidential permit for the Port of Brownsville International Bridges, circumstances in the project area have changed considerably; HOWEVER, NONE OF THESE CHANGES DETRACT FROM THE ORIGINAL RATIONALE FOR BUILDING THE BRIDGES.

- For trucks, the principal development has been the opening of the Veterans International Bridge at Los Tomates. This provided a much-improved crossing with modern new facilities for the federal inspection agencies. Nevertheless, trucks traveling between the Port and Los Tomates are still obliged to traverse congested urban sectors of Brownsville. A significant number of these trucks are overweight, carrying products such as steel coils. If anything, the growth that has occurred in these areas makes them even more congested than they were when the permit was issued, raising the safety concerns still further. The local community is developing plans for an "East Loop" that would circle to the south and east of much of the urban area. If constructed, this would provide some temporary relief to the congestion and would improve safety. Any relief would be short-lived, however, as the urban area is already spreading in this direction, and in a decade or two, the congestion problem would arise again. The only long-term solution for trucks is a dedicated route from the Port directly south into Mexico that would totally remove Port truck traffic from heavily traveled and populated areas. It is worth noting that the Los Tomates Bridge was opened just a decade ago, and it already is in need of a second span to accommodate the much-faster-than-anticipated growth in commercial traffic. The Port truck bridge is a logical solution to a situation that is likely to occur in the foreseeable future when the traffic demand may exceed even the capacity of the new span at Los Tomates. It is worth noting that in addition to alleviating roadway congestion and improving transportation safety and security, the truck bridge would also substantially lower emissions and reduce highway infrastructure repair costs.
- The West Rail Project has been the principal development for rail traffic. This project will be beneficial to the Brownsville community because it will relocate the UP line out of the downtown area to where it will connect to a new bridge to the west of the city. However, the West Rail Project will yield little benefit to Port rail traffic. Rail cars to and from the Port still will be subject to whatever disparate rates and noncompetitive fees UP may establish. They will also continue to face uncertain access to the UP line. Again, the solution remains a new dedicated rail bridge owned by the public linking the Port directly with Mexico.

Clearly the justification for the Port bridges remains as strong and valid as it was when the permit was issued in 1997.

The Port bridges will not negatively affect other nearby projects. They obviously are not an obstacle either to the expansion of the Los Tomates Bridge or to the building of the West Rail Project, as is demonstrated by the fact that both projects are moving forward quickly and will soon be under construction. Since the Port bridges will handle only commercial traffic, they will not hinder any new non-commercial crossing project that the local community might propose in the future. Finally, the geography of the area does not lend itself to any new border crossing projects being developed to the east of the Port bridges.

Since receiving the Presidential permit in 1997, the Brownsville Navigation District has taken numerous steps to advance the project. The District has expended $4 million for engineering documents for the roadway and railway. It has also performed annual updates for the extensive environmental work originally performed for the project. Because of the political sensitivities surrounding the project, much of the progress the District has accomplished has been evolutionary in the form of steady but quiet, behind-the-scenes efforts to build the necessary alliances on both sides of the border.

The current Board of Commissioners of the Brownsville Navigation District is now redoubling its effort to advance the Port bridges project, beginning with a dialogue with officials from the City of Brownsville and Cameron County, including the Cameron County Mobility Authority. [Exhibits omitted.] In these conversations, the Board makes clear that is prepared to be quite flexible in the search for ways in which the project can be beneficial for all involved. The Board has also expanded its contacts with officials from the State of Texas, including particularly Gus de la Rosa of TxDOT. These discussions include the need to have the Port bridges incorporated into the various State planning processes, including the new effort to develop a master plan for border transportation that will be done under the auspices of the U.S.-Mexico Joint Working Committee.

The Board has reached out in a new effort to engage Mexican officials, and the initial response has been encouraging. For example, the Municipality of Matamoros sees considerable merit in having a bridge to the east of the city that could handle commercial traffic, particularly overweight trucks, operating between the Port and Mexico. This would allow the Los Tomates Bridge to handle an increasing volume of traffic not connected to the Port, such as trucks servicing Mexican maquiladoras. The Municipality is already constructing a loop around the western side of Matamoros, and it could include the Port truck bridge in the future planning of the eastern segment of the loop. The Board also plans to work with the local Consuls on both sides of the border to have the Port bridges taken up by the regional Border Liaison Mechanism. The Board has renewed its longstanding contacts with the State of Tamaulipas and will further intensify that dialogue when a new Administration takes office there. The Board has initiated a new round of contacts with the Mexican Federal Government, and it contemplates having representatives travel to Mexico City in the fall. In all these efforts, the Board is exploring strategies that may broaden the benefits for stakeholders in Mexico as well as the United States. For example, it is examining innovative ways to use geography to create a "port alliance" with the emerging Mexican port at El Mezquital, such as developing a "rail canal" between the two ports.

Conclusion

The Brownsville Navigation District remains strongly committed to the implementation of the Port bridges project. One quantifiable manifestation of its commitment is the more than $20 million that it has invested to date and the many tens of millions of dollars more it is prepared to spend to construct and operate the bridges. It seeks to work with the local community and Mexico

to define mutual interests, shape a consensus and build the political will to implement a new regional plan for commerce and economic development that includes the Port bridges.

The Brownsville Navigation District calls upon the Department to refrain from revoking or modifying the 1997 Presidential permit. It believes that such action would not serve U.S. national interests; to the contrary, this would be harmful to U.S. interest.

A revocation would not benefit any current or future border-crossing project, as explained above. Nor would such action benefit the United States Government by relieving it of a commitment to provide the financial resources to build new federal facilities at the bridges as the Port has committed to constructing those facilities, and this is stipulated in the permit. Put simply, there is nothing to be gained by revoking the permit.

Conversely, a revocation would result in grave consequences. Its immediate effect would be to erase the very sizable investment that the Port, a public asset, has made in the project over nearly 20 years. This action could well result in killing the project, as securing the resources to submit a new application may well be problematic in the wake of a revocation.

The Brownsville Navigation District believes that if the Department sustains the permit and allows the project to go forward, the Port of Brownsville bridges will facilitate the efficient movement of legitimate goods across the U.S.-Mexico border. The bridges promise to enhance the economic competitiveness of our nation by improving the connectivity of the Port, increasing its rail-served market access potential, lowering costs and ensuring greater reliability. The South Texas region will gain from increased tax revenue, more reliable freight service and improved highway safety. The region will benefit from new, higher value jobs, the diversion of heavy trucks from the roadways and reduced emissions and fuel usage. Shippers will benefit from lower costs, improved service reliability, reduced transport times, and expanded access to rail services. The Port will benefit from increased throughput and an enhanced competitive position that results from additional transportation options. Given all these benefits, the Brownsville Navigation District is confident that the project clearly will serve U.S. national interests.

End Text.

Dated: December 4, 2009.

Alex Lee,

Director, Office of Mexican Affairs, Department of State.

[FR Doc. E9–29342 Filed 12–8–09; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF STATE

[Public Notice 6833]

Review of Unused Presidential Permit: Mission (Texas) International Bridge

SUMMARY: More than 30 years ago, the Department of State issued to the City of Mission, Texas, a Presidential permit for an international rail and vehicular bridge. To date, the permit remains unused. The Department and other federal agencies are currently evaluating whether to revoke, modify, or retain as written this long-unused permit given the change of circumstances in the project area, development of nearby projects, inaction by the permittee, and apparent lack of interest in pursuing the corresponding projects in Mexico. The review is not a judgment regarding either the need for a new bridge or the merits of Mission's plan, but rather represents a recognition that the project for which this permit was issued has gone unimplemented longer than similar projects and, due to the passage of time, may no longer be viable. The City of Mission provided a project status update, which is included in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Interested members of the public are invited to submit written comments regarding this permit review on or before February 8, 2010 to Mr. Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA–BorderAffairs@state.gov*, or by mail at WHA/MEX—Room 3909, Department of State, 2201 C St., NW., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Mr. Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA–BorderAffairs@state.gov;* by phone at 202–647–9894; or by mail at Office of Mexican Affairs—Room 3909, Department of State, 2201 C St., NW., Washington, DC 20520. Information about Presidential permits is available at *http://www.state.gov/p/wha/rt/permit/.*

SUPPLEMENTARY INFORMATION: Executive Order 11423 of August 16, 1968, as amended, authorizes the Secretary of State to issue Presidential permits for the construction, connection, operation, and maintenance of facilities crossing the international borders of the United States, including, but not limited to, bridges and pipelines connecting the United States with Canada or Mexico. In order to issue a Presidential permit, the Secretary or her delegate must find that a border crossing is in the U.S. national interest. Within the context of appropriate border security, safety, health, and environmental requirements, it is in the U.S. national interest to facilitate the efficient movement of legitimate goods and travelers across U.S. borders.

Since 1968, the Department has issued 21 Presidential permits for non-pipeline border crossings on the U.S.-Mexico border and one for the U.S.-Canada border. Of the 21 U.S.-Mexican border projects that have received permits, most began construction within two to five years. The Presidential permit process, which emphasizes interagency and binational coordination, is designed to ensure that border crossings are built if, and only if, there is clear local, binational, and interagency support for the project and construction is in the U.S. national interest. It is not in the U.S. national interest to commit scarce government resources (e.g., Customs and Border Protection inspectors, highway improvement funds, etc.) as well as private resources (e.g., land, capital, etc.) for border crossing projects that cannot be successfully implemented within a reasonable time period. While the Department may find a project to be in the U.S. national interest under a certain set of circumstances, those circumstances may change over time so that, five or ten years later, the Department may conclude that the project is no longer in the national interest or the relevant agencies may reconsider their recommendations on the Department's initial grant of the permit. The border region is dynamic and fast-changing and it is important that an outdated permit not be used to build a border crossing on a site that is no longer appropriate due to the passage of time (e.g., due to changes in transportation patterns, development patterns, etc.). At the same time, the Department recognizes that, by their nature, border crossing projects are complex, time consuming, and subject to political, financial, regulatory, and logistical setbacks.

In this review, the Department of State seeks public input on whether to revoke, modify, or retain as written the Presidential permit that it issued in 1978 to the City of Mission, Texas, for an international rail and vehicular bridge. Interested members of the public are invited to submit written comments, as set forth above.

The following is the text of a letter that the City of Mission submitted on November 2, 2009, to the Department, providing its initial input to this review process.

Begin text.

My letter today is in response to a teleconference held on October 20 between yourself and persons representing various interests of the City of Mission concerning the status update, requested by the Department of State on the Presidential Permit issued to the City of Mission in 1978 for the construction of an international vehicular and railroad bridge.

Our City has actively pursued over the last several years progress on the Mission International Bridge. We have built partnerships with stakeholders, pursued funding options, and identified future strategies. Following is a summary of the recent activities we have undertaken:

- Developed and submitted a Congressional Appropriations Request for a study to support the Railroad Bridge Project.
- A Project Engineer—L&G Engineers of Mercedes to conduct a feasibility study for the rail bridge has been identified.
- The Governor of Tamp., the city officials of Reynosa, Tamp, and Ramiro Garza Cantu, Owner of Grupo San Juan, have been contacted. These entities will be submitting letters of support within the next thirty days. We will forward them as soon as we receive them.
- Hidalgo County Officials as well as the County's Railroad District have been contacted and are supporting the Rail Project. In fact the County Railroad District has plans for additional Rail Systems within and outside the County to support the project. Public and private local and regional entities will also be submitting letters of support for this project.
- City Officials along with the Mission Economic Development Corporation have met with the Kansas City Rail Systems in Kansas City to discuss not only the new Railroad Bridge in Mission but also the North-South Rail running out of the Valley and connecting with the Kansas City System owned by the Texas-Mexico Railways.

The local international port of entry projects currently in process include the Anzalduas International Bridge and the Donna International Bridge. The Anzalduas Bridge is scheduled to open in December 2009 for vehicular traffic and the Donna International Bridge Project is still under construction with a yet to be defined completion date. It is important to note that neither bridge has a railroad bridge permit and that in fact Mission Bridge is the only permitted Railroad Bridge from Brownsville to Laredo and beyond. It is critical to the continued economic growth of South Texas including in particular Cameron, Hidalgo, and Starr Counties and the U.S. economy as a whole to have railroad access for the transport of goods across the Mexico-Texas border. It is also important to alleviate congestion at the Texas Mexico Railroad Bridge in Laredo and the B&M Rail Bridge in Brownsville.

Our City as mentioned above has contacted Eugenio Hernandez Flores, Governor of the State of Tamaulipas, the city officials of Reynosa, Tamp., as well as Ramiro Garza Cantu, Owner of Grupo San Juan, a business conglomerate that deals with urban development, industrial parks, agriculture, cattle and energy businesses. Grupo San Juan presently owns 16,000 acres across the Mission Permitted Crossing Site. They have all expressed interest. These entities have all shown support for the Mission Railroad Bridge Project. These entities will be submitting letters of support within the next thirty days. We will forward them as soon as we receive them.

The Governor is interested in a new rail connection for the State of Tamaulipas and is aware of the potential of the Madero site. Mr. Garza Cantu and I have visited on numerous occasions about the potential of connecting rail to his existing and sizeable industrial parks, which are home to a large number of maquiladoras employing thousands in Reynosa. The Anzalduas International Bridge, which does not allow rail, empties into Mr. Garza Cantu's Villa Florida Industrial Park, but he recognizes that any rail that may connect to the U.S. side would need to be coordinated with our Mission/Madero permitted site. The Mission/Madero site affords both vehicular and rail capacity as a possibility for the continued growth of his master plan and the west side of Reynosa.

As I enter my twelfth year of service as Mayor of the City of Mission, I take satisfaction in knowing that the Anzalduas crossing will soon be open and my attention is again focused on a Mission International Bridge which was my top priority as I began my tenure as Mayor in 1998. With the dynamic growth in our region both in the United States and Mexico, I am confident that the Mission/Madero permitted site continues to be in the interest of both countries.

Respectfully, Norberto "Beto" Salinas, Mayor.

Dated: December 4, 2009.

Alex Lee,

Director, Office of Mexican Affairs, Department of State.

[FR Doc. E9–29344 Filed 12–8–09; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed highway project, the State Route 160 Antioch Bridge Seismic Retrofit Project, with end points in the city of Antioch in Contra Costa County, and on Sherman Island in Sacramento County, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 7, 2010. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Melanie Brent, Chief, Office of Environmental Analysis, 510–286–5231, *melanie_brent@dot.ca.gov*.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the Antioch Bridge Seismic Retrofit Project with end points in the city of Antioch in Contra Costa County, and on Sherman Island in Sacramento County, State of California. The project adds additional bracing and isolation bearings and makes other improvements to the approximately 1.8

mile concrete structure, which spans the Sacramento River. The purpose of the project is to increase the ability of the bridge to withstand a major earthquake. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) for the project, approved on 2 September 2009, in the Finding of No Significant Impact (FONSI) issued on 2 September 2009, and in other documents in the FHWA project records. The EA, FONSI, and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans EA and FONSI can be viewed and downloaded from the project Web site at *http://www.dot.ca.gov/dist4/documents/antioch/antiochbridgeseismicretrofitprojectfinalenvironmentaldocument.pdf.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal Aid-Highway Act [23 U.S.C. 109].
2. *Land:* Landscape and Scenic Enhancement (Wildflowers) [23 U.S.C. 219].
3. *Air:* Clean Air Act 42 U.S.C. 7401–7671(q).
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)–11]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11] ; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].
6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].
7. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992 (k).
8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: December 2, 2009.

Karen A. Bobo,

Director, Local Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. E9–29348 Filed 12–8–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 39(*l*)(1). The actions relate to a proposed highway project, the Interstate 80 Eastbound Truck Scales Relocation Project, in Cordelia in Solano County, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 7, 2010. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Melanie Brent, Chief, Office of Environmental Analysis, 510–286–5231, *melanie_brent@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Interstate 80 (I–80) Eastbound Truck Scales Relocation Project in Cordelia in Solano County, State of California. The project constructs a larger truck scale facility approximately 2,500 feet to the east of the current facility. Associated on- and off-ramps would be constructed, and, upon completion of the project, the existing facility would be demolished. The purpose of the project is to reduce congestion in that section of I–80 and to increase the efficiency of truck weighing and inspection operations. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) for the project, approved on 16 October 2009, in the Finding of No Significant Impact (FONSI) issued on 16 October 2009, and in other documents in the FHWA project records. The EA, FONSI, and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans EA and FONSI can be viewed and downloaded from the project Web site at *http://www.sta.dst.ca.us/projects-truckscales.html.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal Aid-Highway Act [23 U.S.C. 109].
2. *Land:* Landscape and Scenic Enhancement (Wildflowers) [23 U.S.C. 219].
3. *Air:* Clean Air Act 42 U.S.C. 7401–7671(q).
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].
5. Section 4(f) of the U.S. Department of Transportation Act of 1966 [49 U.S.C. 303].
6. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)–11]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave

Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

7. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209]; The Uniform Relocation Assistance Act and Real Property Acquisition Policies Act of 1970, as amended.

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992(k).

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

January 13, 2010.

Issued on: December 2, 2009.

Karen A. Bobo,

Director, Local Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. E9–29347 Filed 12–8–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Limitation on Claims Against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Limitation on Claims.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for the following projects: (1) Main Street Multi-Modal Access Project, Buffalo, New York; (2) Multi-modal Transit Facility, San Angelo, Texas; (3) East Corridor Project, Denver, Aurora, Adams County, Colorado; (4) Gold Line Corridor Project, Denver, Arvada, Wheat Ridge, Adams County, Jefferson County, Colorado; (5) Lackawanna Cut-off Passenger Rail Service Restoration Project, New Jersey Transit Corporation, New Jersey; (6) Pennsauken Junction Transit Center Park and Ride, Camden County, New Jersey; (7) Second Avenue Subway, modifications to the 72nd Street and 86th Street Station Entrances, New York, New York; (8) 35th Street Commuter Station, Chicago, Illinois; (9) Provo Inter-modal Center, Provo City, Utah; (10) Southside Maintenance Facility Replacement Project, Norfolk, Virginia; (11) Knoxville Station Transit Center, Knoxville, Tennessee; and (12) AMTRAN Transit Facility Expansion Project, Altoona, Pennsylvania. The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject projects and to activate the limitation on any claims that may challenge these final environmental actions.

DATES: By this notice, FTA is advising the public of final agency actions subject to Section 139(l) of Title 23, United States Code (U.S.C.). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation projects will be barred unless the claim is filed on or before June 7, 2010.

FOR FURTHER INFORMATION CONTACT: Antoinette Quagliata, Environmental Protection Specialist, Office of Planning and Environment, 202–366–4265, or Christopher Van Wyk, Attorney-Advisor, Office of Chief Counsel, 202–366–1733. FTA is located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA) and in other documents in the FTA administrative record for the project. Interested parties may contact either the project sponsor or the relevant FTA Regional Office for more information on these projects. Contact information for FTA's Regional Offices may be found at *http://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, NEPA [42 U.S.C. 4321–4375], Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], Section 106 of the National Historic Preservation Act [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period of 180 days for challenges of project decisions subject to previous notices published in the **Federal Register.**

The projects and actions that are the subject of this notice are:

1. *Project name and location:* City of Buffalo Main Street Multi-modal Access and Revitalization Project, Buffalo, New York. *Project sponsor:* Niagara Frontier Transportation Authority (NFTA). *Project description:* The Project will reopen the 1.2-mile Main Street pedestrian mall in downtown Buffalo to vehicular traffic from Tupper Street to Scott Street. Two-way vehicular traffic will share NFTA's existing Light Rail Rapid Transit LRRT track bed. The Project also involves the reopening of cross streets that will facilitate the introduction of vehicular traffic within the Main Street right-of-way. Seven transit stations will be modified to allow vehicular access, while maintaining existing at-grade access by Light Rail Rapid Transit vehicles. This Project is part of an overall strategy to help revitalize downtown Buffalo. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; no use of Section 4(f) properties; and a Finding of No Significant Impact (FONSI) signed October 5, 2009. *Supporting documentation:* City of Buffalo Main Street Multi-Modal Access and Revitalization Project Environmental Assessment (EA) dated April 2009.

2. *Project name and location:* Multi-modal Transit Facility/Administration Facility, San Angelo, Texas. *Project sponsor:* Concho Valley Transit District. *Project description:* The Project will construct a combined multi-modal transit terminal and administration building. It will include a 7,200-square-foot structure, of which 6,000 square feet will be used for administrative/transit operations and customer service support centers, including the Concho Valley Transit District, which includes the San Angelo Street Railroad Company transit operations, Kerrville Coaches, and Concho Coaches; and 1,200 square feet will be used for joint development space. The transit terminal

will include a 15-bay lot, where intercity vehicles will use one of three large head-in bays and local vehicles will use one of 12 pull-through bays. The bays will be arranged around the perimeter of the transit courtyard. Other uses of the multimodal terminal will include taxi parking, package express, customer pick-up/drop-off, parking for 65 vehicles, and transit vehicle storage for nine vehicles. *Final agency actions:* Section 106 finding of no adverse effect; no use of Section 4(f) properties; and a FONSI signed December 23, 2008. *Supporting documentation:* EA for the Concho Valley Multi-Modal Transit Terminal/Administration Building Project dated July 2006.

3. *Project name and location:* East Corridor Project, Denver, Aurora, Adams County, Colorado. *Project sponsor:* Regional Transportation District. *Project description:* The Project consists of an electric multiple unit commuter rail train and track system between Denver Union Station and Denver International Airport, located 23 miles northeast of downtown Denver. The Project alignment will operate on a double-track system using a combination of Union Pacific Railroad right of way, private property, and shared City and County of Denver and City of Aurora right of way. The new track will not be shared with existing or planned freight rail operations. East Corridor vehicles will use the shared alignment north of Denver Union Station to the commuter rail maintenance facility with the FasTracks' Gold Line, North Metro, and Northwest commuter rail corridors. *Final agency actions:* Section 106 Memorandum of Agreement dated September 2009; project-level air quality conformity determination; Section 4(f) determination; and a Record of Decision (ROD) signed November 6, 2009. *Supporting documentation:* Final Environmental Impact Statement (FEIS) for the East Corridor Project dated September 4, 2009.

4. *Project name and location:* Gold Line Corridor Project, Denver, Aurora, Adams County, Colorado. *Project sponsor:* Regional Transportation District. *Project description:* The Project consists of an 11.2-mile Electric Multiple Unit commuter rail system operating between Denver Union Station in downtown Denver and Ward Road in Wheat Ridge with seven stations. The Project alignment will operate primarily on a double-track system dedicated to commuter rail with no track being shared with freight rail operations. The Project from Denver Union Station to the commuter rail maintenance facility, shares the alignment with all of the FasTracks commuter rail corridors (East, North Metro, and Northwest Rail) for vehicle service at the commuter rail maintenance facility. Passenger service for the Gold Line and Northwest Rail share the alignment from Denver Union Station to Pecos Street. West of Pecos Street to Ward Road, the Project alignment separates from the Northwest Rail project and travels on its own alignment separate from the freight railroad to Ward Road. *Final agency actions:* Section 106 Memorandum of Agreement dated July 2009; project-level air quality conformity determination; Section 4(f) determination; and a ROD signed November 2, 2009. *Supporting documentation:* FEIS for the Gold Line Corridor Project dated August 21, 2009.

5. *Project name and location:* Lackawanna Cut-Off Passenger Rail Service Restoration Project; Morris, Warren, and Sussex Counties, New Jersey, and Northampton, Monroe, Wayne, and Lackawanna Counties, Pennsylvania. *Project sponsor:* New Jersey Transit Corporation. *Project description:* The Project proposes to restore rail passenger service on existing railroad right-of-way from Hoboken, New Jersey/midtown Manhattan to Pennsylvania. It will be constructed in two segments: a Minimal Operable Segment (MOS) and a non-MOS. The MOS consists of a 7.3-mile corridor with infrastructure improvements from Port Morris, NJ, to Andover, NJ, and the construction of Andover Station. The non-MOS includes the construction of seven new stations, an overnight train storage yard in Scranton, PA, a maintenance-of-way facility in Greendell, NJ, 20.7 miles of new track, and in Pennsylvania, improvement of approximately 60 miles of track for shared use with freight. *Final agency actions:* Section 106 Programmatic Agreement; project-level air quality conformity determination; Section 4(f) *de minimis* impact determination; and a revised FONSI signed October 2, 2009. *Supporting documentation:* Supplemental EA dated June 2009.

6. *Project name and location:* Pennsauken Junction Transit Center and Park and Ride, Pennsauken Township, New Jersey. *Project sponsor:* New Jersey Transit. *Project description:* The Project, a commuter rail transfer station, consists of the construction of a new rail transit center, including two new interconnected stations, a single, 200-foot long, floor-level platform with a 60-foot long canopy along the RiverLINE, two (2) 300-foot long, high-level, side platforms with 100-foot long canopies along the Atlantic City Rail Line, and a new 283-space commuter parking lot. An elevator and stair tower will connect the two stations. *Final agency actions:* Section 106 no adverse affect determination; project-level air quality conformity determination; Section 4(f) *de minimis* impact determination; and a FONSI signed October 5, 2009. *Supporting documentation:* Pennsauken Junction Transit Center and Park and Ride RiverLINE and Atlantic City Rail Line dated August 21, 2009.

7. *Project name and location:* Second Avenue Subway, changes to the 72nd Street and 86th Street Station Entrances, New York, New York. *Project sponsor:* Metropolitan Transportation Authority and New York City Transit. *Project description:* The project involves the design revisions of the northern entrances to the 72nd Street and 86th Street Stations. The 72nd Street Station design will relocate the proposed subway entrance at 305 East 72nd Street and a single, sidewalk elevator entrance to a newly constructed structure at 300 East 72nd Street. The new structure will house five elevators, replacing an existing four-story building. The 86th Street Station design will relocate the proposed subway entrance from within the building at 305 East 86th Street to two new locations in the sidewalk on the north side of East 86th Street east of Second Avenue. In the revised design, a total of four escalators, two escalators per entrance, will be constructed in the sidewalk. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; no use of Section 4(f) properties; and a FONSI signed October 29, 2009. *Supporting documentation:* Supplemental EA dated May 2009.

8. *Project name and location:* 35th Street Commuter Station, Chicago, Illinois. *Project sponsor:* Metra, Metropolitan Rail. *Project description:* This project will provide for a new commuter station at 35th Street along the existing Metra Rock Island District line in Chicago. The improvement will include the construction of a new station and platforms, sidewalks and pathways for pedestrian access, fencing, lighting, landscaping, fare collection facilities, and signage. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; no use of Section 4(f) properties; and a FONSI signed May 12, 2008. *Supporting documentation:* Metra-35th Street Station EA dated February 2008.

9. *Project name and location:* Provo Inter-modal Center, Provo City, Utah. *Project sponsor:* Utah Transit Authority. *Project description:* The proposed Provo Inter-modal Center will be located on

16.63 acres of land adjacent to and south of Utah Transit Authority's commuter rail right-of-way. The facilities to be constructed include the bus loading areas, the park-and-ride lot, and landscaping. The proposed action will consist of approximately 850 parking stalls, 10 bus bays, and landscaping. The bus bays will be located on the north side of the site near a commuter rail station platform. The facilities will also include bus shelters next to the bus bays or a full canopy covering all of the bus bays. *Final agency actions:* Section 106 Memorandum of Agreement; project-level air quality conformity determination; Section 4(f) evaluation and finding; and a FONSI signed July 7, 2009. *Supporting documentation:* EA for the Provo Inter-modal Center dated May 2009.

10. *Project name and location:* Southside Maintenance Facility Replacement Project, Norfolk, Virginia. *Project sponsor:* Hampton Roads Transit. *Project description:* The project consists of the demolition and reconstruction of a bus maintenance facility located at 509 18th Street. The reconstruction will include improved site access along 18th Street, additional lighting and improved ventilation for maintenance facilities, increased maintenance bay space from 14 feet to 20 feet wide, and improved site drainage to reduce significant flooding and contain runoff. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; no use of Section 4(f) properties; and a FONSI signed June 29, 2009. *Supporting documentation:* EA for the Southside Maintenance Facility Replacement dated May 2009.

11. *Project name and location:* Knoxville Station Transit Center, Knoxville, Tennessee. *Project sponsor:* City of Knoxville. *Project description:* The Knoxville Station Transit Center facility is proposed to be a multi-use, multi-story transit center that would house passenger waiting and transfer facilities for existing and projected future bus volumes (20 bus bays). In addition to the 20 bus bays, the center would also have passenger waiting and transfer facilities for shuttles, access to trolley and taxi service, bicycle facilities including bike racks, and passenger and driver amenities to include public restrooms, vending, and on-site security. Some of these amenities would be available on the platform. The main waiting area and the KAT customer service and administration offices will be housed in an adjacent station house occupying 15,000 square feet on two levels. The connection between the station house and the bus platform would be made accessible by a pedestrian bridge. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; Section 4(f) *de minimis* finding; and a FONSI signed September 21, 2007. *Supporting documentation:* EA for the Knoxville Central Station Transit Center Project dated July 2007.

12. *Project name and location:* AMTRAN Transit Facility Project, Altoona, Pennsylvania. *Project sponsor:* Transportation and Motor Buses for Public Use Authority (AMTRAN). *Project description:* The project will include the purchase of a 3.2-acre commercial lot with three abandoned vacant commercial buildings (two buildings will be updated to current building codes and one will be demolished); conversion of the former trolley barn building into a 6,840-square-foot bus storage facility with the capacity to store 8–12 vehicles and additional outside bus parking with open space for future expansion; creation of an additional 1,780 square feet of conference room space; preparation of approximately 2.3 acres of the site for related development including the demolition of a building; and the creation of a mini transfer hub. *Final agency actions:* Section 106 finding of no adverse effect; project-level air quality conformity determination; no use of Section 4(f) properties; and a FONSI signed April 7, 2008. *Supporting documentation:* EA for the AMTRAN Transit Facility Expansion Project dated February 1, 2008.

Issued on: December 2, 2009.

Susan Borinsky,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. E9–29374 Filed 12–8–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

TIME AND DATE: January 12, 2010, from 11 a.m. until 5 p.m., Pacific Standard Time.

PLACE: This meeting will take place at the Horton Grand Hotel, 311 Island Avenue, San Diego, CA 92101.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: December 4, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–29464 Filed 12–7–09; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[USCG–2002–14134]

Port Pelican LLC Deepwater Port License Relinquish

AGENCY: Maritime Administration, DOT.

ACTION: Relinquishment of Deepwater Port License Announcement; Notice.

SUMMARY: The Maritime Administration (MARAD) announces the cancellation of all actions related to the license to own, construct and operate a deepwater port issued to Port Pelican LLC on January 20, 2004. Pursuant to Section 1503(h) of the Deepwater Port Act of 1974, as amended, a deepwater port license may remain in effect until such time as it is either suspended or revoked by the Secretary of Transportation or surrendered by the licensee. The action is taken in response to the applicant's decision to relinquish its Deepwater Port License.

DATES: The date of relinquishment and cancellation of all actions related to this license was effective October 28, 2009.

ADDRESSES: The Docket Management Facility maintains the public docket for this project. The docket may be viewed electronically at *http://www.regulations.gov* under docket number USCG–2002–14134, or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: If you have questions about the Port Pelican LLC Deepwater Port project, contact Ms. Yvette Fields, Director, Office of Deepwater Ports and Offshore Activities at (202) 366–0926 or *Yvette.Fields@dot.gov*.

SUPPLEMENTARY INFORMATION: On October 28, 2009, the Maritime Administration received notification from the Deepwater Port Licensee, Port Pelican LLC, of the relinquishment of its License to own, construct and operate a liquefied natural gas deepwater port, entitled "Port Pelican" approximately 36 miles south southwest of Fresh Water City, Louisiana, located on the Outer Continental Shelf (OCS) Block Vermillion 140. Consequently, the Maritime Administration is terminating all activities relating to the licensure, construction, and operation of the proposed Port Pelican deepwater port. Further information pertaining to the Port Pelican Deepwater Port project may be found in the public docket at *http://www.regulations.gov* under docket number USCG–2002–14134.

Authority: 49 CFR 1.66.

Dated: December 3, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. E9–29336 Filed 12–8–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0691]

Agency Information Collection (Learner's Perception (LP) Survey) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 8, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0691" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0691."

SUPPLEMENTARY INFORMATION:

Title: Learner's Perception (LP) Survey, VA Form 10–0439.

OMB Control Number: 2900–0691.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 10–0439 will be used to obtain health care trainees perception of their clinical experience with VA versus non-VA facilities. VA will use the data to identify strengths and opportunities for improvement in VA clinical training programs.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 29, 2009, on pages 49915–49916.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,500 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 14,000.

Dated: December 4, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–29303 Filed 12–8–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0523]

Agency Information Collection (Loan Analysis) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 8, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0523" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0523."

SUPPLEMENTARY INFORMATION:

Title: Loan Analysis, VA Form 26–6393.

OMB Control Number: 2900–0523.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6393 is used to determine a veteran-borrower qualification for a VA-guaranteed loan. Lenders complete and submit the form to provide evidence of their decision to submit a prior approval loan application or close a loan on the automatic basis is based upon appropriate application of VA credit standards.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 29, 2009 at page 49916.

Affected Public: Federal Government.

Estimated Annual Burden: 50,000 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 200,000.

Dated: December 4, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–29313 Filed 12–8–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0001]

Agency Information Collection (Veteran's Application for Compensation and/or Pension) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before January 8, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0001" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0001."

SUPPLEMENTARY INFORMATION:

Titles:

a. Veteran's Application for Compensation and/or Pension, VA Form 21–526.

b. Veteran's Supplemental Claim Application, VA Form 21–526b.

c. Authorization and Consent Release Information to the Department of Veterans Affairs (VA), VA Form 21–4142.

OMB Control Number: 2900–0001.

Type of Review: Revision of a currently approved collection.

Abstracts:

a. Veterans complete VA Form 21–526 to apply for compensation and/or pension benefits.

b. Veterans who previously filed a claim using VA Form 21–526, Application for Compensation or Pension, and who wish to request an increase in a service connected condition, reopen their claim for a previously denied claim, and/or file a claim for a new service-connected condition must complete VA Form 21–526b. VA Form 21–526b will be used for supplemental claims for disability compensation.

c. Veterans who need VA's assistance in obtaining non-VA medical records must complete VA Form 21–4142.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 9, 2009, at pages 49916–49917.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. VA Form 21–526—391,708.

b. VA Form 21–526b—50,000.

c. VA Form 21–4142—274.

Estimated Average Burden per Respondent:

a. VA Form 21–526—1 hour.

b. VA Form 21–526b—15 minutes.

c. VA Form 21–4142—5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. VA Form 21–526—391,708.

b. VA Form 21–526b—200,000.

c. VA Form 21–4142—3,292.

Dated: December 4, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–29304 Filed 12–8–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0376]

Agency Information Collection (Agent Orange Registry Code Sheet) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATE: Comments must be submitted on or before January 8, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0376" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0376."

SUPPLEMENTARY INFORMATION:

Title: Agent Orange Registry Code Sheet, VA Form 10–9009.

OMB Control Number: 2900–0376.

Type of Review: Extension of a currently approved collection.

Abstract: VA in an ongoing effort to maintain an Agent Orange Registry (AOR) developed a reporting format to facilitate the collection of information obtained from veterans during the Agent Orange registry examination process. VA is required to organize and update the information contained in AOR to be able to notify Vietnam era veterans who served in the Republic of Vietnam of any increased health risks resulting from exposure to dioxin or other toxic agents. VA may also provide, upon request, a health examination, consultation, and counseling veterans who are eligible for listing or inclusion in any health-related registry administrated by VA that is similar to the Persian Gulf War Veterans Health Registry. Registry examinations is provided to veterans who served in Korea in 1968 or 1969, and/or any U.S. veteran who may have been exposed to dioxin, or other toxic substance in a herbicide or defoliant, during the conduct of, or as a result of, the testing, transporting, or spraying of herbicides, and who requests an Agent Orange Registry examination. VA will enter the information obtained from the veteran during the interview on VA Form 10–9009, Agent Orange Registry Code Sheet. The registry will provide a mechanism that will catalogue prominent symptoms, reproductive health, and diagnoses and to communicate with Agent Orange veterans. VA will inform the veterans on research finding or new compensation

policies through periodic newsletters. The registry is not designed or intended to be a research tool and therefore the results cannot be generalized to represent all Agent Orange veterans.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 29, 2009, at pages 49917–49918.

Affected Public: Individuals or Households.

Estimated Total Annual Burden: 7,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 21,000.

Dated: December 4, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–29305 Filed 12–8–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0335]

Agency Information Collection (Dental Record Authorization and Invoice for Outpatient Services) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATE: Comments must be submitted on or before January 8, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0335" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0335."

SUPPLEMENTARY INFORMATION:

Title: Dental Record Authorization and Invoice for Outpatient Services, VA Form 10–2570d.

OMB Control Number: 2900–0335.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 10–2570d is essential to the proper administration of VA outpatient fee dental program. The associated instructions make it possible to communicate with clarity the required procedures, peculiarities, and precautions associated with VA authorizations for contracting with private dentists for the provision of dental treatment for eligible veteran beneficiaries. Since most of the veterans who are authorized fee dental care are geographically inaccessible to VA dental clinics, it is necessary to request information as to the veteran's oral condition, treatment needs and the usual customary fees for these services from the private fee dentist whom the veteran has selected. The form lists the dental treatment needs of the veteran patient, the cost to VA to provide such services, and serves as an invoice for payment. VA uses the data collected to verify the veteran's eligibility to receive dental benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 29, 2009, on page 49918.

Affected Public: Business and other for profit.

Estimated Total Annual Burden: 3,666 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 11,000.

Dated: December 4, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–29306 Filed 12–8–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
December 9, 2009

Part II

National Credit Union Administration

12 CFR Parts 702, 703, 704, et al.
Corporate Credit Unions; Proposed Rule

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702, 703, 704, 709, and 747

RIN 3133–AD58

Corporate Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: NCUA is issuing proposed amendments to its rule governing corporate credit unions contained in part 704. The major revisions involve corporate credit union capital, investments, asset-liability management, governance, and credit union service organization (CUSO) activities. The amendments would establish a new capital scheme, including risk-based capital requirements; impose new prompt corrective action requirements; place various new limits on corporate investments; impose new asset-liability management controls; amend some corporate governance provisions; and limit a corporate CUSO to categories of services preapproved by NCUA. In addition, this proposal contains conforming amendments to part 702, Prompt Corrective Action (for natural person credit unions); part 703, Investments and Deposit Activities (for federal credit unions); part 747, Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations; and part 709, Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions. These amendments will strengthen individual corporates and the corporate credit union system as a whole.

DATES: Comments must be received on or before March 9, 2010.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Part 704 Corporate Credit Unions" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

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

FOR FURTHER INFORMATION CONTACT: Richard Mayfield, Capital Markets Specialist, Office of Corporate Credit Unions, at the address above or telephone: (703) 518–6642; Ross Kendall, Staff Attorney, Office of General Counsel (OGC), at the address above or telephone (703) 518–6540; Paul Peterson, Director, Applications Section, OGC, at the address above or telephone (703) 518–6540; or Todd Miller, Regional Capital Market Specialist, Region V, at telephone (703) 409–4317.

SUPPLEMENTARY INFORMATION:

The NCUA's primary mission is to ensure the safety and soundness of federally-insured credit unions. NCUA performs this important public function by examining all federal credit unions, participating in the examination and supervision of federally-insured state chartered credit unions in coordination with state regulators, and insuring federally-insured credit union members' accounts. In its statutory role as the administrator of the National Credit Union Share Insurance Fund (NCUSIF), the NCUA insures and supervises approximately 7,740 federally-insured credit unions, representing 98 percent of all credit unions and approximately 89 million members.[1]

Over 95 percent of natural person credit unions (NPCUs) belong to, and receive services from, corporate credit unions (corporates). There are 27 *retail* corporates that provide services directly to NPCUs, and there is one *wholesale* corporate, U.S. Central Federal Credit Union (U.S. Central), that provides services to many of the 27 retail corporates.

The corporate system offers a broad range of support to NPCUs. The products and services provided by U.S. Central to retail corporates, and by retail corporates to NPCUs, include: Investment/deposit services, wire transfers, share draft processing and imaging, automated clearinghouse transactions (ACH) processing, automatic teller machine (ATM) processing, bill payment services and security safekeeping. The volume of payment systems-related transactions throughout the system annually runs into the millions and the dollar amounts associated with those transactions are in the billions each month. Corporates also serve as liquidity providers for NPCUs. Natural person credit unions invest excess liquidity in a corporate when the NPCU has lower loan demand and draw down the invested liquidity when loan demand increases. In sum, corporates provide NPCUs with convenient and quality services and expertise, all at a fair price. For many NPCUs, this is a combination that makes the corporate system a valuable resource and, for some smaller NPCUs, an essential resource.

Federally-chartered corporates are governed by federal law and state chartered corporates by state law. In addition, all corporates that are federally-insured, or that accept share deposits from NPCU members that are federally insured, must comply with NCUA's part 704 corporate credit union rule. 12 CFR part 704; § 704.1, and 12 U.S.C. 1766(a). This proposal contains significant changes to part 704 and conforming changes to other parts of NCUA's rules. The changes include new investment limitations, asset-liability management requirements, capital standards, prompt corrective action requirements, corporate governance requirements, and CUSO requirements.

Prior to drafting this proposal, the Board considered all of the existing part 704, but ultimately concluded that the rule provisions addressed in this proposal, and discussed below, were the provisions that needed modification. These modifications are intended not only to avert a repeat of the recent problems encountered in the corporate system but also to anticipate new problems that might occur. For example, while the recent corporate problems were caused in part by spread widening associated with perceptions of credit risk, the proposal requires a corporate conduct a new spread widening test that should demonstrate sensitivity to both credit risk and other potential market risks. Likewise, increased capital requirements and well-defined concentration limits protect not only

[1] Within the fifty states, approximately 155 state-chartered credit unions are privately insured and are not subject to NCUA regulation or oversight.

against the types of risk that materialized in the past but also different risks that might materialize suddenly in the future.

This preamble is organized in four sections as follows. Section I discusses the historical background leading up to the need for this rulemaking. Section II summarizes affected portions of the current corporate rule and the proposed changes to those portions. Section III contains a more complete analysis of the proposed changes with references to particular sections and paragraph numbers within part 704. Section IV discusses various statutory requirements applicable to the rulemaking process.

Section III, with its analysis of each proposed change to part 704, is particularly important. Included in subsection III.E are illustrations of how the various provisions of this proposal, if they had been applied to the corporate system in the past, would have drastically reduced the recent corporate losses. Section III looks not only to the past, but also the future. Specifically, subsection III.D. includes a discussion of how a hypothetical corporate might structure its balance sheet so as to achieve the proposed new capital requirements while at the same time complying with the various proposed investment and asset-liability limitations. The Board encourages commenters to take a very close look at the discussion in III.D. This discussion will help commenters to understand how the Board envisions the various elements of the proposal, working together, can permit the corporate system to return to a position of providing necessary services to natural person credit unions while ensuring the system operates within appropriate safety and soundness constraints. The Board invites comment on all aspects of Section III, including the viability of the assumptions employed by NCUA.

I. History of Current Issues in the Corporate System

I.A. Corporate System: Prior to 2000

Up until the late 1990s, federally chartered corporates had a defined field of membership (FOM) serving a specific state or geographic region. Most state chartered corporates had national FOMs but primarily serviced the state in which they were incorporated. In 1998, the NCUA Board began to approve national FOMs for federal corporates, in part to provide requested parity with state charters. Within a few years most corporates had a national FOM.

NCUA's intention in allowing national FOMs was to provide NPCUs with the ability to select membership in a corporate that best met the needs of each NPCU in serving its members. The anticipated level of competition was expected to spur consolidation within the industry to build scale and improve efficiencies. In turn, this would build capital through increased earnings. While a few mergers occurred, one of the primary consequences of competition was to reduce margins on services and put pressure on the corporates to seek greater yields on their investments.

I.B. Corporate System: 2000 Through Mid-2007

The investment provisions of NCUA's corporate regulation, located at 12 CFR part 704, have for many years permitted corporates to purchase private label mortgage-backed and mortgage-related securities (collectively referred to as *MBS*). Part 704, however, restricts most corporates (those without expanded investment authority) to investing in only the highest credit quality rated securities by at least one Nationally Recognized Statistical Rating Organization (NRSRO).[2] Historically, highly rated securities have experienced minimal defaults and have been very liquid. Under NCUA rules, some corporates were permitted to exercise expanded investment authority and to purchase investment grade securities rated down to BBB because they had higher capital ratios, more highly trained personnel, and more capacity in their systems to monitor and model their portfolios. Even those corporates that had expanded credit risk authority, however, used it sparingly. In addition to being limited to securities with very high NRSRO ratings, corporates were required to perform a comprehensive credit analysis of the underlying collateral supporting the marketable security.

Either through direct purchase, or indirectly through investments at U.S. Central, the corporate system became heavily invested in privately issued MBS. Between 2003 and mid-2007, the percentage of investments in MBS grew from 24 percent to 37 percent. At purchase, these securities provided the corporates with a modest increase in yield over traditional investments in other asset-backed securities (e.g., securitized credit card and auto receivables). The vast majority of MBS had high credit ratings (AA equivalent or above) and interest rates that reset on a monthly or quarterly basis, which closely matched the corporates' need to fund dividends on member shares.[3] These features made MBS highly marketable and thus provided adequate liquidity to the corporates so they, in turn, could provide liquidity to their NPCU members.

U.S. Central and Western Corporate Federal Credit Union (WesCorp) had the highest concentrations of MBS in the entire corporate system.[4] The advent of national FOMs produced the competition that may, in turn, have helped generate these MBS concentrations. WesCorp was able to attract new NPCU members in part by offering dividend rates higher than other corporates. Consequently, it maintained an aggressive earnings strategy achieved by acquiring higher yielding (i.e., riskier, though still highly rated) MBS with greater amounts of credit risk. In direct response to WesCorp's market share success, other corporates likely pressured U.S. Central, their wholesale corporate, to pay higher, more competitive dividends which those corporates could pass along to their NPCU members. As a result, U.S. Central changed its portfolio strategy and also invested heavily in higher yielding MBS.

NCUA communicated to corporates the need to establish reasonable concentration limits in their board policies. In January 2003, NCUA issued *Corporate Credit Union Guidance Letter 2003–01*, which expressly highlighted the risks associated with credit concentrations and specifically addressed the need for corporates to establish appropriate limitations within their credit risk management policies.

During this timeframe, NCUA was also beginning to focus efforts on identifying and educating NPCUs on emerging risks associated with proper credit risk management of lending, including real estate lending, because of a nation-wide increase in alternative lending arrangements. Over the next few years, NCUA and the federal banking agencies worked cooperatively to provide numerous pieces of industry

[2] The term nationally recognized statistical rating organization (NRSRO) is used in federal and state statutes and regulations to confer regulatory benefits or prescribe requirements based on credit ratings issued by credit rating agencies identified by the Securities and Exchange Commission (SEC) as NRSROs. The Credit Rating Agency Reform Act of 2006 requires a credit rating agency seeking to be treated as an NRSRO to apply for, and be granted, registration with the SEC. See final SEC Rule, *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations*, at 72 FR 33564 (June 18, 2007).

[3] Overnight share dividends repriced daily. Fixed rate share certificates were funded by investing in interest rate swaps. The swaps converted the variable rates paid by the MBS to fixed rates that could be used to pay the certificate dividends.

[4] NCUA placed both USC and WesCorp into conservatorship in March 2009, as discussed further below.

guidance on non-traditional mortgage products. NCUA warned of the potential adverse impact these types of loans could have on consumers and credit union balance sheets. Natural person credit unions have responded favorably to the supervision oversight of NCUA; to date, these types of mortgage loans represent less than 4 percent of all first mortgage loans outstanding in the credit union industry.

In April 2007, several months before the distress in the mortgage market surfaced, NCUA issued *Corporate Credit Union Guidance Letter No. 2007–02,* focusing on the various risks associated with MBS. This letter addressed MBS credit risk, liquidity risk, market value risk, and concentration risk, and by mid-2007 corporates had, by-and-large, ceased the purchase of private label MBS. Still, by the summer of 2007 the MBS at the heart of the corporate problem were already on the books of U.S. Central and WesCorp. At that time, all their investments, including MBS, were still rated investment grade, and 98 percent were rated AA or higher. It was not until a year later (June 2008) that these corporates' MBS credit ratings began migrating downward, and even then 96 percent were still investment grade and 92 percent were still rated AA or better.

I.C. Corporate System: Mid-2007 Through Mid-2008

Beginning mid-year 2007, real estate values declined across many markets in the U.S. and greater numbers of mortgages became delinquent leading to a greater number of foreclosures. The higher number of foreclosures further eroded housing prices, resulting in lower recovery of principal and even higher losses when the foreclosed properties were liquidated. This resulted in sharp price declines for MBS and a corresponding shallowing of the market as a flight to quality arose.

Initially, market participants believed the market disturbance was limited to the subprime market and would be short-lived, and the performance of the senior credit positions in MBS, such as those primarily held by corporates, would not be at risk; however, that has proven not to be the case. By the end of 2007 and early into 2008, what started out as problems with sub-prime mortgages spread to Alt-A loans, option ARM loans, and finally to prime mortgage loans.[5]

Some MBS were backed by underlying loans that had imprudent underwriting. These alternative mortgage loans were aggressively made to buyers in high-price home markets as a means to address home affordability.[6] The weak credit fundamentals of the underlying mortgages, the inherent risk of the MBS structures, and the declining home market combined to severely affect the performance of MBS holdings of some corporates.

MBS prices and marketability declined significantly. Even bonds that held AA ratings or higher were unable to be sold at prices close to par, discouraging investors, including corporates, from selling them. Corporates increasingly looked to borrowings to meet liquidity demands. By pledging their MBS assets as security, corporates were able to obtain financing from external lenders.

In hindsight, it would have been preferable for the corporates to have sold their problem MBS in 2007. However, any sale following the MBS market dislocation in the summer of 2007 would have forced unrealized losses to become realized losses at a time when actual credit impairment of the underlying assets was viewed by many as unlikely. Absent a market of willing buyers, private label MBS increasingly could only be sold at a very severe discount (distressed prices)—causing losses even more significant than the accumulated unrealized losses on available-for-sale securities reflected on the financial statements. The conventional market wisdom at the time was that the problems in the MBS markets were temporary and it did not make economic sense to sell securities until market liquidity and counterparty trust improved.

Conditions did not improve and as the MBS markets became more distressed and illiquid, the margin requirements set by lenders for MBS collateral pledged by their corporate credit union borrowers increased. The cost of primary borrowing sources available to corporates became prohibitively expensive as a result. Due to the continued price devaluation of MBS, the ability to borrow by pledging corporate investment portfolios diminished significantly, thereby increasing liquidity pressures. In turn, this reduced leverage diminished the yields paid by the corporates and made them less attractive. NPCUs began to invest part of their excess liquidity elsewhere, further increasing corporate liquidity concerns.

In response to these concerns, NCUA directed corporates to consider a number of steps to ensure adequate sources of liquidity, including: encouraging the establishment of commercial paper and medium-term note programs; encouraging additional liquidity sources (both advised and committed); encouraging an increase in the number of repo transaction counterparties; encouraging membership in a Federal Home Loan Bank (FHLB); requiring independent third party stress test modeling of mortgage-related securities to determine if the securities would continue to cash flow; assisting U.S. Central to gain access to the Federal Reserve Board's discount window; and encouraging education and communication with their members about what was occurring in the financial market and how it was affecting their balance sheets. Corporates have done a good job of communicating these issues with their members and this did assist in preventing significant outflows of funds from the corporate system.

On August 11, 2008, the Wall Street Journal published an article on the unrealized losses on available-for-sale securities in the corporate system. The article generated additional questions and concerns throughout the credit union industry and increased the possibility of a run on corporate shares. A run would have forced some corporates to sell their MBS at severely depressed prices, leading to loss of not only all the member capital in the affected corporates but also most member shares.[7] The loss of these shares would have likely caused the failure of many member NPCUs and required numerous recapitalizations of the NCUSIF, with catastrophic effects on the credit union system as a whole.

Also in that August 2008 timeframe the media publicized problems with Fannie Mae, Freddie Mac, Bear Stearns, Countrywide, and numerous other financial entities. Liquidity in the global markets froze: liquidity had become not only expensive, but almost impossible to obtain. Unfortunately, these events coincided with seasonal liquidity demands placed by NPCUs on their corporates. Traditionally, NPCUs withdraw funds during August and September, and funds begin to flow back into the corporates in October. The

[5] Alt-A loans are between subprime and prime. Generally, the borrowers have good credit histories, but pay higher interest because of some other risk factor, such as low documentation or high loan-to-value ratio. Option ARM loans (option adjustable rate mortgages) allow the borrower to choose between different payment options period to period. Prime mortgage loans are considered high quality, with highly rated borrowers and other criteria indicating relatively low risk.

[6] Very few, if any, of these problem loans that found their way into MBS pools were originated by credit unions.

[7] The vast majority of shares in corporates are uninsured because the account balances are well above the $250,000 federal insurance limit.

tightening liquidity environment was of significant concern to NCUA and the corporate system, because corporates must maintain adequate liquidity to ensure the uninterrupted functioning of the payment systems.

The potential loss of member confidence in their corporates, ever-increasing concerns about the credit quality of MBS, and the seasonal liquidity outflows all created the "perfect storm" for the corporate system. NCUA was concerned that some corporates would be unable to meet the liquidity demands of their members in the short-term or be unable to fund payment systems activity. In addition, NCUA had indications of an exodus of NPCU funds from the corporate system due to a lack of confidence. Accordingly, in the fall of 2008 it became critical for NCUA to initiate dramatic action to bolster confidence in the corporates and ensure the continuing flow of liquidity in the credit union system. The NCUA's initial public actions involved liquidity support, while the Board intensified its contingency planning on related issues, including corporate capital and corporate restructuring.

During the last half of calendar year 2008 NCUA took several actions, in tandem with the Central Liquidity Facility (CLF), to increase liquidity throughout the entire credit union system, especially within the corporates. These pro-liquidity actions included:

- Encouraging corporates with large unrealized losses on holdings of MBS to make application to the Federal Reserve Discount Window.
- Converting loans made by corporates to NPCUs to CLF-funded loans using funds borrowed by the CLF from the U.S. Treasury.
- Announcing and implementing the *Temporary Corporate Credit Union Liquidity Guarantee Program* (TCCULGP) on October 16, 2008. The TCCULGP is similar to the FDIC's Temporary Liquidity Guarantee Program announced by the FDIC on October 14, 2008. The TCCULGP provides a 100 percent guarantee on certain new unsecured debt obligations issued by eligible corporates.
- Announcing and implementing the Credit Union System Investment Program (CU SIP) and the Credit Union Homeowners Affordability Relief Program (CU HARP). Both programs allow participating NPCUs to borrow funds from the CLF and invest those funds in CU SIP notes issued by corporates, injecting additional liquidity into the corporates and the entire credit union system. With the launch of CU HARP and CU SIP, NCUA provided about $8 billion of additional funding to corporates to pay down external borrowings.[8]

The unrealized losses in the corporate system grew to nearly $18 billion by year-end 2008. The severity of the MBS price declines and credit downgrades, along with the erosion of subordinated classes within the MBS structures held by corporates, required reconsideration by some corporate credit unions that all such fair value declines were temporary.[9] In January, 2009, several corporates reported major realized losses and significant capital depletion, and it became apparent that the NCUA's liquidity assistance efforts by themselves would not be sufficient to stabilize the corporates. The NCUA Board continued its consideration of issues including corporate capital and corporate restructuring and, at its January 28, 2009, meeting, the NCUA Board took the following actions in furtherance of corporate stabilization:

- Approved issuance of a $1 billion NCUSIF capital note to U.S. Central as a result of pending realized losses on MBS and other asset-backed securities. This action was necessary to preserve confidence in U.S. Central, given its pivotal role in the corporate system, and maintain external sources of funding.
- Approved the *Temporary Corporate Credit Union Share Guarantee Program* (TCCUSGP), which guarantees uninsured shares at participating corporates through September 30, 2011. This program was vital in maintaining NPCU confidence in the corporate system.
- Authorized the engagement of Pacific Investment Management Company, L.L.C. (PIMCO), an independent third party, to conduct a comprehensive analysis of expected non-recoverable credit losses for distressed securities held by corporates. This information served to augment NCUA's previous analysis of potential losses to the NCUSIF and provided an independent assessment of the reliability of information provided by the corporates. The focus on non-recoverable credit losses rather than the higher and more volatile losses due to other market factors was consistent with the need to determine the actual loss exposure of the NCUSIF.
- Announced that losses to the NCUSIF associated with corporates would be several billion dollars, exceeding the NCUSIF's entire retained earnings and impairing each credit union's one percent capitalization deposit.
- Issued an Advance Notice of Public Rulemaking (ANPR) on restructuring the corporate rule. The sixty-day comment period expired in April 2009. NCUA received almost five hundred comment letters, providing suggestions on possible regulatory reforms for corporates and the corporate system.

In March 2009, due to huge operating losses at U.S. Central and WesCorp, lack of sufficient capital, and for other reasons, the NCUA Board was forced to place these two corporates into conservatorship. The action protected retail credit union share deposits and the interests of the NCUSIF and helped clear the way for NCUA to take additional mitigating actions as they might become necessary.

As of May 2009, NCUA estimated that losses to the NCUSIF associated with the troubles in the corporate system exceeded the entire equity in the Fund and impaired approximately 69 percent of the capitalization deposit that all federally insured credit unions maintain with the NCUSIF. These losses necessitated premium and deposit replenishment assessments that would, in total, cost insured credit unions an amount equal to almost one percent of their insured shares. Though the credit union system as a whole had the net worth to absorb these costs and remain well capitalized, the legal structure of the NCUSIF would have required that credit unions take all these insurance expense charges at once, which would result in a contraction of credit union lending and other services. This would come at a particularly difficult time, when it was vital that credit unions be a source of consumer confidence and continue to make credit available to support an economic recovery. In fact, the NCUA Board realized that such a large, sudden impact on credit unions' financial statements could further destabilize consumer confidence.

The Board was committed to seeking the lowest cost option for stabilizing the corporate system, while also minimizing the adverse impact on natural person credit unions and their members so that credit unions could remain a vibrant and healthy sector of the U.S. financial system. In pursuit of these ends, the Board drafted legislation to create a Temporary Corporate Credit Union Stabilization Fund (CCUSF). The

[8] The SIP and HARP programs were key in providing liquidity to the corporates and the credit union system at this critical juncture. These two programs, and other CLF lending, would not have been possible without NCUA's advocacy the previous September for lifting the CLF cap.

[9] The term "subordinated" means that the security will absorb credit losses in the underlying pool of loans before other, more senior, securities absorb credit losses. In general, the principal of the subordinated security will be exhausted before the more senior securities absorb any loss.

proposed CCUSF would borrow money from the Treasury for up to seven years and use the money to pay expenses associated with the ongoing problems in the corporate credit union system, such as the capital injection into U.S. Central. The primary purpose of this new CCUSF would be to spread over multiple years the costs to insured credit unions associated with the corporate credit union stabilization effort, and to ensure that the payment by insured credit unions of those costs was anti-cyclical, and not pro-cyclical.

The Board sought Congressional support and passage of the CCUSF. On May 20, 2009, Congress enacted and the President signed into law the *Helping Families Save Their Homes Act of 2009* (*Helping Families Act*), Public Law 111–22. Section 204 of the Helping Families Act created the sought-after CCUSF and provided NCUA with other helpful tools, such as increasing the authority of the NCUSIF and CCUSF to borrow from the Treasury and permitting the NCUSIF to assess premiums over as much as 8 years to rebuild the equity ratio should the ratio fall below 1.20 percent.

Immediately following passage of this legislation, the NCUA Board took a series of actions establishing and implementing the CCUSF. On June 18, 2009, the Board obligated the CCUSF to accept assignment from the NCUSIF of the $1 billion capital note extended to U.S. Central executed on January 28, 2009. The Board also determined to legally obligate the CCUSF for any liability arising from the TCGUSGP (share guarantee) and TCCULGP (liquidity guarantee) programs. These steps effectively spread the cost of the corporate stabilization program for insured credit unions over multiple years.

For more than a year, then, going back to the summer of 2008, the NCUA Board has worked a number of avenues to stabilize the corporate system, involving liquidity improvement and protection, capital injections, and spreading the costs to NPCUs of the stabilization program out over multiple years. These actions were critical to the near- and mid-term survival of the corporate system and to minimizing the potential costs to the NCUSIF and to the insured NPCUs obligated to the fund the NCUSIF. For the longer term, however, the Board believes it needs to address the structure of corporates and the corporate system and the investment, capital, and governance standards by which corporates operate. Accordingly, the Board has turned its attention to part 704, NCUA's corporate rule, and to the public comments that the Board solicited in response to its ANPR.

I.D. The Advance Notice of Proposed Rulemaking (ANPR)

In January 2009, NCUA solicited public comment on whether comprehensive changes to the structure of the corporate system were warranted. 74 FR 6004 (Feb. 4, 2009). This corporate credit union ANPR sought comment on how best to define and structure the role of corporates in the credit union system, whether to modify the level of required capital for corporates, whether to modify or limit the range of permissible investments for corporates, whether to impose new standards and limits on asset-liability management and credit risk, and whether to make modifications in the area of corporate governance.

NCUA received some 445 comments in response to the ANPR. More than 370 of these comments came from natural person credit unions (NPCUs). Eighteen corporates, 27 state credit union leagues, four national trade associations, and the National Association of State Credit Union Supervisors also commented.

NCUA reviewed these public comments closely and considered them carefully in drafting this proposed rule. Certain specific comments received in response to the ANPR are discussed in Section C below as they relate to particular proposed amendments.

II. Summary of Current Rule and Proposed Changes

This proposal contains numerous changes to the current corporate rule. Some of these changes are short and straightforward, while others are more lengthy and complex. This Section II briefly summarizes the current part 704 provisions, and the proposed changes. Section III describes each proposed change in more detail.

II.A. Current Part 704 Capital Rules

Currently, corporates have only one mandatory minimum capital requirement: They must maintain total capital—retained earnings, paid-in capital (PIC), and membership capital accounts (MCAs)—in an amount equal to or greater than 4 percent of their moving daily average net assets.[10] Failure by a corporate to meet this minimum capital ratio triggers the requirement to file a capital restoration plan with NCUA and may cause NCUA to issue a capital restoration directive and take other administrative action.

[10] 12 CFR 704.3(d). Corporates have other capital-related requirements, such as a core capital ratio and a retained earnings ratio, but failure to meet these requirements only triggers future earnings retention requirements and does not trigger a capital restoration plan requirement.

Although Prompt Corrective Action (PCA) applies to NPCUs and to banking entities, PCA does not currently apply to corporates.[11] The current rule also provides that retail corporates with a retained earnings ratio of less than two percent must increase their retained earnings by a certain amount each quarter, but this reserving requirement only applies to a wholesale corporate credit union if its retained earnings ratio falls below one percent.

II.B. Proposed Amendments to Part 704 Capital Rules

NCUA intends to change the corporate capital requirements to make them stronger and more consistent with the requirements of the banking regulators. For example, the other regulators employ three different minimum capital ratios, not one ratio like NCUA. The current corporate minimum capital ratio is also calculated differently from any of the three ratios employed by the other regulators.

The proposal replaces the current four percent total capital ratio with a four percent *leverage ratio,* and limits the capital that can be used to calculate the leverage ratio to *core,* or *Tier 1,* capital, which would include only the more permanent forms of corporate capital. The proposal also includes new minimum risk-based capital ratios that are calculated based on risk-weighted assets. Failure to meet these minimum ratios will trigger a capital restoration plan requirement, potential capital restoration directives, and other, new prompt corrective action (PCA) provisions. The new PCA provisions are similar to those currently applicable to banks. The due process associated with the new PCA provisions is set out in a new subpart to part 747 of NCUA's rules.

The proposal also refines the acceptable elements of corporate capital. For example, after an appropriate phase-in period a certain percentage of core

[11] Section 216 of the Federal Credit Union Act establishes a PCA scheme for natural person credit unions. 12 U.S.C. 1790d. Paragraph (m) of § 216 states specifically that the provisions of § 216 are not applicable to corporate credit unions. Since corporate credit unions are different in form, function, and mission than natural person credit unions, the PCA scheme set forth in this proposal differs from that contained in § 216 and its implementing regulation, 12 CFR Part 702. The legal authority for this proposed corporate PCA scheme is found in two different places. Section 120(a) of the Act, states, in pertinent part, that "[A]ny central credit union chartered by the Board shall be subject to such rules, regulations, and orders as the Board deems appropriate * * *." 12 U.S.C. 1766(a). Section 201(b)(9) of the Act also requires that federally insured credit unions "comply with the requirements of this [share insurance] title and of regulations prescribed by the Board thereto." 12 U.S.C. 1781(b)(9).

capital must be in the form of retained earnings. The timing and amount of this retained earnings requirement is discussed in detail in Section III below.

The proposal will also toughen the requirements for *Tier 2* capital accounts (i.e., MCAs) that can be used in part to satisfy the new total risk based capital ratio. Specifically, the current minimum three year requirement for MCAs will be lengthened to five years, and the adjustable balance type of MCA accounts will be eliminated.

The proposal also renames the two types of contributed capital accounts (PIC and MCA) to render the names more descriptive of what they actually are. PIC is renamed as perpetual contributed capital (PCC), and MCAs are renamed as nonperpetual capital accounts (NCAs). The proposal further permits corporates to issue PCC and NCAs to both members and nonmembers.

The proposal will eliminate the current prohibition on corporates requiring credit unions to contribute capital to obtain membership or receive services. It will also permit members to transfer corporate capital instruments they hold to third parties and will require corporates to facilitate such transfers.

The proposal also eliminates the special treatment that wholesale corporates receive with regard to retained earnings reserving requirements. All corporates will be subject to the same requirements with regard to retained earnings.

Finally, the proposal permits a corporate, at its option, to give new contributed capital priority over existing contributed capital.

II.C. Current Part 704 Investment Limitations

Among other investment provisions, the current part 704:

- Requires that a corporate maintain an internal investment policy that includes reasonable and supportable concentration limits, including limits by investor type and sector, but does not prescribe standards for determining the reasonableness of those limits.
- Requires that the aggregate of all investments in any single obligor is limited to the greater of 50 percent of capital or $5 million.
- Specifies, for permissible investment types, that the investment must be rated no lower than AA—by at least one Nationally Recognized Statistical Rating Organization (NRSRO) at time of purchase. The required rating may be lower for certain investment types if the corporate has expanded authorities. Additional requirements apply if the rating is subsequently lowered. Certain investment types, such as U.S. government securities and CUSO investments, are exempt from the NRSRO requirement.
- Specifically prohibits certain types of investments, including most derivatives, most stripped MBS (e.g., interest only strips and principal only strips), mortgage servicing rights, and residual interests in asset-backed securities (ABS).
- Does not address investments that are structured to be subordinate, in terms of potential credit losses, to other securities.

II.D. Proposed Amendments to Part 704 Investment Limitations

The proposal will impose specific concentration limits by investment sector. Sectors include residential mortgage-backed securities, commercial mortgage-backed securities, student loan asset-backed securities, automobile loan/lease asset-backed securities, credit card asset-backed securities, other asset-backed securities, corporate debt obligations, municipal securities, registered investment companies, and an *all others* category to account for the development of new investments types. The proposal further restricts the purchase of high-risk structured instruments that concentrate, and thus multiply, market risk exposures, such as investments that return a multiple of a particular market interest rate. These limits would be in addition to current limits on derivatives. The proposal would also limit subordinated positions in all sectors. This limit will reduce a corporate's credit risk by restricting its ability to purchase *mezzanine* residential mortgage-backed securities, as some corporates did, or other subordinated structured securities that are not the most senior security in terms of credit risk.

The proposed changes would prohibit additional investment types that have proven problematic, such as collateralized debt obligations (CDOs) and Net Interest Margin (NIM) securities.

The proposed changes would require that a corporate get multiple ratings from different NRSROs, and only use the lowest of the ratings, and require that ratings be used only to exclude an investment, not as authorization to include one. Credit ratings will not be a substitute for pre-purchase due diligence and ongoing risk monitoring. Downgrades below the minimum rating threshold will continue to trigger investment action plans. These provisions, along with the asset-liability management (ALM) provisions described below, will reduce reliance on NRSRO ratings.

The proposal will eliminate the current Part II expanded investment authority, modify the current Part IV expanded authority on derivatives, and impose increased capital requirements to qualify for Part I and II expanded investment authorities.

II.E. Current Part 704 ALM Provisions

The current part 704 requires that corporates maintain an internal ALM policy. The rule requires that as part of that policy the corporate do Net Economic Value (NEV) modeling to measure interest rate risk, but the rule does not have any other specific requirements relating to the risks of mismatches between asset and liability cash flows. The current part 704 requires that any corporate permitting early withdrawals on share certificates "assess a market-based penalty sufficient to cover the estimated replacement cost of the certificate redeemed." The current rule does not establish any minimum amount of cash, or cash equivalents, that a corporate must, for liquidity purposes, maintain on hand at all times. The current rule limits a corporate's borrowing to the greater of 10 times capital or 50 percent of shares and capital, but does not place any additional limits on secured borrowings.

II.F. Proposed Amendments to Part 704 ALM Provisions

The proposal would:

- Establish a maximum limit on the weighted average life of a corporate's aggregate assets.
- Establish limits on cash flow mismatches so as not to exceed an acceptable gap between the average life of assets and liabilities.
- Require additional testing for spread widening and net interest income (NII) modeling; including testing standards.
- Further limit a corporate's ability to pay a market-based redemption price to no more than par, thus eliminating the ability to pay a premium on early withdrawals.
- Require a corporate maintain a minimum amount of cash or cash equivalents to ensure sufficient liquidity protection for payment system operations.
- Restrict the use of secured borrowings for purposes other than liquidity needs.

The effects of these new, proposed ALM provisions, as well as the investment provisions discussed in paragraph E. above, are illustrated in more detail in subsection III.D. below.

II.G. Current Part 704 Corporate Governance Provisions

The current part 704 places limitations on board representation, including limits on the number of trade organization representatives. The current rule does not, however, place any experience or knowledge requirements on individual corporate directors. The current rule does not require any disclosure of executive compensation to the members of a corporate, nor does it place any limits on *golden parachute* severance packages for senior executives.[12] The current part 704 does not limit the representation of corporate executives and officials on the boards of other corporates.

II.H. Proposed Amendments to Part 704 Corporate Governance Provisions

The proposed changes, after appropriate phase-in periods, would:[13]

- Require that corporate directors currently hold a Chief Executive Officer (CEO), Chief Financial Officer (CFO), or Chief Operating Officer (COO) position, at their credit union or member entity.
- Require that all compensation agreements between a corporate and its senior executives and directors be disclosed to the members of the corporate upon request and at least once annually to the entire membership.
- Provide for disclosure of material increases in compensation related to corporate mergers.
- Prohibit certain golden parachute payments and related indemnification provisions.
- Require that a majority of all corporate boards (including USC) consist of representatives from natural person credit unions.
- Establish term limits on both corporate members and individuals serving as representatives of corporate members.
- Prohibit an individual from serving on the boards of more than one corporate at a time and prohibit an organizational entity from having two or more individual representatives on the board of a single corporate.

II.I. Miscellaneous Proposed Amendments to Part 704

The proposal:

- Removes § 704.19, which provided wholesale corporates with a lower retained earnings requirement than retail corporates.
- Restricts the total amount of investments and loans a corporate may accept from any single member.
- Requires that corporate CUSOs restrict their services to brokerage services, investment advisory services, and other categories of services as preapproved by NCUA.
- Expands the current requirement that corporate CUSOs agree to give NCUA access to books and records to include access to the CUSO's personnel and facilities.

III. Discussion and Analysis of Particular Proposed Amendments

This proposed rule contains amendments to different sections and appendices in part 704. The following table summarizes the current organization of part 704, and where, when, and how the Board intends to amend that organization and substance.

Current part 704 Rule Provision	Amended?
704.1 Scope	No.
704.2 Definitions	Yes. First amendment effective upon publication of final rule. Second amendment effective one year after publication of final rule.
704.3 Corporate credit union capital	Yes. Removed and replaced effective one year after publication of final rule.
704.4 Board responsibilities	Yes. Effective one year after publication of final rule, current *Board responsibilities* moved to 704.13. Effective one year after publication of final rule, new 704.4 (*Prompt corrective action*) added.
704.5 Investments	Yes.
704.6 Credit risk management	Yes.
704.7 Lending	No.
704.8 Asset and liability management	Yes.
704.9 Liquidity management	Yes.
704.10 Investment action plan	No.
704.11 Corporate CUSOs	Yes.
704.12 Permissible services	No.
704.13 [Reserved]	Effective one year after publication of final rule, current 704.4, *Board responsibilities,* moved to 704.13. No change to substance.
704.14 Representation	Yes.
704.15 Audit requirements	No.
704.16 Contract/written agreements	No.
704.17 State-chartered corporate credit unions.	No.
704.18 Fidelity bond coverage	No.
704.19 Wholesale corporate credit unions.	Yes. Current 704.19 removed. New 704.19, *Disclosure of executive and director compensation,* added.
704.20 None.	Yes. New 704.20, *Golden parachute and indemnification payments,* added.
Appendix A—Model Forms	Yes. Renamed *Capital Prioritization and Model Forms.*
Appendix B—Expanded Authorities and Requirements.	Yes.
Appendix C—None	Yes. Effective one year after publication of final rule, new Appendix C, *Risk-Based Capital Credit Risk-Weight Categories,* added.

This section of the preamble discusses each of these proposed amendments in detail. This section generally follows the organization of part 704, that is, starting with the proposed capital (§ 704.3) and PCA (§ 704.4) amendments, then investments (§ 704.5) and credit risk (§ 704.6), then asset and liability management (§ 704.8), then corporate

[12] The Internal Revenue Code, and state law, may require some disclosure for state chartered corporates, but not for federal charters.

[13] Some of these proposals are phased-in over time.

board representation § (704.14), and then the new sections relating to disclosure of executive and director compensation (§ 704.19) and golden parachutes and indemnification (§ 704.20).

Many of the proposed amendments require new definitions that appear in § 704.2, and the discussion of these definitions appears with the discussion of the associated substantive change to the corporate rule. The proposal includes amendments to the Appendices A and B, and adds a new Appendix C. Since Appendix B relates to investment authority, the proposed amendments to that appendix are discussed as part of the discussion of § 704.5. Since Appendices A and C (on model forms and the risk-weighting of assets, respectively) relate to corporate capital, the changes to these appendices are discussed as part of the discussion of the proposed § 704.3. The proposed addition of subpart L to part 747 provides the due process associated with the new PCA provision, and so is discussed as part of the § 704.4 discussion.

The proposed changes to capital terminology in part 704 also necessitate conforming amendments to parts 702, 703, and 709, as discussed below.

III.A. Amendments to Part 704 Relating to Capital

Current Part 704 Capital Requirements

Adequate capital is essential to the safe and sound operation of a corporate. It ensures that the corporate has a buffer against the losses associated with all the various risks associated with the investments and activities of a corporate.

Currently, part 704 contains only one mandatory, minimum capital requirement: that corporates achieve and maintain a ratio of capital to moving daily average net assets of at least four percent. Part 704 defines capital, generally, to include retained earnings, paid-in capital (PIC), and membership capital accounts (MCAs). The current capital requirements in part 704 differ in certain respects from the capital requirements that banking regulators impose on banks. For example, part 704 does not include any capital calculations based on risk-weighted assets. Part 704 also permits certain membership capital accounts to qualify as corporate capital where those same accounts would not satisfy the bank regulators' definition of capital. Part 704 permits membership capital accounts with terms as short as three years, while banking regulators require such capital to have terms of at least five years. In addition, part 704 permits adjustable balance membership capital accounts; while banking regulators do not recognize any sort of adjustable balance accounts as capital.

Public Comment on the ANPR

The ANPR discussed various approaches that NCUA is considering with respect to capital requirements for corporates and solicited comment on several aspects of this issue. For example, the agency asked whether it should establish a new *leverage ratio* consisting only of more permanent (core) capital and excluding MCAs; increase the required capital ratio to more than four percent; and implement changes that would result in redefining MCAs in line with accepted banking notions of capital. The agency asked whether it should establish new minimum capital ratios based on risk-weighted asset classifications, which could include the use of some form of membership capital. Another question presented for comment and discussion in the ANPR was whether natural person credit unions should maintain contributed capital as a prerequisite to obtaining services from a corporate.

Comments about capital and capital requirements were wide ranging, reflecting the importance and difficulty of this issue. Many commenters believe there is a need for greater capital within the corporate system and for more sensitive measures of the necessary capital.

Ninety-seven commenters addressed the question of whether the agency should establish a new required capital ratio consisting of core capital only and excluding membership capital accounts. Sixty-four favored such a new capital ratio while 33 opposed it. One hundred sixteen commenters discussed whether a corporate should be permitted to provide services only to members who contributed tier 1 capital; 82 favored this restriction while 34 opposed it. Regarding the question of whether the required capital ratio should be increased, the vast majority of commenters—80 of 93—favored increasing the required capital ratio to more than four percent.

Of the 58 commenters who addressed the topic of whether the agency should change the rules regarding the manner in which membership capital can be adjusted, 44 favored and 14 opposed rule changes in this area. On the question of whether the corporates should be subject to risk-based capital standards, the commenters were nearly unanimous, with 173 of 185 comments favoring risk-based capital standards for corporates.

Commenters advocating greater capital requirements generally supported a phase-in period before any new requirements become effective. The corporate trade association and many corporates suggested that all corporates should attain a minimum Tier 1 core capital ratio of four percent using 12 month daily average net assets (DANA) by the end of 2010 and higher minimum core capital levels in the future based on Basel.[14] These commenters also said the use of DANA is necessary to account for fluctuations in assets due to the cash flow seasonality of credit unions, although there were different views among the commenters about the appropriate length of DANA, ranging from three months to three years.

Some commenters took the opposing view, suggesting that current capital requirements are adequate with proper oversight and risk management. One commenter noted that an increased capital contribution requirement would limit the flexibility of credit unions in dealing with the corporate system. Another commenter indicated that, with an appropriate limitation on the investment authority and range of permissible services offered by a corporate in a consolidated corporate network, current capital rules should be adequate.

Other commenters advocated that NCUA require mandatory capital contributions by natural person credit unions as a condition of receiving services from a corporate. One corporate that supported mandatory capital for services stated that such a requirement would likely drive the regionalization of corporates as natural person credit unions would limit their corporate relationships to one nearby corporate. Some commenters, however, took the opposite view, believing mandatory capital contributions to be too limiting on the ability of credit unions to choose the corporate they want to do business with; these commenters suggested that the corporate simply charge higher service fees for members not contributing capital.

Many of those commenters who discussed the issue of membership capital accounts (MCAs) supported the idea of making MCA conform to the accepted banking standard of *Tier 2* capital, e.g., to require that it be a minimum of five year term or, if of indefinite term, subject to at least five years notice of withdrawal. Many commenters suggested that MCA contributions be tied to asset size and

[14] The definitions of DANA, and moving DANA, are laid out and discussed further on in this preamble.

also that NCUA mandate that corporates implement MCA with uniform characteristics, so that there would be less competition among the corporates for capital from NPCUs. Some commenters also stated that MCA withdrawals should only be permitted if the corporate would be in compliance with applicable capital standards after withdrawal. Some commenters expressed the opposite view, with one suggesting that withdrawal within six months of notice should be sufficient.

Commenters who supported the idea of a risk-based approach to capital indicated that they believed that appropriately designed risk-based capital requirements would encourage corporates to monitor and control their more risky investments and activities. Some of these commenters, however, stated that if NCUA restricts investment or other authorities of corporates through regulatory changes, then capital requirements should be less than that required of other institutions under Basel standards. Another commenter expressed doubt about the effectiveness of a risk-based system, noting that it did not alleviate or prevent the current difficulties being experienced in the banking sector.

Discussion of Proposed Capital Regulations

A corporate's capital levels must be consistent with the risks associated with the activities in which a corporate engages. Linking the amount of a credit union's capital requirement to the overall riskiness of its assets is a more accurate method of ensuring that the credit union can afford to cover losses that may arise from such activities without becoming insolvent. The other federal banking regulators have adopted this risk-based approach to capital in a manner consistent with the international framework for capital standards established by the Basel Committee on Banking Supervision (commonly referred to as the *Basel Supervisors Committee*) in July, 1988 (*Basel I*), and as subsequently expanded upon in 2006 (*Basel II*).

Activities that potentially have higher returns generally have such potential because of their higher risk of loss. Because higher risk/return activities can exhaust a corporate's capital faster than lower risk/return activities, the Board believes corporates engaging in higher risk activities should hold more capital to protect the National Credit Union Share Insurance Fund and to provide appropriate incentives for prudent management. Likewise, institutions that engage in lower risk activities do not need as large a capital cushion and should be permitted to operate with a lower minimum capital requirement, consistent with protection of the insurance fund and the long-term safety of the credit union industry and the individual corporate.

Unfortunately, it is not easy to develop a capital scheme that accounts for all possible risks and that requires only as much capital as is necessary to cover the potential losses associated with such risks. The Board has closely examined the efforts of the other regulators to develop a risk-based capital scheme. Those efforts are based, in large part, on the Basel Accords. A short discussion of those Accords and the related efforts of the banking regulators follows.

Summary of the Basel Accords

A group of eleven industrialized nations, including the U.S., formed the Basel Committee to harmonize banking standards and regulations among the member nations. One of the Committee's tasks was to design standards that would provide a bank with sufficient capital in relation to the risks undertaken by the bank. In July of 1988, the Committee issued the *International Convergence of Capital Measurements and Capital Standards,* known informally as *Basel I.*

Basel I created a risk-based capital scheme based on four *pillars.* The first pillar, *constituents of capital,* defined the elements of Tier 1 and Tier 2 capital. The second pillar, *asset risk weighting,* provided for risk-weighting of asset classes into four categories: zero percent, 20 percent, 50 percent, and 100 percent. The third pillar, *target standard ratio,* imposed an eight percent minimum risk-weighted capital ratio, at least half of which (four percent) must be Tier 1. Pillar 4, or *transitional and implementing agreements,* urged banking regulators to support these capital requirements with strong surveillance and enforcement. All of the major U.S. banking regulators subsequently adopted capital requirements based on Basel I.[15]

Basel I, however, was subject to significant domestic and international criticism. One criticism was that the risk-weightings only accounted for credit risk. In other words, Basel I did not provide a capital buffer for potential loss from other risks, such as operational risk, market risk, interest rate risk, legal risk, currency risk, and reputational risk.[16] The U.S. banking regulators compensated for the capital requirements associated with these additional risks by imposing a separate capital ratio, the leverage ratio, which was not based on the credit risk-weighted assets but was based on *total* assets. Another criticism of Basel I was that the risk-weightings were too broad and general, and that within a particular asset class individual assets should not all be risk-weighted at, say, 50 percent, but should be classified with more specificity. For example, loans to corporations are of varying credit quality and should not all carry the same risk-weighting. Again, the leverage ratio helps compensate for this lack of granularity in credit-risk weighting. Also, Basel I did not account for new asset classes, such as the securitizations that were first making an appearance during the 1980s.

Due in part to the criticisms of Basel I, the Basel Committee set to work on another agreement, the *International Convergence of Capital Measurement and Capital Standards: A Revised Framework,* which was finalized in 2006. This *New Accord,* also known as *Basel II,* greatly expands the scope, technicality, and depth of Basel I. Basel II provides for new approaches to credit risk; adapts to the securitization of bank assets; covers market, operational, and interest rate risk; and incorporates market based surveillance (market discipline) and regulation.

Basel II has three pillars. Pillar one, *minimum capital requirements,* created a formula for risk-based capital that translates roughly into Reserves (capital) = (.08)(Risk-Weighted Assets) + (Operational Risk Reserves) + (Market Risk Reserves). Basel II provided alternative ways to calculate credit-risk weights and operational reserves.[17] Pillar two, *the supervisory review process,* required that banking regulators provide significant oversight and enforcement of capital standards. Pillar three, *market discipline,* required

[15] References to banking regulators here mean the Federal Reserve (Fed), Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), and the Federal Deposit Insurance Corporation (FDIC).

[16] "Operational risk" includes risks such as loss due to fraud and legal/compliance risk. "Market risk" includes losses due to general economic downturns and market fluctuations, but also sometimes includes the other enumerated risks (e.g., reputational and interest rate risk).

[17] The other banking agencies, in their July 2008 proposed rulemaking, listed six different Basel II methods for calculating the reserve requirements associated with credit and operational risk:

Credit-Risk Weighting Methods:
Standardized
Foundation Internal ratings based
Advanced internal ratings based
Operation Risk Reserve Methods:
Standarized
Basic Indicator Approach (BIA)
Advanced Measurement (AMA)

that banks make significant public disclosure of their investments and activities to help control risk through market discipline.

The primary criticism of Basel II is the complexity associated with its more comprehensive, and more complex, risk and risk-weighting scheme.

Status of the Capital Schemes of the Banking Regulators

As noted above, the primary banking regulators have adopted capital schemes based on Basel I, referred to here as the "general risk-based capital rules." Since the completion of Basel II these regulators have published three important rulemakings related to capital.

- In September 2006, the banking regulators issued a proposed rule with *Advanced* Basel II risk standards and measurements. Generally, the proposal would have permitted banks to adopt their own methodology for calculating credit and operation risks, so long as the methodology complied with the three pillars of Basel II and the banks could justify the methodology to the regulators. In December 2007, the regulators finalized this Advanced Basel II rulemaking.[18] Compliance with this Advanced methodology is mandatory for large banks (i.e., above $250 billion), and optional for all other banks.
- In December 2006, the banking regulators published proposed improvements to the general risk-based capital rules, which they labeled as the *Basel IA NPR*.[19] This Basel IA NPR stated: "A banking organization would be able to elect to adopt these proposed revisions or remain subject to the Agencies' existing risk-based capital rules, unless it uses the Advanced Capital Adequacy Framework proposed in the notice of proposed rulemaking published in September 2006." The banking regulators, however, never adopted these proposed improvements.
- In July 2008, the banking agencies published a proposed Basel II rulemaking called the *Standardized Framework*.[20] The preamble to this NPR noted that the "[a]gencies have decided not to finalize the Basel IA NPR and to propose instead a new risk-based capital framework that would implement the Standardized Framework for credit risk, the Basic Indicator Approach for operational risk, and related disclosure requirements," and "[m]any commenters felt the Basel II Standardized Framework is more risk sensitive than the Basel IA NPR and would more appropriately address the industry's economic concerns regarding domestic and international competitiveness." Under this proposed Basel II Standardized Framework banks that are not required to use the Basel II Advanced approach have the option of either continuing with existing (pre-Basel IA) general risk-based capital rules or opting into the new Basel II Standardized Framework. Also, regardless of whether a bank opts to continue under the Basel I rules or the Basel II Standardized Framework rules, the banking regulators indicated that they will continue to require a minimum leverage ratio as well as risk-based capital ratios. As of October 2009, the banking regulators, however, had not adopted a final Basel II Standardized rulemaking.

In determining how to amend the existing capital requirements of part 704 to meet the needs of corporates, NPCUs, and the NCUSIF, the Board concluded that the ideal would be a corporate capital scheme that provides sufficient capital protection against risk without undue complexity. The scheme needs to take into account the capital schemes of the banking regulators, so as to give external entities some comfort with the scheme, while including capital elements that account for the unique nature of corporate as member-owned cooperatives serving other member-owned cooperatives. The capital scheme must also account for the fact that corporates have limited means to raise capital because, for example, they cannot issue stock.

The Advanced Basel II approach appears inappropriate for corporates at this time. The Advanced approach is more complex than necessary, and the other regulators do not require it for banks with less than $250 billion in assets. The Standardized Basel II approach also appears inappropriate for corporates because the other regulators have not yet finalized their Standardized methodology and could make significant changes to that methodology. In addition, even when the other regulators do finalize their Basel II Standardized Framework, they will permit banks smaller than $250 billion in size to elect to continue under the Basel I rules. If NCUA adopted a Basel II Standardized Framework, NCUA would need to have both a Basel II and a Basel I rule for corporates to be consistent with the rules of the other regulators—which would add an additional level of complexity to the pending NCUA rulemaking. The Board has determined that, given this fact and the relative size of corporates and their activity base, the NCUA should adopt a corporate capital rule based on the existing general risk-based capital rules of the other regulators, that is, the Basel I rules. The Basel I standards, when combined with investment and ALM requirements that limit noncredit risk and a robust leverage ratio requirement, should ensure corporates have the capital they need to cover noncredit risks and to reserve for weaknesses in the Basel I credit risk methodology. The Board believes use of the existing Basel I format provides the best synthesis of capital requirements and ease of application.[21]

In crafting the proposed capital rule, NCUA closely examined the capital rules of the federal banking regulators. In particular, NCUA looked to the capital rules of the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS), the primary regulators of federally-chartered banks.[22] The NCUA also looked to the capital rules of the Federal Deposit Insurance Corporation (FDIC) for state chartered nonmember banks, since both the NCUA and the FDIC function as federal account insurers.[23] The Board adapted these rules, as much as possible, to the capital needs of corporates, in consonance with the differences between credit unions and banks and with a view toward simplification wherever possible.

The NCUA also looked to the OTS' PCA regulations, and Section 38 of the Federal Deposit Insurance Act (FDIA), in drafting proposed regulations for corporates on the consequences of having inadequate capital.[24] The proposed PCA regulations are discussed later in this preamble.

The NCUA believes that corporates operating with adequate capital have more incentive and are better positioned to evaluate the potential risks and rewards inherent in various activities. Thus, a corporate operating with more than minimum amounts of capital may be permitted a wider range of activities

[18] 72 FR 69288 (Dec. 7, 2007).

[19] 71 FR 77446 (Dec. 26, 2006).

[20] 73 FR 43983 (July 29, 2008).

[21] To understand the length and complexity of the Basel I capital rules alone, the OTS Basel I capital provisions fill up 35 full pages in the Code of Federal Regulations (CFR), and the OTS Prompt Corrective Action provisions fill up another 10 full CFR pages, for a total of 45 pages. These two OTS rulemakings together are twice as long as NCUA's entire corporate rule, Part 704, which fills up about 23 CFR pages. The proposed Basel II Standardized and the final Basel II Advanced rules are even longer.

[22] See 12 CFR part 567 (OTS Capital Rules) and 12 CFR part 3 (OCC Capital Rules). The OTS rules were of particular interest the mutual savings banks regulated by the OTS, like credit unions, are structured as mutual organizations.

[23] See 12 CFR part 325 (FDIC capital rules).

[24] 12 CFR 565 (OTS' Prompt Corrective Action rules); and 18 U.S.C. 1831o (FDIA Prompt Corrective Action).

without as much direct regulatory restriction, subject only to supervisory review.

Structure of Proposed Capital Regulations

The proposed changes to the capital requirements of part 704 affect three different sections.

Proposed § 704.3 establishes new risk-based and leveraged capital ratios and standards. The credit risk categories that are used in determining a corporate's risk-weighted assets appear in a proposed new Appendix C to part 704.

Proposed amendments to § 704.2 contain revised definitions of terms used in the capital standards. The permissible components of a corporate's capital base, including which items qualify as core capital, which items qualify as supplementary capital, and which items must be deducted in determining the corporate's capital base for purposes of the risk-based and leverage ratio standards are set forth in proposed § 704.2.

Proposed § 704.4, prompt corrective action, outlines the potential consequences of a corporate's failure to meet any of its regulatory capital requirements.

Proposed § 704.3 Corporate Credit Union Capital

Overview

The proposed rule establishes three standards that a corporate must satisfy in order to meet its capital requirement: a leverage ratio of adjusted core capital to moving daily average net assets (DANA), a tier 1 risk-based capital ratio of that same adjusted core capital over moving daily average net risk-based assets (DANRA), and a total risk-based capital standard expressed as a percentage of total capital to moving DANRA.

The two risk-based capital standards address the credit risk inherent in the assets in a corporate's investment portfolio and activities. Of course, there are other risks that are inherent in corporates and their portfolios and activities, such as market risk, interest rate risk, liquidity risk, and the risk of fraud. The leverage ratio requirement is intended to ensure that no matter how free from credit risk a corporate may be, it must maintain a minimum amount of capital measured in terms of its total assets as protection against risks other than credit risk. While there are other, important provisions of the existing corporate rule and the proposal that place limits around these noncredit risks, these risks still exist and are significant.[25] Accordingly, a minimum leverage ratio requirement is essential.

These proposed capital measurements and associated minimums are similar to those described in Basel I and adopted by the federal banking regulators. There are some minor differences, reflecting the mutual organization of corporates and the unique role they play in the credit union system. For example, this proposal employs average asset calculations in the capital ratio denominators, and not the period-end assets employed by the banking regulators. This reflects the corporate's unique role as a liquidity provider, as discussed further below. The proposal also does not include a tangible capital or tangible equity requirement.[26] On the other hand, the proposal does require that corporates build and maintain a certain amount of retained earnings to satisfy their minimum leverage ratio requirement.

Elements of Capital

As discussed above, the current part 704 sets forth three different categories of capital: retained earnings, PIC, and MCAs. These elements of capital are divided by moving DANA to obtain the capital ratio. A corporate must maintain a minimum four percent capital ratio.

MCAs are currently defined in part 704 as:

> [F]unds contributed by members that: are adjustable balance with a minimum withdrawal notice of 3 years or are term certificates with a minimum term of 3 years; are available to cover losses that exceed retained earnings and paid-in capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

12 CFR 704.2. The proposed rule changes the nomenclature for MCAs, renaming them with a more descriptive title: *nonperpetual contributed capital accounts* (NCAs). This proposed retitling summarizes the substantive difference between MCAs and PIC and reflects that fact that the proposal will permit corporates to issue NCAs to both members and nonmembers.[27] The proposal specifically defines NCAs as follows:

> *Nonperpetual capital* means funds contributed by members or nonmembers that: are term certificates with a minimum term of five years or that have an indefinite term (i.e., no maturity) with a minimum withdrawal notice of five years; are available to cover losses that exceed retained earnings and perpetual contributed capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings. In the event the corporate is liquidated, the holders of nonperpetual capital accounts (NCAs) will claim equally. These claims will be subordinate to all other claims (including NCUSIF claims), except that any claims by the holders of perpetual contributed capital (PCC) will be subordinate to the claims of holders of NCAs.

The currently permissible three-year term MCAs, and MCAs that are adjustable balance over a short period of time, are insufficiently permanent to meet the definition of capital as described in the Basel accords and as adopted by the federal banking regulators.[28] To qualify as capital, the proposal requires that hybrid debt instruments such as nonperpetual contributed capital accounts (NCAs) be term instruments of an initial maturity of at least five years or, if structured as indefinite notice (or "no maturity") accounts, must have a notice period of at least five years.

Accounts that can adjust automatically as permitted under the current rule on a periodic basis are also of insufficient permanency. A member can rapidly manipulate its share balances in a corporate, so NCA adjustments based on share balances have little permanency—and a member can even manipulate its asset size to some extent and so that measure also does not ensure the necessary capital permanency. The proposed redefinition of NCAs to eliminate adjustable balance accounts helps ensure permanency and so ensure that NCAs reflect the basic requirements of true capital. Although the proposal eliminates adjustable balance capital accounts, a corporate may enter into an agreement with a member where the member commits to providing additional capital if the member uses certain services or increases its shares at the corporate above a certain level.

The current part 704 permits a corporate to issue paid-in capital to both members and nonmembers, but the membership capital account, as suggested by its name, is currently available only to members of the corporate. Corporates may, of course, borrow funds from various entities under various terms, and the Board believe that if a corporate issues long-term subordinate debt to nonmembers under terms and conditions identical to

[25] For example, the interest rate sensitivity analysis required by § 704.8(d) of the current corporate rule controls for, but does not eliminate, interest rate risk. Likewise, the provisions in this proposed rule that would control the mismatch in the duration of a corporate's assets and liabilities would limit, but not eliminate, the risk of spread widening.

[26] *See, e.g.*, 12 CFR 567.2(a)(3).

[27] PIC will also be retitled as *perpetual contributed capital*, as discussed further below.

[28] *See, e.g.*, 12 CFR 3.100(f) (OCC requires minimum five year term).

the current membership capital, the corporate should be able to treat such nonmember subordinated debt as capital in the same manner it treats membership capital accounts. Accordingly, the proposal permits both members and nonmembers to invest in nonperpetual contributed capital accounts (NCAs).

Currently, Part 704 Defines *Paid-In Capital* (PIC) as Follows:

> Paid-in capital means accounts or other interests of a corporate that: are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

12 CFR 704.2. The proposal does not make any change to the definition of PIC except to rename PIC as *perpetual contributed capital* (PCC). To ensure that a corporate can function as a viable entity, it must be clear to creditors, both current and future, that capital in the form of PCC and NCAs protect the creditors against any losses borne by the corporates. Capital instruments, to perform their function as capital, must be depleted when needed to cover corporate losses.

Accordingly, the proposal also adds the following definition of *available to cover losses* in § 704.2 to clarify the meaning of that phrase:

> *Available to cover losses that exceed retained earnings* means that the funds are available to cover operating losses realized, in accordance with generally accepted accounting principles (GAAP), by the corporate credit union that exceed retained earnings. Likewise, *available to cover losses that exceed retained earnings and perpetual contributed capital* means that the funds are available to cover operating losses realized, in accordance with GAAP, by the corporate credit union that exceed retained earnings and perpetual contributed capital. Any such losses must be distributed *pro rata* at the time the loss is realized first among the holders of perpetual contributed capital accounts (PCC), and when all PCC is exhausted, then *pro rata* among all nonperpetual contributed capital accounts (NCAs), all subject to the optional prioritization in Appendix A of this Part. To the extent that any contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances. In addition, contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

This language is similar to that used to define the phrase *available to cover losses* as it relates to secondary capital in NCUA's low income credit union rule. 12 CFR 701.34(b)(7).

The proposal defines *core capital* as Generally Accepted Accounting Principles (GAAP) retained earnings, PCC, the retained earnings of any acquired credit union if the acquisition was a mutual combination, and certain minority interests in the equity accounts of CUSOs that are fully consolidated. This definition is the same as the current § 704.2 definition, with the addition of any minority interests in the equity accounts of CUSOs that are fully consolidated with the corporate. So, for example, if a corporate owned 90 percent of the equity in a CUSO, with 10 percent equity owned by third parties, and the corporate consolidated its financials with the CUSO, the corporate could include the remaining 10 percent minority interest in its Tier 1 capital. This treatment is consistent with the treatment afforded such minority interests by the other regulators.[29]

Also, the terms *core capital* and *Tier 1 capital* are used synonymously in this proposal.

The proposal further defines *supplementary capital* as including certain portions of its NCAs, GAAP allowance for loan and lease losses, and net unrealized gains on available-for-sale equity securities with readily determinable fair values. During the last five years of an nonperpetual contributed capital account, the amount that may be considered supplementary capital is reduced, on a monthly basis, until the amount reaches zero when the account has only one year of life remaining, all as described in paragraph 704.3(b)(3). This reduction is consistent with the current corporate rule and the capital regulations of the other regulators. A corporate may also include its allowance for loan and lease losses in supplementary capital, up to a maximum of 1.25 percent of risk-weighted assets. This is also consistent with the capital regulations of the other regulators. As noted by the OCC:

> The allowance for loan and lease losses is intended to absorb future losses. Although future losses may not be identified specifically at the time a provision is made, a presumption exists that losses are inherent in the loan and lease portfolio. The obvious link between the allowance and inherent losses in the loan and lease portfolio precludes it from qualifying as Tier 1 capital, which encompasses only the purest and most stable forms of capital. Furthermore, it is intended that the loan loss reserves which qualify for inclusion as Tier 2 capital will be general in nature. That is, any portion of the allowance for loan and lease losses which is ascribed to particular assets that have been identified as possessing a reasonable probability of some loss is not to be included as Tier 2 capital * * *. Beyond the clearly identified specific loan loss reserves, it is difficult to distinguish between the portion of the loan loss reserve that is freely available to absorb future losses within the portfolio and the portion that reflects likely losses on existing problem or troubled loans. However, a bank that maintains a relatively large allowance for loan and lease losses usually has a relatively greater incidence of identified asset quality problems in its loan and lease portfolio, and in this situation the entire allowance for loan and lease losses cannot be considered to be a true general reserve for the purposes of risk-based capital. Therefore, a standard percentage limitation, based on total risk-weighted assets, is the most reasonable method of eliminating the bulk of the non-qualifying loan loss reserves from banks' capital calculations. The figure of 1.25 percent of risk-weighted assets was determined on the basis of historical data * * *.
>
> 54 FR 4168 (Jan. 27, 1989).

The proposal also provides that a corporate may include 45 percent of its unrealized gains on available-for-sale equity securities in supplementary capital. Unrealized gains are unrealized holding gains, net of unrealized holding losses, calculated as the amount, if any, by which fair value exceeds historical cost. The proposal further provides that NCUA may disallow such inclusion in the calculation of supplementary capital if the NCUA determines that the securities are not prudently valued. Again, this is similar to how the other regulators define supplementary capital.[30] Although it is unlikely that corporates will hold much in the way of equity securities, they might have some equity securities in CUSOs. Because the 45 percent limitation used by the banking regulators includes the effects of possible taxation upon sale, and corporates are not subject to income taxation, the Board invites comment on the proposed 45 percent limitation.[31]

The terms *supplementary capital* and *Tier 2 capital* are used synonymously in this preamble and the proposal.

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[29] *See, e.g.*, 12 CFR 567.5(a)(1)(iii) (OTS definition of Tier 1 capital); 12 CFR part 3, Appendix A, § 2(a)(3) (OCC definition of Tier 1 capital). "[M]inority interests in the equity accounts of consolidated subsidiaries * * * [are] accorded Tier 1 treatment because, as a general rule, [they] represent equity that is freely available to absorb losses in operating subsidiaries.'" Todd Eveson, "Financial and Bank Holding Company Issuance of Trust Preferred Securities," 6 N.C. Banking Inst. 315, 321 (2002).

[30] *See, e.g.*, 12 CFR 567.5(a) (OTS capital rule).

[31] "The Basel Accord also permits institutions to include up to 45 percent of the pretax net unrealized gains on equity securities in supplementary capital. As explained in the Basel Accord, the 55 percent discount is applied to the unrealized gains to reflect the potential volatility of this form of unrealized capital, as well as the tax liability charges that generally would be incurred if the unrealized gain were realized or otherwise taxed currently." 63 FR 46518 (Sept. 1, 1998) (Discussion of joint FDIC, OTS, and OCC capital rulemaking).

Nonperpetual contributed capital is a form of Tier 2 capital.

The use of core capital and supplementary capital, and their incorporation into the proposed minimum capital ratios, is discussed further in the following paragraph-by-paragraph summary of the proposed § 704.3.

Paragraph-by-Paragraph Analysis of § 704.3

Paragraph 704.3(a) Capital Requirements

This proposed paragraph (a) requires a corporate to maintain, at all times, three minimum capital ratios. Paragraph (a)(1) requires all corporates maintain a leverage ratio of 4.0 percent or greater, a Tier 1 risk-based capital ratio of 4.0 percent or greater, and a total risk-based capital ratio of 8.0 percent or greater. Each of these ratios are further defined in § 704.2 as discussed below. Paragraph 704.3(a)(2) continues the existing requirement that a corporate have a capital plan in place to achieve and maintain the necessary capital. Paragraph (a)(3) requires that the corporate prepare and submit a retained earnings accumulation plan if, under certain circumstances described below, the corporate is not making sufficient progress in building the necessary retained earnings to satisfy its future minimum leverage ratio requirements.

Leverage Ratio

The proposed leverage ratio is defined in the proposal as the adjusted core capital divided by moving DANA. As discussed above, the leverage ratio ensures that the corporate has adequate capital to provide for losses other than credit losses. Paragraph 704.3(a) requires a minimum leverage ratio of 4.0 percent. The capital numerator, and the asset denominator, of the leverage ratio are discussed below.

Leverage Ratio Denominator: Moving DANA

The proposal employs moving DANA as the leverage ratio denominator.

Moving DANA means the average of DANA for the month being measured and the previous eleven (11) months. DANA means the average of net assets calculated for each day during the period (which would be the previous month).

Net assets means total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions. For its own account, a corporate's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net assets.

This is virtually the same denominator employed in the current part 704 for the total capital ratio. The proposal includes a slight modification to make clear that any asset deducted from core capital to obtain adjusted core capital (*i.e.*, the leverage ratio numerator) should likewise be deducted from the denominator.

The proposed leverage ratio differs from that of the banking regulators in that the proposal uses a moving 12-month average of assets where the other regulators use period-end assets. The Board believes that the corporates, in their role as liquidity providers and liquidity managers for natural person credit unions, need some flexibility to handle seasonal variations in total assets—and moving DANA provides that flexibility. Proposed paragraph 704.3(e), however, empowers the NCUA, in appropriate cases, to direct that a particular corporate use period-end assets in its capital ratio calculations rather than moving DANA.

Leverage Ratio Numerator: Adjusted Core Capital

As discussed above, core capital generally means the sum of a corporate's retained earnings, as calculated under GAAP, and perpetual contributed capital.[32] To obtain adjusted core capital, the proposal requires the corporate to make several modifications to core capital.

First, the corporate must deduct an amount equal to the amount of the corporate's intangible assets that exceed one half percent of the corporate's moving DANA. Generally, intangible assets are difficult to value and highly volatile. In addition, many forms of intangible assets, such as goodwill, decline in value if an entity suffers losses, which is the point in time that the permanency of capital is most important. The other regulators have recognized these problems with intangible assets and so generally require banks to deduct problematic intangibles from both assets and capital when calculating core capital ratios. Corporates, however, do not generally maintain intangibles on their books. The Board, therefore, is proposing that intangibles of a *de minimus* amount (one half of one percent of total assets) may be treated just like other assets in the capital calculation. However, intangibles above this *de minimus* amount must be deducted from both core capital (the numerator of the capital ratios) and assets (the denominator). This treatment of intangibles is similar to the treatment given intangibles by the other regulators.[33]

The proposal, however, provides some flexibility on the treatment of intangibles. The NCUA, on its own initiative or upon application from a corporate, may direct that a particular corporate add some or all of these excess intangibles back into the corporate's adjusted core capital and associated assets. In making this determination, the NCUA will consider the volatility and permanency of the particular intangible and the overall financial condition of the particular corporate.

Second, the corporate must deduct investments, both equity and debt, from consolidated CUSOs. To include these investments would overstate the amount of capital available to absorb losses in the consolidated entity. This treatment of these investments is similar to the treatment given these investments by the other regulators.[34]

Third, if the corporate credit union, on or after twelve months following the publication of the final rule, contributes new capital or renews existing capital to another corporate credit union, the corporate must deduct an amount equal to the aggregate of such new or renewed capital. Because the corporate universe is so small, and may get even smaller in the future, the Board is concerned that capital investment between two or more corporates can endanger the stability of the entire corporate system and, ultimately, the stability of the entire credit union system. Accordingly, this proposed deduction from corporate capital discourages capital investment between corporates. For example, without the deduction corporate A might place significant capital in corporate B, which then, in turn, might place significant capital in corporate C. Losses in corporate C might then cause corresponding losses in corporates A and B which, in turn, may have to pass some of those losses to their natural person credit union members. The Board invites comment on this proposed deduction from capital, including whether there should be an exception for *de minimus* member capital contributions between corporates and, if so, how that exception should be

[32] For a corporate that acquires another credit union in a mutual combination, core capital also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

[33] *See, e.g.*, 12 CFR 567.5(a)(2) (OTS capital rule).

[34] *See, e.g.*, 12 CFR 567.5(a)(2)(iv) (OTS capital rule).

defined. The Board notes that corporates will have some time to adapt to this deduction, since it will not be effective for 12 months and, even then, will not apply to preexisting capital accounts unless the account is renewed in some fashion (*e.g.*, renewal of an NCA instrument upon maturity).

The current part 704 encourages corporates to achieve and maintain retained earnings at 2 percent of assets, but does not actually require them to do so. The Board believes that some regulatory mechanism to force corporates to build retained earnings is necessary. In the long run, contributed capital like PCC is a supplement to retained earnings, but PCC is not an entirely adequate replacement for retained earnings. As demonstrated in the recent corporate crisis, the depletion of the contributed capital at corporates put severe, procyclical stress on their member natural person credit unions. While this situation cannot be entirely avoided in the future, it can be mitigated through retained earnings growth. Accordingly, the proposal requires that, after an appropriate phase-in period, a certain percentage of core capital consist of retained earnings.

The initial adjustment to core capital, effective six years after the date of publication of the final rule, will require that a corporate deduct from core capital any amount of PCC that causes PCC minus retained earnings, all divided by moving daily average net assets (DANA), to exceed two percent. The effect of this provision is to require that, for a corporate to achieve the minimum four percent leverage ratio necessary for adequate capitalization, it must have at least 100 bp of retained earnings at the six year mark. The remaining 300 bp in the ratio numerator may consist of either PCC or retained earnings. Similarly, to have a five percent leverage ratio at the six year mark and thus be well capitalized, a corporate must have 150 bp of retained earnings, and the remaining 350 bp in the ratio numerator may consist of PCC. This adjustment to core capital will, then, force corporates to work toward building their retained earnings.

The Board, however, believes that, ideally, a corporate should continue to increase its retained earnings and reduce its reliance on contributed capital. The second adjustment to core capital, effective ten years after the date of publication of the final rule, will require that a corporate deduct from core capital any amount of PCC that causes PCC to exceed retained earnings. The effect of this provision is to require that, for a corporate to have a four percent leverage ratio at the ten year mark and thus be adequately capitalized, the corporate must have at least 200 bp of retained earnings. The remaining 200 bp in the ratio numerator may consist of PCC. Similarly, to have a five percent leverage ratio at the ten year mark and thus be adequately capitalized, a corporate must have 250 bp of retained earnings, and the remaining 250 bp in the ratio numerator may consist of PCC.

Although the first explicit retained earnings requirement will not become effective for six years, the Board recognizes that corporates must work hard during the entire six year period to build retained earnings. Accordingly, paragraph 704.3(a)(3) provides that, beginning with the first call report submitted by the corporate three years after the date of the final rule:

> [A] corporate credit union must calculate and report the ratio of its retained earnings to its moving daily average net assets. If this ratio is less than 0.45 percent, the corporate credit union must, within 30 days, submit a retained earnings accumulation plan to the NCUA for NCUA's approval. The plan must contain a detailed explanation of how the corporate credit union will accumulate earnings sufficient to meet all its future minimum leverage ratio requirements, including specific semiannual milestones for accumulating retained earnings. If the corporate credit union fails to submit a plan acceptable to NCUA, or fails to comply with any element of a plan approved by NCUA, the corporate will immediately be classified as significantly undercapitalized or, if already significantly undercapitalized, as critically undercapitalized. The corporate credit union will be subject to all the associated prompt corrective actions under § 704.4 of this part.

The intent of this retained earnings accumulation plan (REAP) provision is to ensure that corporates strive for, and attain, retained earnings growth rates that are adequate to achieve 100 bp of retained earnings by the end of year six and 200 bp of retained earnings by the end of year ten.

Adequate retained earnings are critical to the health of the corporate system going forward. It is the Board's intent that, if a corporate is subject to a REAP and fails to meet any of the established retained earnings milestones, NCUA will take decisive action under the prompt corrective action authorities of 704.4. Included among those authorities are replacement of the board and senior management, and liquidation, conservatorship or consolidation of the corporate. These actions are discretionary on NCUA's part under 704.4, however, and the NCUA Board requests comment on whether any such actions should be mandatory for a corporate that fails to meet its REAP requirements.

In addition to the REAP provision in paragraph 704.8(a)(3) above, the proposal contains other tools to deal with corporates that are either unable, or unwilling, to build retained earnings at an adequate pace during the phase-in period. For example, proposed § 704.3(d), discussed further below, permits the Board to establish different minimum capital requirements for individual corporates "upon a determination that the corporate credit union's capital is *or may become* inadequate in view of the credit union's circumstances." Proposed § 704.3(d)(2) (emphasis added). This provision also provides that "higher capital levels may be appropriate when NCUA determines that * * * the credit union has failed to properly plan for, or execute, necessary retained earnings growth." Proposed § 704.3(d)(2)(ix). NCUA could use this particular tool, and other PCA tools, to address capital inadequacies, if any—even *before* the third anniversary of the final rule and the associated requirement to prepare a REAP.

Tier 1 Risk-Based Capital Ratio

The proposal defines the Tier 1 risk-based capital ratio (T1RBCR) to mean the ratio of adjusted core capital to the moving daily average net risk-weighted assets. NCUA intends this ratio, along with the total risked-based capital ratio (TRBCR), to ensure that the corporate has sufficient capital to handle the credit risk associated with its investments and activities. The combination of the T1RBCR, and the TRBCR ratio discussed below, ensures that at least half of the capital used for purposes of protecting against losses associated with credit risk is the more permanent capital (*i.e.*, core capital). The other portion of capital used to protect against credit risk may be *Tier 2 capital*, also called *supplementary capital*, as discussed below in connection with the TRBCR.

T1RBCR Numerator: Adjusted Core Capital

The capital numerator for the T1RBCR is adjusted core capital, the same as the numerator for the leverage ratio discussed above.

T1RBCR Denominator: Moving Daily Average Net Risk-Weighted Assets (DANRA)

The moving DANRA means the average of daily average net risk-weighted assets for the month being measured and the previous eleven (11) months.

DANRA means the average of net risk-weighted assets calculated for each day during the period (which would be the previous month).

Net risk-weighted assets means risk-weighted assets less CLF stock subscriptions, CLF loans guaranteed by the NCUSIF, U.S. Central CLF certificates, and member reverse repurchase transactions. For its own account, a corporate's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net risk-weighted assets. To this point, this is similar to the moving DANA calculation in the denominator of the leverage ratio. However, the moving DANRA calculation required the use of *risk-weighted* assets, which are calculated as provided for in the proposed Appendix C of part 704. This risk-weighting process is described in detail in the section of the preamble devoted to Appendix C.

Total Risked-Based Capital Ratio

The total risk-based capital ratio means the ratio of total capital to moving DANRA.

The denominator, moving DANRA, is the same as the denominator for the T1RBCR, as discussed above. The numerator, "Total capital" means the sum of a corporate's adjusted core capital and its supplementary capital less the corporate's equity investments not otherwise deducted when calculating adjusted core capital.

Supplementary capital, or Tier 2 capital, generally means the sum of all the corporate's NCAs, except that at the beginning of each of the last five years of the life of an NCA instrument the amount that is eligible to be included as supplementary capital is reduced by 20 percent of the original amount of that instrument (net of redemptions). While, as discussed above, the proposal adjusts the definition of NCAs to make these accounts more permanent and bring them in line with the Basel requirements for supplementary capital, the value of these NCAs as a buffer against losses as the NCAs approach their maturity or withdrawal date. The proposed amortization schedule tracks the amortization used by the banking regulators for supplementary capital that takes this hybrid debt instrument form.

Paragraph 704.3(b) Requirements for Nonperpetual Contributed Capital

This proposed paragraph describes the NCA account terms and the various disclosure, transfer, and release requirements. This paragraph is similar to the existing 704.3(b), taking into account the change in NCA terms described above. The proposal also protects against the premature release of NCAs with the addition of the following new paragraph (b)(5):

> A corporate credit union may redeem nonperpetual contributed capital prior to maturity or the end of the notice period only with the prior approval of the NCUA.

Paragraph 704.3(c) Requirements for Perpetual Contributed Capital

This paragraph describes the PCC account terms and the various disclosure, transfer, and release requirements. Again, this paragraph is similar to the existing 704.3(c). As with NCA, the proposal protects against the premature release of PCC by permitting a corporate to call PCC only with NCUA's prior approval.

Paragraph 704.3(d) Individual Minimum Capital Requirements

Paragraph 704.3(d) provides that the NCUA may establish increased individual minimum capital requirements for a particular corporate upon a determination that the corporate's capital is or may become inadequate in view of the credit union's circumstances.

The proposal provides several examples where a greater minimum capital requirement may be appropriate, such as where a corporate:

- Is receiving special supervisory attention;
- Has or is expected to have losses resulting in capital inadequacy;
- Has a high degree of exposure to interest rate risk, prepayment risk, credit risk, concentration risk, certain risks arising from nontraditional activities or similar risks, or a high proportion of off-balance sheet risk;
- Has poor liquidity or cash flow;
- Is growing, either internally or through acquisitions, at such a rate that supervisory problems are presented that are not dealt with adequately by other NCUA regulations or other guidance;
- May be adversely affected by the activities or condition of its CUSOs or other persons or credit unions with which it has significant business relationships, including concentrations of credit;
- Has a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or that has loans or securities in nonperforming status or on which borrowers fail to comply with repayment terms;
- Has inadequate underwriting policies, standards, or procedures for its loans and investments;
- Has failed to properly plan for, or execute, necessary retained earnings growth; or
- Has a record of operational losses that exceeds the average of other, similarly situated corporates; has management deficiencies, including failure to adequately monitor and control financial and operating risks, particularly the risks presented by concentrations of credit and nontraditional activities; or has a poor record of supervisory compliance.

When the NCUA determines that a different minimum capital requirement is necessary or appropriate for a particular corporate, including minimum capital relating to classification as significant or critically undercapitalization, the NCUA will notify the corporate in writing of its proposed minimum capital requirements; the schedule for compliance with the new requirement; and the specific causes for determining that the higher individual minimum capital requirement is necessary or appropriate for the corporate. The NCUA will forward the notifying letter to the appropriate state supervisor if a state-chartered corporate would be subject to an individual minimum capital requirement.

The responses of the corporate and appropriate state supervisor must be in writing and must be delivered to the NCUA within 30 days after the date on which the notification was received. The NCUA may extend or shorten the time period for good cause.

The corporate's response must include any information that the credit union wants the NCUA to consider in deciding whether to establish or to amend an individual minimum capital requirement for the corporate, what the individual capital requirement should be, and, if applicable, what compliance schedule is appropriate for achieving the required capital level.

After expiration of the response period, the NCUA will decide whether or not the proposed individual minimum capital requirement should be established for the corporate, or whether that proposed requirement should be adopted in modified form, based on a review of the corporate's response and other relevant information. Failure to provide an adequate response will constitute a legal basis for prompt corrective action under § 704.4.

Paragraph 704.3(e) Reservation of Authority

Financial organizations are constantly developing innovative transactions that may not fit well into the various risk-weight categories in Appendix C to part 704. New investment activities may nominally fit into a particular risk-weight category or credit conversion factor, but impose risks on the holder at levels that are not commensurate with the nominal risk-weight or credit conversion factor for the asset, exposure or instrument. Accordingly, the proposal clarifies NCUA's authority over corporates, on a case-by-case basis, to determine the appropriate risk-weight for assets and credit equivalent amounts and the appropriate credit conversion factor for off-balance sheet items in these circumstances. Specifically, the NCUA may:

- Disregard any transaction entered into by a corporate primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this section;
- Require a corporate to compute its capital ratios on the basis of period-end, rather than average, assets when it is appropriate to carry out the purposes of part 704;
- Notwithstanding the definitions of core and supplementary capital in the corporate rule, find that a particular asset or core or supplementary capital component has characteristics or terms that diminish its contribution to a corporate's ability to absorb losses and require the discounting or deduction of such asset or component from the computation of core, supplementary, or total capital;
- Notwithstanding Appendix C of this section, look to the substance of a transaction, find that the assigned risk-weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the corporate, and may require the corporate to apply another risk-weight, credit equivalent amount, or credit conversion factor that the NCUA deems appropriate; and
- If Appendix C does not specifically assign a risk-weight, credit equivalent amount, or credit conversion factor to a particular asset or activity of the corporate, assign any risk-weight, credit equivalent amount, or credit conversion factor that it deems appropriate.

Exercise of this authority by NCUA may result in a higher or lower risk-weight for an asset or credit equivalent amount or a higher or lower credit conversion factor for an off-balance sheet item. This reservation of authority explicitly recognizes NCUA's retention of sufficient discretion to ensure that corporates, as they become involved with new types of financial assets and activities, will be treated appropriately under the regulatory capital standards.

Applicable State Regulator

Several paragraphs of this proposed § 704.3 on capital, and the proposed § 704.4 on prompt corrective action, refer to the *applicable state regulator* in connection with potential actions involving state chartered corporates. The proposal amends § 704.2 to define *applicable state regulator* as the prudential state regulator of a state chartered corporate.

Appendix A to Part 704—Capital Prioritization and Model Forms

The current Appendix A to part 704, entitled *Model Forms*, contains forms that members provide the corporate on an annual basis acknowledging the terms and conditions of the members' PIC and MCA accounts. The proposal renames Appendix A as *Capital Prioritization and Model Forms*. The new Appendix A has two parts. Part II contains amended model disclosure forms. Part I is new, and reads as follows:

Part I—Optional Capital Prioritization

Notwithstanding any other provision in this chapter, a corporate credit union, at its option, may determine that capital contributed to the corporate on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] will have priority, for purposes of availability to absorb losses and payout in liquidation, over capital contributed to the corporate before that date. The board of directors at a corporate credit union that desires to make this determination must:

(a) On or before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], adopt a resolution implementing its determination.

(b) Inform the credit union's members and NCUA, in writing and as soon as practicable after adoption of the resolution, of the contents of the board resolution.

(c) Ensure the credit union uses the appropriate initial and periodic Model Form disclosures in Part II below.

This option, if implemented by a corporate's board of directors, will give those entities that contribute new capital to the corporate starting 60 days after the publication of the final rule priority—in terms of availability to absorb losses and payout in liquidation—over those capital contributions made before that date. The purpose of this provision is to provide a tool for facilitating capital growth. The proposal amends the forms so that they are consistent with the proposed definitions of PCC and NCAs. These form changes include changing the notice and term of NCAs from three years to five years, eliminating references to adjustable balance NCAs, and describing in more detail the meanings of the phrase "available to cover losses." Because this new option will be available to corporates before the other new capital provisions go into effect, including the nomenclature changes (that is, from PIC to PCC, and from MCAs to NCCs), the proposal expands the number of model forms in Part II from the two current forms to eight forms.

The current paragraph (6) in the model forms reads as follows:

Where the corporate credit union is liquidated, membership capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF.

It is possible, for example, that a solvent corporate could be voluntarily liquidated and that there could be some funds remaining after payment to creditors, uninsured shareholders, and the NCUSIF. It is also possible (although unlikely) that the value of the assets of an insolvent, involuntarily liquidated corporate credit union could increase between the date of liquidation and the date the assets are sold, and there could then be some funds in the liquidation estate remaining after payment to the creditors, uninsured shareholders, and the NCUSIF. In both of these cases, the NCA holders, and possibly the PCC holders, would receive a distribution[35]—but this is only true to the extent that the NCAs and PCCs were not used in a previous fiscal year to cover losses. Once used to cover losses, the NCAs and PCC are gone to the extent so used, and all possible claims related to those accounts, including liquidation-based claims, are extinguished. Accordingly, the proposal adds the following clarifying language to the end of each paragraph (6):

However, [NCAs or PCCs] that are used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

The proposal also adds a conforming amendment to NCUA's involuntary liquidation rule, 12 CFR 709.10, to reflect the option to give new contributed capital payout priority.

[35] This possibility is recognized in NCUA's involuntary liquidation rule. 12 CFR 709.5(b)(7) and (9).

Appendix C to Part 704—Risk-Based Capital Ratios and Asset Risk-Weightings

A corporate's risk-based capital requirement is calculated based on the credit risk presented by both its on-balance sheet assets and off-balance sheet commitments and obligations. With certain limited exceptions, the asset base of a corporate is determined on a consolidated basis, *i.e.*, including its consolidated CUSOs. Assets are assigned a credit-risk weighting based upon their relative risk. Risk-weights are generally tied to the nature of the underlying obligor.

The risk-weightings range from zero percent for assets backed by the full faith and credit of the United States or that pose no credit risk to the corporate to 100 percent as the standard risk-weighting.

Off-balance sheet commitments are converted to a "credit equivalent" amount by using a conversion factor intended to estimate the likelihood that the contingent obligation will result in an actual obligation of the corporate and the potential size of loss such items may result in. That amount is then risk-weighted according to the risk associated with the underlying obligor, just as an on-balance sheet asset would be. The amount of risk-weighted assets will then be multiplied by a credit risk capital requirement to determine the minimum amount of capital required for that corporate.

The rule also sets forth the items that count as capital and that may be used to satisfy the risk-based capital requirement. "Core capital," or "tier 1 capital," includes items of a more permanent nature, such as PCC and GAAP retained earnings. Certain other items provide a somewhat lesser degree of protection, often because of their nonpermanent nature or their imposition of fixed obligations. These items are considered "supplementary capital," or "tier 2 capital," and include NCAs. Together, the sum of core and supplementary capital equal a corporate's "total capital."

Although both core and supplementary capital may be used in meeting the risk-based capital requirement, the amount of supplementary capital that may be counted toward that requirement is limited to the amount of the credit union's core capital through the use of the T1RBC ratio. Additional limits are placed upon certain types of supplementary capital. These limits may restrict the extent to which these forms of supplementary capital may be used to satisfy the corporate's capital requirement. Items that are deducted from a corporate's asset base in determining its assets are also deducted from its capital.

On-Balance Sheet Assets

The proposed amendments sets forth a system of risk-weighted assets similar to that used by the other federal banking regulators. Assets, in general, will be assigned to risk categories based on the degree of credit risk associated with the obligor or nature of the obligation. The categories include risk-weights of 0, 20, 50, and 100 percent.

The 100 percent category is the standard risk category. Assets not specifically included in another category fall within this category. Items that are less risky than a "standard risk asset" because of the traditional financial strength of the obligor, the default history of the asset type, or the guarantee or security backing the asset are assigned to a lower risk category. This reflects the Board's determination, mirroring in many ways the implicit determinations made by the market, that such assets present lower risks.

Risk-weighted assets are determined by taking the book value of each asset and multiplying it by the risk-weight assigned to it. Ownership interests in investment companies such as mutual funds are assigned risk-weights based upon the composition of the investment company's underlying portfolio of assets. The resulting values are added together to arrive at total risk assets. The amount of total risk assets is the amount against which the minimum capital requirement is applied.

Summary of Risk-Weights for On-Balance Sheet Assets

Zero percent weighting (Category 1). This category, presenting, in the Board's estimation, a nearly non-existent level of credit risk, includes:

- Cash;
- Securities issued by and other direct claims on the U.S. Government or its agencies or the central government of an Organization for Economic Cooperation and Development (OECD) country;
- Notes and obligations issued by or guaranteed by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund and backed by the full faith and credit of the United States Government;
- Deposit reserves at, claims on, and balances due from Federal Reserve Banks; the book value of paid-in Federal Reserve Bank stock;
- Assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country; and
- Certain claims on a qualifying securities firm that are collateralized by cash on deposit in the corporate or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country.

Twenty percent weighting (Category 2). This category contains items viewed as presenting a significantly lower level of risk than standard risk assets. It includes:

- Cash items in the process of collection;
- Assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, or collateralized by securities issued or guaranteed by the United States government or its agencies, or the central government of an OECD country;
- Certain securities issued by the U.S. Government or its agencies which are not backed by the full faith and credit of the United States Government;
- Certain securities issued by United States Government-sponsored agencies;
- Assets guaranteed by United States Government-sponsored agencies;
- Assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;
- Claims guaranteed by a qualifying securities firm, subject to certain conditions;
- Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;
- Balances due from and all claims on domestic depository institutions.
- The book value of paid-in Federal Home Loan Bank stock;
- Deposit reserves at, claims on, and balances due from the Federal Home Loan Banks;
- Assets collateralized by cash held in a segregated deposit account by the reporting corporate;
- Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member;[36]
- Assets collateralized by the current market value of securities issued by

[36] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member;

- All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country;
- Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less; and
- Local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the corporate has local currency liabilities in that country.

Fifty percent risk-weighting (Category 3). This category contains assets considered to present a moderate level of credit risk as compared to standard risk assets. It includes:

- Revenue bonds issued by any public-sector entity in an OECD country for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;
- Qualifying mortgage loans and qualifying multifamily mortgage loans;
- Certain privately-issued mortgage-backed securities; and
- Qualifying residential construction loans.

One hundred percent risk-weighting (Category 4). All assets not classified elsewhere or deducted from calculations of capital pursuant to §§ 704.2 and 704.3 are assigned to this category, which comprises standard risk assets. This category includes:

- Consumer loans;
- Commercial loans;
- Home equity loans;
- Non-qualifying mortgage loans;
- Non-qualifying multifamily mortgage loans;
- Residential construction loans;
- Land loans;
- Nonresidential construction loans;
- Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligations;
- Debt securities not specifically risk-weighted in another category;
- Investments in fixed assets and premises;
- Servicing assets;
- Interest-only strips receivable, other than credit-enhancing interest-only strips;
- Equity investments;
- The prorated assets of subsidiaries (except for the assets of consolidated CUSOs) to the extent such assets are included in adjusted total assets;
- All repossessed assets or assets that are more than 90 days past due; and
- Intangible assets not specifically weighted in some other category.

The term "prorated assets" means the total assets (as determined in the most recently available GAAP report) of a consolidated CUSO multiplied by the corporate credit union's percentage of ownership of that consolidated CUSO.

Corporates may take indirect ownership of assets, such as through a mutual fund. The proposal provides that investments representing an indirect holding of a pool of assets are assigned to risk-weight categories based upon the risk-weight that would be assigned to each category of assets in the pool, and described various methods for achieving that result. In no case, however, will any such investment be assigned a total risk-weight of less than 20 percent.

The proposal also recognizes that certain transactions or activities, such as derivatives transactions, may appear on corporate's balance sheet but are not specifically described in the Section II(a) on-balance sheet risk-weight categories. These items will be assigned risk-weights as described in Section II(b) or II(c) below, generally relating to off-balance sheet items.

Off-Balance Sheet Items

The Board is also proposing to incorporate off-balance sheet items in its calculation of risk-weighted assets, using a method similar to that used by the federal banking regulators.

Under the proposal, off-balance sheet items are incorporated into risk-weighted assets by first determining the on-balance sheet credit equivalent amounts for the items and then assigning the credit equivalent amounts to the appropriate risk category according to the obligor, or if relevant, the guarantor or the nature of the collateral.

For many types of off-balance sheet transactions, the risk-weight is determined by a two-step process. First, the notional principal, or face value, amount of the off-balance sheet item is multiplied by a credit conversion factor to arrive at a balance sheet "credit-equivalent amount." The conversion factor is based upon the relative likelihood that a credit obligation will result from the commitment. The credit-equivalent amount is then assigned to the appropriate risk category depending upon the obligor (e.g., to the 20 percent risk category if guaranteeing an obligation of a depository institution). For certain off-balance sheet contracts, however, including interest and exchange rate contracts, credit equivalent amounts are determined by summing two amounts: the current exposure and the estimated potential future exposure.

Summary of Conversion Factors for Off-Balance Sheet Items

Conversion factors—Group A—100 Percent. Direct credit substitutes are assigned to Group A. Direct credit substitutes are any irrevocable obligations in which a corporate has essentially the same credit risk as if it had made a direct loan to the obligor or account party. Direct credit substitutes include guarantees (or guarantee-type instruments) backing financial claims, such as outstanding securities, loans, and other financial obligations including those on behalf of CUSOs. Direct credit substitutes also include standby letters of credit, equivalent obligations, and forward agreements that are legally binding agreements (contractual obligations) to purchase assets with certain drawdowns at specified future dates.

Asset sales with recourse, if not already included on the balance sheet, are treated in the same way as direct credit substitutes. Such sales will be treated as if they did not occur. Capital will be required against the full amount sold for assets sold with recourse. Retention of the subordinated portion of a senior/subordinated loan participation or package of loans will be treated in the same manner as an asset sale with recourse. The minimum amount of capital required against loans sold to an institution with full recourse is determined by the type of obligor.

Group B—50 percent. This group includes transaction-related contingencies and unused commitments not falling within Group E. Transaction-related contingencies include performance bonds, performance standby letters of credit, warranties, and standby letters of credit related to particular transactions. These instruments are different from financial guarantee-type standby letters of credit in that they concern performance of nonfinancial or commercial contracts or undertakings. These instruments generally involve guaranteeing the account party's obligation to deliver a service or product in the conduct of its day-to-day business.

A commitment is defined as any arrangement between an institution and its customer that legally obligates the institution to extend credit to the customer in the form of loans or leases.

It also includes such undertakings as overdraft transactions. Normally, a commitment involves a written contract or agreement, a commitment fee, or some other form of consideration.

Commitments are included in risk-weighted assets regardless of whether they contain "material adverse change" clauses or other similar provisions. Commitments with material adverse change clauses are included in this category (rather than in a category carrying a smaller conversion factor) because they represent obligations that may involve risk if an institution funds the commitment before the customer's condition deteriorates, or before the deterioration is recognized. Moreover, while the Board does not wish to discourage the use of material adverse change clauses, some court decisions suggest that the presence of a material adverse change clause cannot necessarily be relied on to relieve an institution of its obligations pursuant to a commitment.

Only the unused portion of a commitment is treated as an off-balance sheet item. Amounts that are already drawn and outstanding under a commitment appear on the balance sheet; such amounts, therefore, will not be included as commitments for purposes of computing the risk-asset ratio.

Group C—20 percent. Group C includes short-term, self-liquidating, trade-related contingencies that arise from the movement of goods, including commercial letters of credit and other documentary letters of credit collateralized by the underlying shipments.

Group D—10 percent. Group D includes unused portions of eligible Asset-backed Commercial Paper (ABCP) liquidity facilities with an original maturity of one year or less. The ABCP risk-weighting treatment is similar to the risk-weighting employed by the other regulators. The proposal adds key terms related to the ABCP risk-weighting to the definitions section. 12 CFR 704.2.

Group E—Zero Percent. Group E includes unused commitments that are less than one year in maturity or that the corporate can, at its option, unconditionally (without cause) cancel. Facilities that, at the institution's option, are unconditionally cancelable at any time are not considered to be commitments, provided that the institution makes a separate credit decision before each drawdown under the facility. Unused retail credit card lines are deemed to fall under this group if the corporate has the unconditional option to cancel the card at any time.

Group F—Off balance sheet contracts; interest rate and foreign exchange contracts. Credit equivalent amounts for these contracts, including interest-rate swaps, futures, over-the-counter options, interest-rate options purchased (caps, floors and collars), foreign exchange rate contracts, and forward rate agreements are determined by summing two amounts: the current exposure and the estimated potential future exposure.

The current exposure (sometimes referred to as replacement cost) of a contract is derived from its market value. In most instances the initial market value of a contract is zero.[37] A corporate should mark all of its rate contracts to market to reflect the current value of the transaction in light of changes in the market price of the contracts or in the underlying interest or exchange rates. Unless the market value of a contract is zero, one party will always have a positive mark-to-market value for the contract, while the other party (counterparty) will have a negative mark-to-market value.

An institution holding a contract with a positive mark-to-market value is "in-the-money," that is, it would have the right to receive payment from the counterparty if the contract were terminated. Thus, an institution that is in-the-money on a contract is exposed to counterparty credit risk, since the counterparty could fail to make the expected payment. The potential loss is equal to the cost of replacing the terminated contract with a new contract that would generate the same expected cash flows under the existing market conditions. Therefore, the in-the-money institution's current exposure on the contract is equal to the market value of the contract.

An institution holding a contract with a negative mark-to-market value, on the other hand, is "out-of-the-money" on that contract, that is, if the contract were terminated, the institution would have an obligation to pay the counterparty. The institution with the negative mark-to-market value has no counterparty credit exposure because it is not entitled to any payment from the counterparty in the case of counterparty default. Consequently, a contract with a negative market value is assigned a current exposure of zero. A current exposure of zero is also assigned to a contract with a market value of zero, since neither party would suffer a loss in the event of contract termination. In summary, the current exposure of a rate contract equals either the positive market value of the contract or zero.

The second part of the credit equivalent amount for rate contracts, the estimated potential future exposure (often referred to as the add-on), is an amount that represents the potential future credit exposure of a contract over its remaining life. This exposure is calculated by multiplying the notional principal amount of the underlying contract by a credit conversion factor that is determined by the remaining maturity of the contract and the type of contract.

The potential future credit exposure is calculated for all contracts, regardless of whether the mark-to-market value is zero, positive, or negative. For interest rate contracts with a remaining maturity of one year or less, the credit conversion factor is 0 percent and for those over one year, the factor is .5 percent. For exchange rate contracts with a maturity of one year of less, the factor is 1 percent and for those over one year the factor is 5 percent. Because exchange rate contracts involve an exchange of principal upon maturity and are generally more volatile, they carry a higher conversion factor. No potential future credit exposure is calculated for single-currency interest-rate swaps in which payments are made based on two floating indices (basis swaps).

The potential future exposure is then added to the current exposure to arrive at a credit equivalent amount.[38] Each credit equivalent amount is then assigned to the appropriate risk category, according to the counterparty or, if relevant, the guarantor or the nature of the collateral. The maximum risk-weight applied to such rate contracts is 50 percent.

Netting and Risk-Based Capital Treatment of Off-Balance Sheet Contracts

Netting arrangements are a means of improving efficiency and reducing counterparty credit exposure. Often referred to as master netting contracts, these arrangements typically provide for both payment and close-out netting.

Payment netting provisions permit an institution to make payments to a counterparty on a net basis by offsetting payments it is obligated to make with

[37] An options contract has a positive value at inception, which reflects the premium paid by the purchaser. The value of the option may be reduced due to market movements but it cannot become negative. Therefore, unless an option has zero value, the purchaser of the option contract will always have some credit exposure, which may be greater than or less than the original purchase price, and the seller of the option contract will never have credit exposure.

[38] This method of determining credit equivalent amounts for rate contracts is known as the *current exposure method*, which is used by most banks under $250 billion in assets.

payments it is entitled to receive and, thus, to reduce its costs arising out of payment settlements. Close-out netting provisions permit the netting of credit exposures if a counterparty defaults or upon the occurrence of another event such as insolvency or bankruptcy. If such an event occurs, all outstanding contracts subject to the close-out provisions are terminated and accelerated, and their market values are determined. The positive and negative market values are then netted, or set off, against each other to arrive at a single net exposure to be paid by one party to the other upon final resolution of the default or other event.

The potential for close-out netting provisions to reduce counterparty credit risk, by limiting an institution's obligation to the net credit exposure, depends upon the legal enforceability of the netting contract, particularly in insolvency or bankruptcy.

Accordingly, the proposal permits a corporate, in determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, to net off-balance sheet rate contracts subject to a bilateral netting contract by offsetting positive and negative mark-to-market values, provided that the netting contract meets certain requirements, including that the bilateral netting contract creates a single, enforceable legal obligation for all individual off-balance sheet rate contracts covered by the contract.[39] A bilateral netting contract that contains a walkaway clause is not eligible for netting for purposes of calculating the current credit exposure amount. A walkaway clause is a provision in a netting contract that permits the non-defaulting counterparty to make only limited payments, or no payments at all, to the estate of the defaulter even if the defaulter is a net creditor under the contract.

Certain off-balance sheet rate contracts are not subject to the above calculation, and therefore, are not part of the denominator of a corporate's risk-based capital ratio. These include a foreign exchange rate contract with an original maturity of 14 calendar days or less; any interest rate or foreign exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract; and certain asset-backed commercial paper programs.

Recourse Obligations, Direct Credit Substitutes, and Certain Other Positions

The proposed rule provides additional risk-weighting provisions for recourse obligations, direct credit substitutes, and certain other positions. These terms generally relate to asset securitization and associated securities. A discussion of asset securitization follows.

Asset securitization is the process by which loans or other credit exposures are pooled and reconstituted into securities, with one or more classes or positions, that may then be sold. Securitization provides an efficient mechanism for depository institutions to buy and sell loan assets or credit exposures and thereby to increase the organization's liquidity.[40]

Securitizations typically carve up the risk of credit losses from the underlying assets and distribute it to different parties. The "first dollar," or most subordinate, loss position is first to absorb credit losses; the most "senior" investor position is last to absorb losses; and there may be one or more loss positions in between ("second dollar" loss positions). Each loss position functions as a credit enhancement for the more senior positions in the structure.

For residential mortgages sold through certain Federally-sponsored mortgage programs, a Federal government agency or Federal government-sponsored enterprise (GSE) guarantees the securities sold to investors and may assume the credit risk on the underlying mortgages. However, many of today's asset securitization programs involve assets that are not Federally supported in any way. Sellers of these privately securitized assets therefore often provide other forms of credit enhancement—that is, they take first or second dollar loss positions—to reduce investors' credit risk.

A seller may provide this credit enhancement itself through recourse arrangements. The proposed rule uses the term "recourse" to refer to the credit risk that a banking organization or credit union retains in connection with the transfer of its assets. Banks and credit unions have long provided recourse in connection with sales of whole loans or loan participations; today, recourse arrangements frequently are also associated with asset securitization programs. Depending on the type of securitization transaction, the sponsor of a securitization may provide a portion of the total credit enhancement internally, as part of the securitization structure, through the use of excess spread accounts, overcollateralization, retained subordinated interests, or other similar on-balance sheet assets. When these or other on-balance sheet internal enhancements are provided, the enhancements are "residual interests" for regulatory capital purposes. Such residual interests are a form of recourse.

A seller may also arrange for a third party to provide credit enhancement in an asset securitization.[41] If the third-party enhancement is provided by another banking organization, that organization assumes some portion of the assets' credit risk. In this final rule, all forms of third-party enhancements, i.e., all arrangements in which a banking organization assumes credit risk from third-party assets or other claims that it has not transferred, are referred to as "direct credit substitutes."[42] The economic substance of the credit risk from providing a direct credit substitute can be identical to its credit risk from retaining recourse on assets transferred.

Many asset securitizations use a combination of recourse and third-party enhancements to protect investors from credit risk. When third-party enhancements are not provided, the transferring entity often retains credit risk on the assets transferred.

[39] The Basel Supervisors' Committee issued a consultative paper on April 30, 1993, proposing an expanded recognition of netting arrangements in the regulations based on Basel I. The paper is entitled "The Prudential Supervision of Netting, Market Risks and Interest Rate Risk." The section applicable to netting is subtitled "The Supervisory Recognition of Netting for Capital Adequacy Purposes." Specifically, the Basel proposal states that netting for risk-based capital purposes is permissible if (1) In the event of a counterparty's failure to perform due to default, bankruptcy or liquidation, the corporate's claim (or obligation) would be to receive (or pay) only the net value of the sum of unrealized gains and losses on included transactions; (2) the banking entity has obtained written and reasoned legal opinions stating that in the event of legal challenge, the netting would be upheld in all relevant jurisdictions; and (3) the entity has documentation and procedures in place to ensure that the netting arrangements are kept under review in light of changes in relevant law. These criteria are contained in the proposed rule.

[40] For purposes of this discussion, references to "securitization" also include structured finance transactions or programs and synthetic transactions that generally create stratified credit risk positions, which may or may not be in the form of a security, whose performance is dependent upon a pool of loans or other credit exposures. Synthetic transactions bundle credit risks associated with on-balance sheet assets and off-balance sheet items and resell them into the market. For examples of synthetic securitization structures, *see* Banking Bulletin 99–43, November 15, 1999 (OCC).

[41] As used in this proposed rule, the terms "credit enhancement" and "enhancement" refer to both recourse arrangements, including residual interests, and direct credit substitutes.

[42] For purposes of this rule, purchased credit-enhancing interest-only strips are also "residual interests."

Risk Management of Exposures Arising From Securitization Activities

While asset securitization can enhance both credit availability and profitability, managing the risks associated with this activity can pose significant challenges. The risks involved, while not new to banking organizations and credit unions, may be less obvious and more complex than the risks of traditional lending. Specifically, securitization can involve credit, liquidity, operational, legal, and reputational risks in concentrations and forms that may not be fully recognized by management or adequately incorporated into a credit union's risk management systems.

Risk-Weighting of Direct Credit Substitutes and Recourse Obligations (Including Residual Interests and Credit Enhancing IO Strips)

The proposal defines four key terms: direct credit substitute, recourse obligations, residual interests, and credit enhancing interest only (IO) strips. The proposal defines a direct credit substitute as any arrangement in which a corporate assumes, in form or in substance, credit risk associated with an on-balance sheet or off-balance sheet asset or exposure that was not previously owned by the corporate (third-party asset) and the risk assumed by the corporate exceeds the *pro rata* share of the corporate's interest in the third-party asset.[43]

The proposal generally defines *recourse obligations* as a corporate's retention, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with Generally Accepted Accounting Principles) that exceeds a *pro rata* share of that corporate's claim on the asset. A recourse obligation typically arises when a corporate transfers assets in a sale and retains an explicit obligation to repurchase assets or to absorb losses due to a default on the payment of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may also exist implicitly if a corporate provides credit enhancement beyond any contractual obligation to support assets it has sold.[44]

As stated above, the primary difference between direct credit substitutes and recourse obligations is that recourse obligations involve the assumption of credit risk associated with assets that the corporate once owned but transferred, while direct credit substitutes involve the assumption of credit risk related to assets that the corporate does not own. Both direct credit substitutes and recourse obligations, however, can involve similar, and significant, credit risk. Accordingly the proposal outlines the same general process (with some exceptions) for risk-weighting both direct credit substitutes and recourse obligations.

The proposal requires that the corporate multiply the full amount of the credit-enhanced assets for which the corporate directly or indirectly retains or assumes credit risk by a 100 percent conversion factor. The corporate will then assign this credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral, in accordance with the risk-weight categories in Section II(a) of the Appendix. The proposal states that, for a direct credit substitute that is an on-balance sheet asset (e.g., a purchased subordinated security), a corporate must use the amount of the direct credit substitute and the full amount of the asset it supports, *i.e.*, all the more senior positions in the structure). This means, for example, that if a corporate invests in a senior mezzanine security that supports a more senior tranche, the corporate must use the full amount of the supported tranche, without regard for the existence or not of tranches subordinate to the mezzanine tranche. This can result in a risk-weighting several times greater than the risk-weighting for the most senior tranche.

There are two subsets of recourse obligations that receive special treatment for risk-weighting purposes: residual interests and credit enhancing interest only strips. In addition, in some asset transfers the transferring entity might retain two or more different recourse obligations on the same transferred assets, and the rule provides for a special risk-weighting calculation in this case. These situations are discussed further below.

The proposal defines *residual interests*, a form of recourse obligation, as any on-balance sheet asset that:

(1) Represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with Generally Accepted Accounting Principles) of financial assets, whether through a securitization or otherwise; and

(2) Exposes a corporate to credit risk directly or indirectly associated with the transferred asset that exceeds a *pro rata* share of that corporate's claim on the asset, whether through subordination provisions or other credit enhancement techniques.

Residual interests generally include credit-enhancing interest-only strips, spread accounts, cash collateral accounts, retained subordinated interests (and other forms of overcollateralization), and similar assets that function as a credit enhancement. Residual interests further include those exposures that, in substance, cause the corporate to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold. While residual interests generally do not include assets purchased from a third

[43] If a corporate has no claim on the third-party asset, then the corporate's assumption of any credit risk is a direct credit substitute. As stated in the definition, direct credit substitutes include:

(1) Financial standby letters of credit that support financial claims on a third party that exceed a corporate's *pro rata* share in the financial claim;

(2) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims that exceed a corporate's *pro rata* share in the financial claim;

(3) Purchased subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets, including any tranche of asset backed securities that is not the most senior tranche;

(4) Credit derivative contracts under which the corporate assumes more than its *pro rata* share of credit risk on a third-party asset or exposure;

(5) Loans or lines of credit that provide credit enhancement for the financial obligations of a third party;

(6) Purchased loan servicing assets if the servicer is responsible for credit losses or if the servicer makes or assumes credit-enhancing representations and warranties with respect to the loans serviced. Servicer cash advances as defined in this section are not direct credit substitutes;

(7) Clean-up calls on third party assets. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate are not direct credit substitutes; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

[44] As stated in the definition, recourse obligations include:

(1) Credit-enhancing representations and warranties made on transferred assets;

(2) Loan servicing assets retained pursuant to an agreement under which the corporate will be responsible for losses associated with the loans serviced. Servicer cash advances as defined in this section are not recourse obligations;

(3) Retained subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(5) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(6) Credit derivatives that absorb more than the corporate's *pro rata* share of losses from the transferred assets;

(7) Clean-up calls on assets the corporate has sold. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate are not recourse arrangements; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

party, the definition does include a credit-enhancing interest-only strip that is acquired in any asset transfer as a residual interest.

The proposal provides that a corporate must maintain risk-based capital for a residual interest equal to the face amount of the residual interest, even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred. For residual interests in the form of credit enhancing interest only strips, the rule further provides that a corporate must maintain risk-based capital equal to the remaining amount of the *strip* (emphasis added) even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred.

Where a corporate transfers assets, and holds both a residual interest (including a credit-enhancing interest-only strip) and another recourse obligation in connection with that transfer, the corporate must maintain risk-based capital equal to the greater of the risk-based capital requirement for the residual interest or the full risk-based capital requirement for the assets transferred.

Ratings-Based Approach to Risk-Weighting

In lieu of the general risk-weighting approach described above, the proposal would allow a corporate to employ a ratings based approach to certain asset-backed securities, direct credit substitutes, or residual interests.

To apply a ratings based approach to one of these particular assets, the asset must generally be a *traded position,* and if a long term position, must be rated by an NRSRO as one grade below investment grade or better or, if a short-term position, must be publicly rated by an NRSRO as investment grade or better.[45] To obtain the risk-weighted asset amount, the corporate will multiply the face amount of the asset by the appropriate risk-weight determined in accordance with Table A or B below:

TABLE A

Long-term rating category	Risk-weight (in percent)
Highest or second highest investment grade	20
Third highest investment grade	50
Lowest investment grade	100
One category below investment grade	200

TABLE B

Short-term rating category	Risk-weight (in percent)
Highest investment grade	20
Second highest investment grade	50
Lowest investment grade	100

The proposal also permits certain asset-backed securities (ABS), direct credit substitutes, and recourse obligations that do not meet the definition of "traded position" to be risk-weighted based on NRSRO ratings category under certain circumstances.[46]

Use of Ratings Based Approach to Assets That Are Not Specifically Rated by an NRSRO

The proposal provides that, in certain circumstances, a corporate may use the ratings based approach for asset-backed securities, direct credit substitutes, or residual interests that are not specifically rated by an NRSRO.

If the asset is senior or preferred in all features to a particular traded position, including collateralization and maturity, the corporate may risk-weight the face amount of the senior position under the ratings based approach using Tables A and B above based on the NRSRO rating of the traded position, subject to supervisory guidance. The corporate must satisfy NCUA that this treatment is appropriate.

An asset created in connection with a securitization is eligible for a ratings-based risk-weighting treatment in accordance with Table C below if the asset is not rated by an NRSRO, is not a residual interest, and meets one of three different, alternative standards for internal ratings described below.

TABLE C

Rating category	Risk-weight (in percent)
Investment grade	100
One category below investment grade	200

A direct credit substitute, but not a purchased credit-enhancing interest-only strip, is eligible for the a ratings based risk-weighting under Table C if the asset is created in connection with an asset-backed commercial paper program sponsored by the corporate and the rating is generated by an appropriate internal credit risk rating system.[47]

A recourse obligation or direct credit substitute, but not a residual interest, is eligible for a ratings based risk-weighting under Table C if the asset is created in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program.[48] If the program has

[45] The proposal defines a *traded position* as a position retained, assumed, or issued in connection with a securitization that is rated by a NRSRO, where there is a reasonable expectation that, in the near future, the rating will be relied upon by:

(1) Unaffiliated investors to purchase the security; or

(2) An unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

Also, if two or more NRSROs assign ratings to a traded position, the corporate must use the lowest rating to determine the appropriate risk-weight category.

[46] A position that is not traded is eligible for the ratings based risk-weighting if:

(1) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security extended in connection with a securitization and is not a credit-enhancing interest-only strip;

(2) More than one NRSRO rate the position;

(3) All of the NRSROs that provide a rating rate a long term position as one grade below investment grade or better or a short term position as investment grade. If the NRSROs assign different ratings to the position, the corporate must use the lowest rating to determine the appropriate risk-weight category;

(4) The NRSROs base their ratings on the same criteria that they use to rate securities that are traded positions; and

(5) The ratings are publicly available.

[47] The proposed rule provides that such internal credit risk rating systems typically:

(1) Are an integral part of the corporate's risk management system that explicitly incorporates the full range of risks arising from the corporate's participation in securitization activities;

(2) Link internal credit ratings to measurable outcomes, such as the probability that the position will experience any loss, the expected loss on the position in the event of default, and the degree of variance in losses in the event of default on that position;

(3) Separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of the particular securitization transaction;

(4) Identify gradations of risk among "pass" assets and other risk positions;

(5) Use clear, explicit criteria to classify assets into each internal rating grade, including subjective factors;

(6) Employ independent credit risk management or loan review personnel to assign or review the credit risk ratings;

(7) Include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the corporate's established criteria;

(8) Monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and

(9) Make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

[48] Under the proposal, a corporate may use a rating obtained from a rating agency for unrated direct credit substitutes or recourse obligations (but

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options for different combinations of assets, standards, internal or external credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the corporate may apply the rating category applicable to the option that corresponds to the corporate's position. To rely on this sort of program rating, the corporate must demonstrate to NCUA's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The corporate must also demonstrate to NCUA's satisfaction that the criteria underlying the assignments for the program are satisfied by the particular position.

A recourse obligation or direct credit substitute, but not a residual interest, is eligible for a ratings based risk-weighting under Table C if the asset is created in connection with a structured financing program and the corporate uses an acceptable credit assessment computer program to determine the rating of the position. An NRSRO must have developed the computer program and the corporate must demonstrate to NCUA's satisfaction that the ratings under the program correspond credibly and reliably with the rating of traded positions.[49]

Other Limitations on Risk-Based Capital Requirements

The proposal contains some miscellaneous limitations on the risk-based capital requirements. There is a low-level exposure provision that limits the maximum risk-based capital requirement to the maximum contractual loss exposure, even where risk-based capital requirement as calculated under Appendix C might exceed that amount. There is a provision that limits the amount of risk-based capital to support mortgage-related securities or participation certificates retained in a mortgage loan swap. There is a provision that eliminates double counting of assets for purposes of risk-weighting. Finally, there is a provision that requires the corporate to risk-weight recourse obligations and direct credit substitutes retained or assumed by a corporate on the obligations of CUSOs in which the corporate has an equity investment in accordance with this Section II(c), unless the corporate's equity investment is deducted from credit union's capital and assets under § 704.2 and § 704.3.

III.B. Amendments to Part 704 Relating to Prompt Corrective Action

Proposed § 704.4 Prompt Corrective Action

Section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o) (Section 38) contains a framework that applies to every insured banking institution a system of supervisory actions indexed to the capital level of the individual institution. The purpose of this "prompt corrective action" (PCA) statutory provision is to "resolve the problems of insured depository institutions at the least possible long-term loss to the [Federal Deposit Insurance Corporation's] deposit insurance fund." Section 216 of the Federal Credit Union Act (12 U.S.C. 1790d) (Section 216) contains a similar PCA provision, and NCUA has implemented Section 216 through regulations in part 702. 12 CFR part 702. Section 216 of the FCUA, however, is not applicable to corporates, and neither is part 702. 12 U.S.C. 1790d(m); 12 CFR 702.1(c). The Board has determined, however, that some sort of regulatory PCA regime is appropriate for corporates, and this proposal sets forth such a regime.

Corporates have a wider variety of powers than natural person credit unions, including some powers that are more like bank powers. Accordingly, this proposed PCA rule, to be located at § 704.4 of NCUA's corporate rule, contains elements from both Section 38 of the FDIA and Section 216 of the FCUA, and their various implementing regulations. Part 747 of NCUA's rules describes the rules and procedures for various hearings and recommendations, and subpart L sets forth the procedures for the issuance, review, and enforcement of orders imposing PCA on natural person credit unions. The proposal contains a new subpart M in part 747 that contains similar procedures for corporate PCA.

The proposal establishes five categories of corporate capital classification: well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. The proposal deems a corporate, generally, to be "well capitalized" if the institution significantly exceeds the required minimum level for each relevant capital measure; "adequately capitalized" if the institution meets the required minimum level for each relevant capital measure; "undercapitalized" if the institution fails to meet the required minimum level for any relevant capital measure; "significantly undercapitalized" if the institution is significantly below the required minimum level for any relevant capital measure; or "critically undercapitalized" if the institution is critically below the required minimum level for any relevant capital measure.

Capital ratios alone, of course, are not fully indicative of the capital strength of an institution. In particular, in proposing these minimum capital levels, the NCUA is aware that a corporate can have capital ratios above the specified minimums for the well capitalized and adequately capitalized categories while still exhibiting unsafe and unsound characteristics. One reason for this dichotomy is that capital is a lagging indicator of problems of insured depository institutions, and use of

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not residual interests) in structured finance programs that satisfy specifications set by the rating agency. The corporate would need to demonstrate that the rating meets the same rating standards generally used by the rating agency for rating traded positions. In addition, the corporate must also demonstrate to the NCUA's satisfaction that the criteria underlying the rating agency's assignment of ratings for the program are satisfied for the particular direct credit substitute or recourse exposure.

To use this approach, a corporate must demonstrate to the NCUA that it is reasonable and consistent with the standards of this final rule to rely on the rating of positions in a securitization structure under a program in which the corporate participates if the sponsor of that program has obtained a rating. This aspect of the final rule is most likely to be useful to corporates with limited involvement in securitization activities. In addition, some banking entities extensively involved in securitization activities already rely on ratings of the credit risk positions under their securitization programs as part of their risk management practices. Such corporates also could rely on such ratings under this final rule if the ratings are part of a sound overall risk management process and the ratings reflect the risk of non-traded positions to the corporates.

This approach can be used to qualify a direct credit substitute or recourse obligation (but not a residual interest) for a risk-weight of 100 percent or 200 percent of the face value of the position under the ratings-based approach, but not for a risk-weight of less than 100 percent.

[49] The NCUA will also allow corporates, particularly those with limited involvement in securitization activities, to rely on qualifying credit assessment computer programs that the rating agencies have developed to rate otherwise unrated direct credit substitutes and recourse obligations (but not residual interests) in asset securitizations. To qualify for use by a corporate for risk-based capital purposes, a computer program's credit assessments must correspond credibly and reliably to the rating standards of the rating agencies for traded positions in securitizations. A corporate must demonstrate the credibility of the computer program in the financial markets, which would generally be shown by the significant use of the computer program by investors and other market participants for risk assessment purposes. A corporate must also demonstrate the reliability of the program in assessing credit risk.

A corporate may use a computer program for purposes of applying the ratings-based approach under this final rule only if the corporate satisfies NCUA that the program results in credit assessments that credibly and reliably correspond with the ratings of traded positions by the rating agencies. The corporate should also demonstrate to the NCUA's satisfaction that the program was designed to apply to its particular direct credit substitute or recourse exposure and that it has properly implemented the computer program.

moving DANA and DANRA exacerbates this lag.

Accordingly, a corporate might be subject to a written order or directive that establishes higher capital levels for that institution. NCUA is proposing that for a corporate to be well capitalized, it must not be subject to any written capital order or directive.[50] This proposal reflects the view that a corporate that is subject to a written capital directive does not have capital that significantly exceeds the required minimum level for the relevant capital measures.

The proposal also gives the NCUA discretion to downgrade, where appropriate, a "well capitalized" corporate by one category and require an "adequately capitalized" or "undercapitalized" corporate to comply with supervisory actions as if it were in the next lower category. Additionally, the NCUA may, for good cause, modify the minimum capital ratio percentages for purposes of determining the appropriate PCA capital category for a particular corporate credit union. The proposal further clarifies that NCUA continues to have available all other non-PCA supervisory tools traditionally used to supervise corporates, and the agency intends to use these tools as appropriate in supervising corporates. These tools include appropriate enforcement actions and supervisory follow-up measures based upon the corporate's overall condition and the existence of any financial, operational, or other supervisory weaknesses, irrespective of the corporate's capital category for purposes of the prompt corrective action provisions of the proposal.

Finally, the proposal prohibits a corporate from disseminating to third-parties its capital category, except where permitted by NCUA or otherwise provided by statute or regulation. This also prohibits corporates from advertising their capital category.

A paragraph-by-paragraph summary of the PCA proposal follows.

Paragraph 704.4(a) Purpose

This proposed paragraph establishes that the principal purpose of PCA is to define, for corporates that are not adequately capitalized, the capital measures and capital levels that are used for determining appropriate supervisory actions. The proposal also establishes procedures for submission and review of capital restoration plans and for issuance and review of capital directives, orders, and other supervisory directives. In the case of a state-chartered corporate credit union, the proposal provides that NCUA will consult with, and seek to work cooperatively with, the appropriate State official before taking any discretionary PCA actions.

Paragraph 704.4(b) Scope

This paragraph establishes that the PCA section applies to corporates, including officers, directors, and employees. The paragraph clarifies that the section does not limit the authority of the NCUA in any way to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. It generally prohibits a corporate from stating in any advertisement or promotional material its capital category or that the NCUA has assigned the corporate to a particular category. The proposal also requires newly chartered corporates to submit to NCUA a draft plan that sets forth how the corporate will solicit contributed capital and build retained earnings.

Paragraph 704.4(c) Notice of Capital Category

This paragraph describes the effective date of change in capital category, which is important in terms of triggering various time-sensitive actions. The paragraph provides that that the effective date will be the most recent date that a 5310 Financial Report is required to be filed with the NCUA; a final NCUA report of examination is delivered to the corporate; or written notice is provided by the NCUA to the corporate that its capital category has changed.

The rule also provides that a corporate must provide the NCUA with written notice that an adjustment to the corporate's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the corporate to be placed in a lower capital category from the category assigned to the corporate on the basis of the corporate's most recent call report or report of examination. After receiving this notice, or on its own initiative, the NCUA will determine whether to change the capital category of the corporate and will notify the corporate of the NCUA's determination.

Paragraph 704.4(d) Capital Measures and Capital Category Definitions

This paragraph restates the relevant capital measures from proposed § 704.3, that is the total risk-based capital ratio, the tier 1 risk-based capital ratio, and the leverage ratio. The paragraph then defines the five PCA capital categories in terms of these ratios.

The proposal provides that a corporate is "well capitalized" if it has a total risk-based capital ratio of 10.0 percent or greater, a Tier 1 risk-based capital ratio of 6.0 percent or greater, a leverage ratio of 5.0 percent or greater, and is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by NCUA to meet and maintain a specific capital level for any capital measure. A corporate must satisfy all four of these criteria to be considered well capitalized.

The proposal provides that a corporate is "adequately capitalized" if the corporate has a total risk-based capital ratio of 8.0 percent or greater, a Tier 1 risk-based capital ratio of 4.0 percent or greater, a leverage ratio of 4.0 percent or greater, and does not meet the definition of a well capitalized corporate. A corporate must satisfy all four of these criteria to be considered adequately capitalized.

The proposal provides that a corporate is "undercapitalized" if the corporate has a total risk-based capital ratio that is less than 8.0 percent, or has a Tier 1 risk-based capital ratio that is less than 4.0 percent, or has a leverage ratio that is less than 4.0 percent. Failure to achieve any one of these three minimum percentages will cause the corporate to be undercapitalized.

The proposal provides that a corporate is "significantly undercapitalized" if the corporate has a total risk-based capital ratio that is less than 6.0 percent, or a Tier 1 risk-based capital ratio that is less than 3.0 percent, or a leverage ratio that is less than 3.0 percent. Again, failure to achieve any one percentage will cause the corporate to be significantly undercapitalized.

The proposal provides that a corporate is "critically undercapitalized" if the corporate has a total risk-based capital ratio that is less than 4.0 percent, or a Tier 1 risk-based capital ratio that is less than 2.0 percent, or a leverage ratio that is less than 2.0 percent. Again, failure to achieve any one of percentages will cause the corporate to be critically undercapitalized.

The proposal provides NCUA with authority to reclassify a corporate's capital category based on supervisory criteria other than capital. One such criteria is a determination by NCUA that the corporate received a less-than-satisfactory rating (i.e., three or lower) for any rating category (other than in a rating category specifically addressing

[50] This would include capital orders, capital directives, and cease and desist orders related to capital.

capital adequacy) under the Corporate Risk Information System (CRIS) rating system and has not corrected the conditions that served as the basis for the less than satisfactory rating. In this case, the NCUA may reclassify a well capitalized corporate as adequately capitalized, and may require an adequately capitalized or undercapitalized corporate to comply with certain mandatory or discretionary supervisory actions as if the corporate were in the next lower capital category. NCUA may also downgrade the capital category of a well capitalized, adequately capitalized, or undercapitalized corporate by one category if the NCUA determines that the corporate is otherwise in an unsafe or unsound condition.

In both situations, however, the NCUA must offer the corporate notice and opportunity to be heard before carrying out such a supervisory downgrade. The procedures, which include the opportunity for a hearing, are described in paragraph 704.4(h) and the proposed subpart M of part 747.

Paragraph 704.4(e) Capital Restoration Plans

The proposal requires that any corporate that is downgraded to undercapitalized, or a lower capital category, must file a capital restoration plan with the NCUA.

The capital restoration plan must include all of the information required to be filed under paragraph (k)(2)(ii). This information includes the steps the corporate will take to become adequately capitalized; the levels of capital to be attained during each year in which the plan will be in effect; how the corporate will comply with the other PCA restrictions or requirements then in effect under this section; the types and levels of activities in which the corporate will engage; and other information as the NCUA may require. All financial data in the plan must be prepared in accordance with the instructions provided on the call report. A corporate required to submit a capital restoration plan as the result of a reclassification of the corporate for supervisory reasons must also include a description of the steps the corporate will take to correct the unsafe or unsound condition or practice.

The capital restoration plan must be filed with the NCUA within 45 days of the date that the corporate receives notice or is deemed to have notice that the corporate is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the NCUA notifies the corporate of a different filing period. An adequately capitalized corporate that has been reclassified for supervisory reasons is not, however, required to submit a capital restoration plan solely by virtue of the reclassification. Also, a corporate that has already submitted and is operating under a capital restoration plan is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification unless the NCUA requests one.

A corporate that is undercapitalized and that fails to submit a timely, written capital restoration plan will be subject to all of the provisions of this section applicable to significantly undercapitalized corporates.

Within 60 days after receiving a capital restoration plan under this section, the NCUA will provide written notice to the corporate of whether it has approved the plan. The NCUA may extend this time period.

If NCUA does not approve a capital restoration plan, the corporate must submit a revised capital restoration plan, when directed to do so and within the time specified by the NCUA. An undercapitalized corporate is subject to the provisions of § 704.4 applicable to significantly undercapitalized credit unions until it has submitted, and NCUA has approved, a capital restoration plan. If NCUA directs that the corporate submit a revised plan, it must do so in time frame specified by NCUA.

Any undercapitalized corporate that fails in any material respect to implement a capital restoration plan will be subject to all of the provisions of § 704.4 applicable to significantly undercapitalized corporates. A corporate that has filed an approved capital restoration plan may, after prior written notice to and approval by the NCUA, amend the plan to reflect a change in circumstance. Until such time as NCUA has approved a proposed amendment, the corporate must implement the capital restoration plan as approved prior to the proposed amendment.

Paragraph 704.4(f) Mandatory and Discretionary Supervisory Actions

The proposal provides for certain mandatory supervision actions depending on a corporate's capital category. Many of these provisions are incorporated by cross reference to paragraph 704.4(k).

Provisions Applicable to All Corporates

Paragraph (k)(1) provides that a corporate is prohibited, unless it obtains NCUA's prior written approval, from making any capital distribution, including payment of dividends on perpetual contributed capital or nonperpetual contributed capital accounts if, after making the distribution, the institution would be undercapitalized.

Provisions Applicable to Undercapitalized, Significantly Undercapitalized, and Critically Undercapitalized Corporates

Upon being categorized as undercapitalized, significantly undercapitalized, or critically undercapitalized, a corporate will be subject to the following conditions and restrictions.

The corporate must submit an acceptable capital restoration plan to the NCUA. The corporate must not permit its DANA during any calendar month to exceed its moving DANA unless the NCUA has accepted the corporate's capital restoration plan and any increase in total assets is consistent with the plan. The corporate also must not, directly or indirectly, acquire any interest in any entity, establish or acquire any additional branch office, or engage in any new line of business unless the NCUA determines that the proposed action is consistent with and will further the achievement of the plan.

The NCUA will also closely monitor the corporate for compliance with capital standards, capital restoration plans and activities.

Additional provisions applicable to significantly undercapitalized corporates and undercapitalized corporates that fail to submit and implement acceptable capital restoration plans.

If a corporate is significantly undercapitalized, or is undercapitalized and has failed to submit and implement a capital restoration plans acceptable to the NCUA, the corporate is prohibited from doing any of the following without the prior written approval of the NCUA:

- Paying any bonus or profit-sharing to any senior executive officer.
- Providing compensation to any senior executive officer at a rate exceeding that officer's average rate of compensation (excluding bonuses and profit-sharing) during the 12 calendar months preceding the calendar month in which the corporate became undercapitalized.

The NCUA will not grant approval with respect to a corporate that has failed to submit an acceptable capital restoration plan.

If a corporate is significantly undercapitalized, or is undercapitalized and has failed to submit and implement a capital restoration plans acceptable to

the NCUA, the NCUA may also take one or more of the following actions:

- Requiring recapitalization, through requiring the corporate to seek and obtain additional contributed capital, requiring the corporate to increase its rate of earnings retention, or requiring the corporate to combine with another insured depository institution, if one or more grounds exist for appointing a conservator or liquidating agent for the institution.
- Further restricting the corporate's transactions with affiliates.
- Restricting the interest rates that the corporate pays on shares and deposits to the prevailing rates of interest on deposits of comparable amounts and maturities in the region where the institution is located, as determined by the NCUA.
- Restricting the corporate's asset growth more stringently than required under paragraph (k)(2)(iii), or requiring the corporate to reduce its total assets.
- Requiring the corporate or any of its CUSOs to alter, reduce, or terminate any activity that the NCUA determines poses excessive risk to the corporate.
- Ordering a new election for the corporate's board of directors.
- Requiring the corporate to dismiss from office any director or senior executive officer who had held office for more than 180 days immediately before the corporate became undercapitalized.
- Requiring the corporate to employ qualified senior executive officers (who, if the NCUA so specifies, will be subject to approval by the NCUA).
- Requiring the corporate to divest itself of or liquidate any interest in any CUSO or other entity if the NCUA determines that the entity is in danger of becoming insolvent or otherwise poses a significant risk to the corporate.
- Conserve or liquidate the corporate if NCUA determines the corporate has no reasonable prospect of becoming adequately capitalized.
- Requiring the corporate to take any other action that the NCUA determines will better carry out the purpose of this section than any of the actions described in this paragraph.

The NCUA may also impose one or more of the restrictions applicable to critically undercapitalized corporates, discussed below, if the NCUA determines that those restrictions are necessary to carry out the purpose of this section.

Additional Provisions Applicable to Critically Undercapitalized Corporates

In addition to the provisions described above for undercapitalized and significantly undercapitalized corporates, the proposal provides that corporates that are critically undercapitalized are subject to additional requirements and restrictions.

A critically undercapitalized corporate must not, beginning 60 days after becoming critically undercapitalized, make any payment of dividends on contributed capital or any payment of principal or interest on the corporate's subordinated debt unless the NCUA determines that the exception would further the purpose of this section. Interest, although not payable, may continue to accrue under the terms of any subordinated debt to the extent otherwise permitted by law. Dividends on contributed capital do not, however, continue to accrue.

The NCUA will, by order, restrict the activities of any critically undercapitalized corporate and prohibit any such corporate from doing any of the following without the NCUA's prior written approval:

- Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action.
- Extending credit for any highly leveraged transaction.
- Amending the corporate's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order.
- Making any material change in accounting methods.
- Paying excessive compensation or bonuses.
- Paying interest on new or renewed liabilities at a rate that would increase the corporate's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the corporate's normal market areas.

With regard to the phrase "significantly exceeding the prevailing rates," the prevailing effective yields of interest are the effective yields on insured deposits (or shares) of comparable maturities offered by other insured depository institutions in the market area in which the corporate is soliciting shares. A market area is any readily defined geographic area in which the rates offered by any one insured depository institution operating in the area may affect the rates offered by other institutions operating in the same area. For a corporate, the market could be a national market.

The NCUA may also, at any time, conserve or liquidate a critically undercapitalized corporate or require such a corporate to combine, in whole or part, with another institution. NCUA will consider, not later than 90 days after a corporate becomes critically undercapitalized, whether NCUA should liquidate or conserve the institution.

Paragraph 704.4(g) Directives To Take Prompt Corrective Action

The proposed rule states that the NCUA will provide an undercapitalized, significantly undercapitalized, or critically undercapitalized corporate prior written notice of the NCUA's intention to issue a directive requiring such corporate to take actions or to follow restrictions described in this part. Proposed § 747.3002 of this chapter, discussed below, prescribes the notice content and associated process.

Paragraph 704.4(h) Procedures for Reclassifying a Corporate Based on Criteria Other Than Capital

This provides that when the NCUA intends to reclassify a corporate or subject it to the supervisory actions applicable to the next lower capitalization category based on an unsafe or unsound condition or practice the NCUA will provide the credit union with prior written notice of such intent. Proposed § 747.3003 of this chapter, discussed below, prescribes the notice content and associated process.

Paragraph 704.4(i) Order To Dismiss a Director or Senior Executive Officer

This provides that when the NCUA issues and serves a directive on a corporate requiring it to dismiss from office any director or senior executive officer, the NCUA will also serve upon the person the corporate is directed to dismiss (Respondent) a copy of the directive (or the relevant portions, where appropriate) and notice of the Respondent's right to seek reinstatement. Proposed § 747.3004 of this chapter, discussed below, prescribes the content of the notice of right to seek reinstatement and the associated process.

Paragraph 704.4(j) Enforcement of Directives

This proposed paragraph cross references proposed § 747.3005, discussed below, on the process for enforcement of directives.

Paragraph 704.4(k) Remedial Actions Towards Undercapitalized, Significantly Undercapitalized, and Critically Undercapitalized Corporates

This proposed paragraph describes the various PCA remedial actions, discussed in detail in the section of paragraph 704.4(f) above.

Proposed Subpart M of Part 747—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporates

Proposed subpart M of part 747 provides an affected corporate, and its officials and employees, with due process related to certain NCUA actions taken under proposed § 704.4 establishing PCA for corporates. Proposed subpart M is similar to the current subpart L, which sets forth the applicable due process for natural person credit union PCA under part 702 of NCUA's rules. 12 CFR part 702. A section-by-section analysis of subpart M follows.

Section 747.3001 Scope

Section 747.3001 establishes an independent process for appealing certain NCUA decisions to impose PCA under part 704.4. In the case of state charted corporates seeking independent review under subpart M, this section provides that the parties (*i.e.*, NCUA and corporate and/or a dismissed director or officer) will serve upon the appropriate State official the documents filed or issued in connection with a proceeding under subpart M.

Section 747.3002 Discretionary Supervisory Actions (DSAs)

Section 747.3002 provides for prior notice and an opportunity to be heard before a DSA is imposed. The NCUA Board must give advance notice of its intention to impose a DSA, 12 CFR 747.3002(a)(1), except when necessary to further the purpose of PCA. 12 CFR 747.3002(a)(2). The corporate may then challenge the proposed action in writing and request that the DSA not be imposed or be modified. 12 CFR 747.3002(c). The corporate, however, is not entitled to a hearing. The NCUA, or an independent person designated by the NCUA, may then decide not to issue the directive or to issue it as proposed or as modified, 12 CFR 747.3002(d); and that decision is final. A corporate which already is subject to a DSA may request reconsideration and rescission due to changed circumstances. 12 CFR 747.3002(f).

In general, this system avoids involving panels or councils in the appeal process, and expanding it beyond an opportunity to be heard in writing, because this would undermine the overall objective of PCA, that is, to take prompt action. On the other hand, a time limit, as contained in the proposal, for the NCUA to decide on requests to modify, to not issue, or to rescind DSAs is appropriate. Accordingly, the rule includes in § 747.3002(f) the safeguard that if NCUA fails to decide a request to modify or rescind an existing DSA within 60 days, that DSA will be deemed modified or rescinded.

Section 747.3003 Reclassification to Lower Capitalization Category

The NCUA is authorized to reclassify a corporate to the next lower capital category on grounds of an unsafe or unsound practice or condition, provided the corporate is first given notice and an opportunity for a hearing. 12 CFR 704.4(d)(3). In such cases, therefore, § 747.3003 requires the NCUA to give notice of the NCUA's intention to reclassify a corporate, 12 CFR 747.3003(a), and describe the practice(s) and/or condition(s) justifying reclassification. 12 CFR 747.3003(b). The corporate may then challenge the reclassification, provide evidence supporting its position, and request an informal hearing and the opportunity to present witnesses. 12 CFR 747.3003(c).

If the corporate requests a hearing, an informal hearing will be conducted by a presiding officer designated by the NCUA. 12 CFR 747.3003(d). At the hearing, the corporate or its counsel may introduce relevant documents, present oral argument, and, if authorized, present witnesses. 12 CFR 747.3003(e). The presiding officer then makes a recommended decision to the NCUA, 12 CFR 747.3003(e)(4), who then issues a final decision whether to reclassify the corporate. 12 CFR 747.3003(f).

Section 747.3004 Dismissal of Director or Senior Executive Officer

The NCUA is authorized to issue a DSA directing a corporate to dismiss a director or senior executive officer. 12 CFR 704.4(k)(3)(ii)(F). In such cases, § 747.3004 requires the NCUA Board to serve the dismissed person with a copy of the directive issued to the corporate, accompanied by a notice of the right to seek reinstatement by the NCUA Board. 12 CFR 747.3004(a)–(b). That person may then challenge the dismissal and request for reinstatement, and may request an informal hearing and the opportunity to present witness testimony.[51] 12 CFR 747.3004(c). The dismissal remains in effect while the request for reinstatement is pending. 12 CFR 747.3004(g).

If a hearing is requested, an NCUA-designated presiding officer conducts the hearing under procedures identical to those which § 747.3003 prescribes in cases of reclassification, with two exceptions. First. the dismissed person bears the burden of proving that his or her continued employment would materially strengthen the corporate's ability to become "adequately capitalized" or to correct an unsafe or unsound condition, as the case may be. 12 CFR 747.3004(e)(4). Second, if the NCUA's final decision is to deny reinstatement, it must provide reasons for its decision. 12 CFR 747.3004(f).

Section 747.3005 Enforcement of Orders Imposing Prompt Corrective Action

When a corporate fails to comply with a mandatory supervisory action (MSA) or DSA, the NCUA Board may apply to the appropriate U.S. District Court to enforce that action. 12 CFR 747.3005(a). Alternatively, the NCUA Board may assess a civil money penalty against a corporate (and any institution-affiliated party acting in concert with it) which violates or fails to comply with an MSA or DSA, or fails to implement an approved capital restoration plan. 12 CFR 747.3005(b). Finally, subpart M allows the NCUA Board to enforce an MSA or DSA under § 704.4 "through any other judicial or administrative proceeding authorized by law." 12 CFR 747.3005(c).

Phase-in of Proposed Capital and PCA Requirements

The Board intends to phase-in the proposed capital and PCA requirements over time. Details about the proposed phase-in are contained in subsection III.D. below.

III.C. Amendments to Part 704 Relating to Corporate Investments and Asset-Liability Management

The proposal contains amendments to the part 704 investment authorities. These proposed amendments work in conjunction with the asset-liability management provisions of the regulation to prevent excessive concentrations of risk. By limiting investment types and concentrations in combination with more comprehensive risk assessment requirements, the proposal establishes a more rigorous framework for identifying, measuring, monitoring, and controlling a corporate's balance sheet risks—and does so in a manner consistent with the avowed conservative principles of corporate credit union mission.

In formulating the proposed changes to investment authorities and asset-liability management, NCUA incorporated lessons learned from both its recent experience with corporate

[51] The corporate directed to dismiss a director or officer may not seek reinstatement of the dismissed director or officer under § 747.3004, but that corporate may challenge the directive under § 747.3002.

investment portfolios and their associated losses, as well as comments received from the ANPR. NCUA determined that three major risk conditions were the primary contributors to the current losses in the corporate system: (1) Excessive investment sector concentrations; (2) excessive average-life mismatches between assets and liabilities; and (3) excessive concentrations in subordinated securities, including mezzanine securities.

The proposed revisions to the investment and asset-liability provisions of the corporate rule restrict these risk conditions in the aggregate through the use of limits tied to a corporate credit union's capital. The intent of the proposed revisions is to provide a framework that allows for a level of risk-taking necessary to support the profitability of a corporate but which will be continuously and adequately supported by the corporate's capital. Sufficient capital prevents losses from adversely affecting corporate members and the entire credit union industry. As illustrated in more detail in subsection III.E. below, the proposed revisions, had they been in place prior to 2007, would have significantly reduced the current losses in the corporate system.

NCUA believes that placing restrictions on investment authorities without concomitant limits on asset-liability management could still result in corporate credit unions assuming excessive risk positions. Accordingly, members of the public are encouraged to consider the combined effects of the revised investment and asset-liability management authorities and restrictions when submitting comments to NCUA.

In addition to the amendments to part 704 investment authorities, NCUA also intends to revise corporate credit union reporting requirements on the 5310. The goal of the additional reporting requirements will be for readers to have a clear and comprehensive view of the financial condition of corporate credit unions. Likely additions and modifications to the current 5310 will include: (1) Credit ratings and sector concentrations by book and market value; (2) average lives and durations, spread and effective, of a corporate credit unions assets and liabilities; and (3) additional disclosure on pricing sources and pricing level.

Section 704.5 Investments

The current § 704.5 describes permissible corporate investments and the limits on those investments. Corporate investment authority is somewhat different than the investment authority for natural person federal credit unions.

One hundred thirty eight commenters responded to the ANPR question on whether corporate investments should be limited to those permissible for natural person credit unions. Thirty-four commenters were in favor of the proposal, but 104 were opposed. The NCUA Board agrees with the commenters opposed to limiting corporate credit union investment authorities to those provided to natural person credit unions. Corporate credit unions and natural person credit unions have different balance sheet dynamics and business models and serve different types of members. As such, an alignment of investment authorities for the sake of parity may not be prudent. Ninety-four commenters discussed the question of prohibiting specific investment authorities. Sixty-three supported some prohibitions, while 31 did not. The NCUA Board concurs with the commenters that some investment types that are permissible under the current regulation are not appropriate for corporate credit unions.

Accordingly, the proposal amends paragraph 704.5(h) to prohibit corporate credit unions from making investments in collateralized debt obligations and net interest margin securities.

Collateralized debt obligations (CDOs) are defined in § 704.2 as a debt security collateralized by mortgage- and asset-backed securities or corporate obligations in the form of loans or debt. *Net interest margin securities* (NIMs) are defined in § 704.2 as securities collateralized by residual interests in (1) collateralized mortgage obligations, (2) real estate mortgage investment conduits, or (3) asset-backed securities. *Residual interests* are further defined in § 704.2 as the ownership interest in remainder cash flows from a CMO or ABS transaction after payments due bondholders and trust administrative expenses have been satisfied.

Both CDOs and NIMs have concentrated risk attributes (i.e., they are highly leveraged by design) and complex cash flow rule structures that make them susceptible to excessive losses. These high-risk investments are also inherently less liquid and more price volatile than other investments backed by similar collateral, making them inappropriate investments for corporate credit unions.

Although Re-REMICs are technically collaterized debt obligations, the proposal excludes senior tranches of Re-REMICs consisting of senior mortgage- and asset-backed securities from the CDO definition. Accordingly, these Re-REMICs, which do not have the excessive risk characteristics of other CDOs, are permissible investments provided they fall within the other investment and asset-liability restrictions of the rule.

Mortgage-Related Securities

The proposal eliminates the phrase *mortgage-related security* (MRS) from part 704 because it is unnecessary and potentially confusing. The current part 704 permits corporates to invest in domestic *asset backed securities*, a term which includes *mortgage-backed securities* (MBS), that is, a type of security backed by first or second mortgages on real estate upon which is located a dwelling, mixed residential and commercial structure, a residential manufactured home, or a commercial structure. 12 CFR 704.5(c)(5), 704.2 (definition of ABS and MBS). MRS are a limited subset of MBS, and so references to MBS, and not MRS, are appropriate in the corporate rule.[52] Of course, a corporate may not invest in any MBS, or any other ABS, unless the security satisfies the other requirements of part 704, including the minimum NRSRO rating requirements and the prohibitions on certain investments, such as strips, residuals, CDOs, and NIMs. 12 CFR 704.5(h).

Expanded Investment Authorities

The current part 704 provides that corporates that meet certain requirements may qualify for expanded investment authorities. Those expanded authorities, currently labeled as *Base-plus, Part I, Part II, Part III, Part IV,* and *Part V,* are described in Appendix B of part 704. Base-plus expanded authority permits slightly greater declines in NEV when subjected to interest rate shocks. Part I expanded authority allows for the purchase of certain investments with lower NRSRO ratings, provides for additional categories of permissible investments, and permits greater declines in NEV when subject to interest rate shocks. Part II expanded authority is similar to Part I, but provides even more leeway. Parts III, IV, and V relate to foreign investments, derivative transactions, and loan participation authority, respectively.

The ANPR sought comments on the continued need for expanded authorities for corporate credit unions. Of the 164 commenters who discussed the topic of expanded authorities, 110 deemed expanded authorities appropriate and necessary for corporate credit unions, while 54 commenters

[52] Natural person federal credit unions may invest in MRS, as permitted by 12 U.S.C. 1757(15), but are generally not permitted to invest in ABS or MBS that are not also MRS.

thought the expanded authorities should be reduced or eliminated. Seventy-five of these commenters discussed whether NCUA should change the eligibility requirements and/or require periodic requalification for expanded authorities, with 68 commenters favoring changes and seven opposed.

Many commenters opposed to expanded authorities suggested that reliance on the authorities is a large contributor to the current problems facing corporate credit unions. Many of these commenters believe the authorities are no longer beneficial or necessary. Other commenters argued that the current economic problems confronting the corporate system were not, in fact, caused by reliance on expanded authorities.

Supporters of expanded authorities noted that corporates must be allowed to earn a return on their investments above their cost of funds and the use of expanded authorities, when properly done, facilitates this level of return and benefits the entire credit union system. Some of these commenters suggested that NCUA should consider even broader investment authorities for corporate credit unions. These commenters argue that the current limits on corporate credit union investment authority require a corporate to overexpose itself to securities backed by mortgages, auto loans, and credit card receivables, which forces concentration into the same products that natural person credit unions are exposed to and increases risk throughout the credit union industry.

Many of those supporting the continuation of expanded authorities stated that NCUA should adopt stronger capital requirements and more conservative concentration limits to help manage the associated risks. Additional suggestions included enhanced safety and soundness oversight, establishment of education and experience standards for corporate staff who oversee investments, and ongoing requalification of corporates that have been approved for expanded authority. Commenters strongly supported risk-based capital levels commensurate with any additional investment risk associated with the use of expanded authorities.

The NCUA Board agrees that expanded authorities for corporate credit unions do offer benefits to the entire credit union system. The Board does, however, believe stronger controls in this area are appropriate. Accordingly, the proposed rule revises the qualification criteria, and elements of, Base-plus and Part I authority, and eliminates the current Part II authority.

To qualify for Part I authority, the proposal adds a requirement that a corporate achieve and maintain a leverage ratio of at least six percent, meaning that its tier 1 capital, divided by its moving DANA, must equal or exceed six percent.

Part I currently permits investments with lower NRSRO ratings, and, to control for credit risk, proposed paragraph (e) limits the aggregate investments purchased under the authority of Part I to the lower of 500 percent of capital or 25 percent of assets. Paragraph (b) of Part I also currently permits qualifying corporates to engage in repurchase and securities lending agreements in an amount up to 300 percent of capital with any one counterparty, but the proposal removes this provision, thus limiting all such transactions to 200 percent of capital. 12 CFR 704.6(c)(2)(i).

The current rule further also provides that, as part of the interest rate shock test, a Part I corporate's NEV may decline as much as 28 percent if the corporate has a minimum capital ratio of at least five percent and as much as 35 percent if the corporate has a minimum capital ratio of at least six percent. The proposal, after a 12 month phase-in, replaces the capital ratio with the new leverage ratio, and replaces 5 and 6 percent with 7 and 8 percent, respectively. The proposal makes similar changes to Part I authority with regard to the new Asset-Liability NEV test, discussed further in connection with the amendments to § 704.8 below.

The proposal also eliminates Part II authority (which permits investments down to the lowest investment grade) in its entirety. In the past, corporates did not use much of the Part II authority they had, and those corporates that did use the authority generally used it only to continue to hold downgraded investments and avoid divestiture. Prices of securities also tend to drop precipitously once an investment's credit rating falls to non-investment grade, so it is prudent to avoid the threat that a further single credit category downgrade might lead to additional impairment of asset values.

The proposal also modifies the current Part IV authority on derivatives to ensure that corporates do not use derivatives to take on additional risk, but only use derivatives to mitigate interest rate and credit risk or to create structured products equivalent to what a corporate could purchase directly.

Due to the elimination of Part II, the proposal renumbers the current Parts III, IV, and V authorities as Parts II, III, and IV, respectively. Also, a corporate that currently qualifies for a particular expanded authority may continue to use that authority without seeking requalification if the corporate meets the new requirements in the final rule. For Parts I and II, those new requirements include a six percent minimum total capital ratio, and, one year after publication of the final rule in the **Federal Register**, a six percent minimum leverage ratio.

Investments in Investment Companies

Paragraph (f) currently permits a corporate credit union to invest in an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 where the prospectus restricts the investment portfolio to investments and investment transactions that are permissible for that corporate credit union to engage in directly. The proposal amends the paragraph to permit investment in collective investment funds maintained by a national bank or a mutual savings bank subject to the same requirement that the fund limit its investment and investment transactions to those that are permissible direct investments for corporates.

Miscellaneous Revisions to Investment Definitions

The proposal contains several miscellaneous revisions, and additions, to the investment definitions.

The proposal adds a definition of *Nationally Recognized Statistical Rating Organization* (NRSRO) that recognizes that NRSROs are designations made by the United States Securities and Exchange Commission. The proposal amends the definitions of *derivatives contract, equity investment,* and *equity security* so that they stand alone without external cross-references. The proposal eliminates references to *regular way settlement,* and the definition of that term, in favor of a simpler reference to *investment settlement.* The proposal amends the definition of *residual interest* to clarify that it represents the ownership interest in certain cash flows.

Section 704.6 Credit Risk Management

The current § 704.6 includes a single obligor concentration limit. The rule also requires that a corporate have a credit risk management policy that addresses certain concentrations of risk, but does not dictate sector concentrations. Additionally, the current rule requires that all corporate investments, other than in another corporate or a CUSO, have a credit rating from at least one NRSRO of no

lower than AA—for long term ratings and A–1 for short term ratings.

There was strong support among the ANPR commenters for additional regulation of concentration limits. Seventy-nine of 89 commenters favored adoption of stronger concentration limits. Some commenters, however, expressed concern about the possibility that sector limits could actually force corporates to over-diversify into the more risky sectors and thus increase risk.

The current rule generally limits investments in any single obligor to 50 percent of capital or $5 million, whichever is greater. 12 CFR 704.6(c). The proposed rule reduces this 50 percent single obligor limit to 25 percent.

The Board believes the current, general limit of 50 percent of capital is too high and presents excessive potential risk to corporate credit unions. The 25 percent limit encourages risk diversification, alleviates excessive concentration of risk exposure with any one obligor, and protects corporate credit unions' ongoing ability to serve as liquidity providers.

The Board also believes that the current rule has not resulted in effective corporate policies on sector investment concentrations. Accordingly, the proposed rule adds a new paragraph 704.6(d) establishing explicit regulatory concentration limits by discreet investment sector.

The proposed sector concentration limits are divided into ten asset classes: (1) Residential mortgage-backed securities; (2) commercial mortgage-backed securities; (3) Federal Family Education Loan Program (FFELP) student loan asset-backed securities; (4) private student loan asset-backed securities; (5) auto loan/lease asset-backed securities; (6) credit card asset-backed securities; (7) other asset-backed securities; (8) corporate debt obligations; (9) municipal securities; and (10) registered investment companies. The proposal also adds several related definitions to § 704.2. *Mortgage-backed security* (MBS) means a security backed by first or second mortgages secured by real estate upon which is located a dwelling, mixed residential and commercial structure, residential manufactured home, or commercial structure. *Commercial MBS* means an MBS collateralized primarily by multi-family and commercial property loans. *Residential MBS* means an MBS collateralized primarily by residential mortgage loans. The proposal also modifies the existing definition of asset-backed security (ABS) to clarify that, generally, MBS are a type of ABS.

The maximum amount of a corporate's investment in each of these ten sectors is limited to a certain multiple of capital: Either the lower of 500 percent of capital or 25 percent of assets, or the lower of 1,000 percent of capital or 50 percent of assets. In formulating the proposed sector concentration limits, the Board considered various factors. For example, the Board wanted to ensure adequate diversification of investments across a range of asset types considered appropriate for the stable liquidity, NEV and capital levels expected to be maintained by corporates. The Board also wanted to ensure, however, that the sectors and sector limits did not force a corporate to "overdiversify." In other words, the Board wanted to permit a corporate to concentrate in two or three less risky sectors, or to avoid investing in certain sectors altogether, if that was the corporate's desired course of action.

Accordingly, the rule places a lower of 1,000 percent of capital limitation or 50 percent of assets on each of these three sectors: corporate debt obligations, municipal securities, FFELP student loan asset-backed securities, and registered investment companies, and places a more restrictive limit of the lower of 500 percent of capital or 25 percent of assets on the other sectors. The higher limits for corporate debt obligations and municipal securities allow a corporate the flexibility and option to invest away from securitized bonds, if they choose to do so. The higher limit for FFELP student loan asset-backed securities is appropriate since the U.S. Department of Education reinsures a vast majority of the underlying student loan balances. The lower of 500 percent of capital limits or 25 percent of assets for the remaining sectors ensure that a corporate has prudent diversification when investing in non-government securities. Both USC and WesCorp, the two conserved corporates, would have had substantially less losses if non-government residential mortgage-backed securities had been limited to the lower of 500 percent of capital or 25 percent of assets, working in conjunction with the proposed subordinated security limitations prior to 2007. The hypothetical effect of this concentration limit, and other aspects of the proposed rule, on U.S. Central's and WesCorp's historical balance sheets is discussed in more detail in subsection III.E. below.

Sector concentration limits ensure that the composition of the investment portfolio is consistently more diversified across various asset types. The asset classes and concentration limits are necessarily broad to allow for various portfolio mixtures and changing market factors. While the limits allow for significant portions of the investment portfolio to be placed in a specific asset type, they are restrictive enough to force any particular corporate to hold multiple asset types at all times. These sector concentration limits—when combined with the tighter single obligor, short weighted average life, and limited subordinated securities restrictions—substantially reduce the threat of excessive credit risk to corporate earnings and capital.

The Board invites comment on whether there should be additional concentration sublimits in any of these sectors. For example, the Board is interested in whether it should impose further limits on corporate debt obligations by industry of the obligor.

In addition to the 1,000 percent of capital or 50 percent of assets for registered investment companies (i.e., mutual funds), the corporate must identify the underlying assets in each fund. The corporate must then categorize each asset into one of the other nine sectors and include those assets when calculating compliance with those sector limits. If current data on the underlying assets is not readily available, the corporate can use the most recent available data. Also, a corporate may only invest in a registered investment if the fund's prospectus limits the fund to investments otherwise permissible for direct corporate investment.

The proposal also includes a catchall sector in paragraph 704.6(d)(2). A corporate credit union must limit its aggregate holdings in any investments that do not fall within one of the ten sectors above to the lower of 100 percent of capital or five percent of assets. To provide flexibility for the development and use by corporates of new investment types, the NCUA may approve a higher limit in appropriate cases.

The proposal excludes certain assets entirely from both the proposed sector concentration limits and the single obligor concentration limit, including fixed assets, loans, investments in CUSOs, investments issued by the United States or its agencies or its government sponsored enterprises, and investments fully guaranteed or insured as to principal and interest by the United States or its agencies. Investments in other federally-insured credit unions, deposits in other depository institutions, and investment repurchase agreements are also excluded from the sector concentration limits but not the single obligor concentration limit.

The proposal amends paragraph 704.6(d)(4), renumbered to 704.6(f)(5), to clarify that if any investment group or asset class fails the single obligor, or sector, concentration limit, at the time of purchase or after the time of purchase, then all the investments of that obligor, or in that asset class, are subject to the investment rule's investment action plan requirements. 12 CFR 704.10. Although the new sector concentration limits and changes to the single obligor concentration limit are effective immediately, they will not require automatic divestiture of any existing asset held by a corporate credit union on the effective date of the rule. Accordingly, the Board does not believe that corporate credit unions need a transition period before the sector concentration limits become effective.

In addition to the new obligor and sector concentration limits, the proposal adds a new paragraph 704.6(e) that further limits a corporate's investments in subordinated securities. Holders of subordinated debt are accorded a low priority in the event of insolvency and liquidation. Subordinated securities present greater credit risk, liquidity risk, price volatility, and ratings volatility than more senior securities. All these factors combine to make any significant concentration in subordinated securities inappropriate for a corporate's portfolio. Accordingly, the proposal limits a corporate's aggregate investment in subordinated securities to the lower of 400 percent of capital or 20 percent of assets and the amount of subordinated securities in any single asset sector to the lower of 100 percent of capital or 5 percent of assets.

The proposal includes the following definition of subordinated security to § 704.2:

> *Subordinated security* means a security that has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior to only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition.

This definition covers all support tranches, including senior mezzanine tranches. The definition also includes securities with performance "triggers" that could cause the security to assume a junior claim position.

The proposed limitations on subordinated securities, working in conjunction with the proposed sector limitations on non-government residential MBS, would have—assuming both limits had been in effect prior to 2007—prevented a substantial amount of the current MBS losses experiences by U.S. Central and WesCorp. This is explained in greater detail in subsection III.E. below.

The current paragraph 704.6(d) provides that all corporate investments, other than in a corporate credit union or CUSO, must have an applicable credit rating from at least one nationally recognized statistical rating organization (NRSRO). Many ANPR commenters expressed support for decreased reliance on NRSRO ratings, with 89 of 122 commenters in favor of tighter regulation in this area. Some of these commenters suggested requiring a consensus of three NRSROs, and some suggested requiring that ratings only be used for the purpose of excluding investments, not including them, in an investment portfolio.

The Board believes that credit ratings constitute potentially useful information about credit risk, but expects corporates to avoid reliance on individual ratings or NRSROs as a primary criterion of purchase suitability. Several provisions of this proposal act to reduce the effect of NRSRO reliance, including the new sector concentration limits and the limits on subordinated securities, discussed above, and the restrictions on average-life mismatches discussed later in this section.

The proposal also amends the current paragraph 704.5(d), and renumbers it as 704.5(f), to place two new, specific limits on the use of NRSROs. First, the proposal requires a corporate use the lowest available NRSRO rating for compliance purposes. NRSRO rating changes may lag changes in the financial condition of the entity or instrument being rated, particularly in the case of downgrades, and so the corporate should be required to respond to the first such NRSRO downgrade. Second, the proposal requires that a minimum of 90 percent of a corporate's investment holdings, by book value, must be rated by at least two NRSROs. This will ensure ratings diversification, will further reduce reliance on individual NRSROs, and will result in a more timely identification of credit problems with particular investments. The proposal also requires that a corporate monitor any new post-purchase NRSRO ratings on investments it holds.

Finally, the proposal requires that a corporate address, in its policies, the treatment of concentration risk related to servicers of receivables, collateral type, and tranche priority.

§ 704.8 Asset and Liability Management

The current § 704.8 contains several asset-liability management (ALM) provisions. The rule requires a corporate establish an asset and liability management committee, charge a market-based penalty on early withdrawals sufficient to cover replacement cost of a redeemed certificate, adopt a written ALM policy that includes modeling for interest rate risk (IRR) sensitivity and affect on net economic value (NEV), and assess on an annual basis whether the corporate should do additional NEV modeling. 12 CFR 704.8.

The ANPR proposed a number of possible actions to further reduce the level of risk in corporate credit union balance sheets, including the implementation of cash flow duration requirements and additional, mandatory stress testing. Of the 104 comments directed to this issue, 94 supported some action in this area. The NCUA Board generally agrees with these commenters and is proposing several new ALM requirements in an effort to better identify, measure, monitor and control future risk.

Maximum Redemption Value for Share Certificates

While not specifically addressed in the ANPR, the Board recognizes the need for more stability within the liabilities on a corporate credit union's balance sheet. While the current rule requires market-based early withdrawal penalties, the liquidity problems faced by corporates can be exacerbated by permitting members to redeem certificates a premium, that is, a price higher than book value. Accordingly, the proposal amends paragraph 704.8(b) to permit redemption at the lesser of book value plus accrued dividends or the value based on a market-based penalty sufficient to cover the estimated replacement cost of the certificate redeemed.

Limiting the Average-Life Mismatches Between Assets and Liabilities

To the extent that a corporate maintains a mismatch between the average life of its assets and liabilities, it becomes exposed to several forms of market risk. A corporate credit union that buys floating rate securities may have minimal exposure to changes in the level of the Treasury yield curve but may have significant risk exposure to changes in credit spreads (a change in yields on non-Treasury instruments relative to market Treasury yields). For example, when a depository invests its assets in a long-term, floating rate security rather than in a short-term security, and the depository is funded with overnight deposits, it is exposed to additional credit spread risk whenever the market spread relationship on that

instrument changes vis-à-vis Treasury securities. Short of default, the price decline of a long-term security is likely to be greater than that of a short-term security, given a deteriorating credit outlook for the issuer.

The Board intends to restrict any mismatch between the principal cash flows of assets and liabilities so as to limit the degree of credit spread duration to which a corporate credit union is exposed. In lieu of capturing the repricing risk, the Board decided to limit the base case average-life mismatch between assets and liabilities as well as the change in base case mismatch for given changes in market spreads.

Net economic value (NEV) has traditionally been used by the NCUA to measure interest rate risk (IRR) on a corporate credit union's balance sheet. NCUA adopted the IRR NEV measurement requirement in response to excessive interest rate risks taken in the early to mid 1990's by corporate credit unions. IRR NEV proved to be an effective tool of measuring interest rate risk during periods of relative asset price stability, prior to mid-2007, while providing a less effective measurement of credit spread risk when market values of assets suffered from the systemic shock that began in mid-2007. Accordingly, the Board is now proposing a new paragraph 704.8(e) to require average life (AL) mismatch NEV modeling in addition to the existing IRR NEV modeling. The new AL NEV modeling will help ensure appropriate matching of asset and liability cash-flow durations.

Proposed paragraph 704.8(e) requires an AL NEV stress test to measure the economic impact on capital resulting from a credit spread widening of 300 bp. These spread increases would be applied to both assets and liabilities. The corporate will examine the effect on its absolute NEV and the volatility of its NEV (how much NEV changes for a given stress) in a manner similar to the current § 704.8(d) IRR NEV modeling. Specifically, a corporate must limit its risk so that, when the spread widening shock is applied, its NEV ratio does not decline below 2 percent and the NEV itself does not decline more than 15 percent. The proposal specifies that all investments must be tested, excluding derivatives and equity investments, and that all borrowings and shares must be tested, but not contributed capital.

The proposed rule will also add a new paragraph 704.8(f) with a separate spread widening test that assumes a 50 percent slowdown in prepayment speeds. This additional test will force a corporate to structure its assets and liabilities so that, when the spread widening shock is applied, its NEV ratio does not decline below 1 percent and the NEV itself does not decline more than 25 percent. This additional test will help determine if a potential extension of a corporate's average life mismatch is within an acceptable limit.

For example, consider a corporate with a five percent base case NEV. Applying the § 704.8(e) base AL NEV test, the proposed regulatory limits—that is, that the NEV ratio not decline below two percent and the NEV itself not decline more than 15 percent—will permit this corporate to operate with an approximate average-life mismatch of up to 0.25 years. Applying the § 704.8(f) AL NEV test with its 50 percent slowdown in prepayment speeds, the proposed regulatory limits—that is, that the NEV ratio not decline below 1 percent and the NEV itself not decline more than 25 percent—will permit this corporate an additional mismatch extension of up to 0.2 years. These proposed AL NEV tests, of course, are designed to permit greater average-life mismatches as a corporate's base case NEV level moves higher, just as with the current IRR NEV modeling.

The proposed rule employs a conservative approach when NEV testing for dealing with assets and liabilities with embedded options. The rule imposes conservative treatment of non-mandatory issuer options, i.e., issuer call options, by assuming they are not exercised. Additionally, the proposed rule balances this conservative approach against the lack of a requirement for a corporate to shorten liabilities based on anticipated or potential early redemption of share certificates. The NCUA, however, will be monitoring the issuance of liabilities with long maturities and short calls to determine if they are issued to manipulate NEV measures and may, among other things, mandate a greater capital requirement. See the proposed § 704.3(e).

New paragraphs (e)(2) and (f)(2) also require corporates to measure the effect that failed triggers, e.g., delinquency triggers and cumulative loss triggers, have on average-life NEVs. Many non-government mortgage-backed securities, and other securitized securities, redirect cash-flows if delinquencies or losses increase to a predetermined level because of a failed trigger. The effects of the redirected cash-flows should be measured and understood by corporate credit unions.

Below are two examples that illustrate both the current IRR NEV calculation and the proposed, new average life (AL) NEV calculation using a simplified corporate balance sheet. These examples are intended to provide the reader with a better understanding the current and proposed rules.

Sample Corporate Credit Union "A" Balance Sheet [53]

	Weighted average life (years)	Modified duration	Par value	Market value
Assets:				
Private Label MBS (2)	2	0.083	$1,000,000	$1,000,000
ABS (3)	1.5	0.8	2,000,000	2,000,000
Corporate Bonds & Member Loans (3)	1.5	0.90	3,000,000	3,000,000
Cash and Cash Equivalent Investments (1)	0.1	0.1	3,850,000	3,850,000
Capital Instruments (PCC or NCA) (2)	3	0.083	50,000	50,000
Property	N/A	N/A	50,000	50,000
CUSO Equity	N/A	N/A	50,000	50,000

[53] This is a simplified balance sheet and simplified examples. Each corporate credit union will likely, depending on its particular balance sheet, need to employ more granular information and sophisticated modeling.

	Weighted average life (years)	Modified duration	Par value	Market value
Total (Capital Notes and Property not included in WAL and duration)	1.01	0.48	10,000,000	10,000,000
Liabilities:				
Overnight and Short-Term Deposits (1)	0.1	0.1	7,500,000	7,500,000
Long-Term Certificates (1)	1.0	0.95	1,500,000	1,500,000
Borrowings (2)	2.0	0.24	450,000	450,000
Total	0.34	0.24	9,500,000	9,500,000
Base Case NEV				500,000
Capital Instruments (PCC or NCA) (2)	3	0.083	50,000	50,000
Retained Earnings	N/A	N/A	450,000	450,000

1—Fixed Rate, 2—Floating Rate, and 3—both Fixed and Floating Rate.

The sample balance sheet is for a corporate credit union with NEV ratio (base case NEV/Fair market value of assets) of 5 percent. The current IRR NEV requires the corporate credit union to evaluate the impact of an instantaneous, permanent, and parallel shock of the yield curve of plus and minus 100, 200, and 300 bp on its IRR NEV ratio and IRR NEV volatility. Corporate credit unions must consider the effects on prepayment speeds when performing the rate shocks. Results of the rate shocks must not result in NEV ratio declining below 2 percent or a decline of NEV (NEV volatility) of more than 15 percent (expanded authorities allow for greater NEV volatility). A corporate credit union must also include the effects of interest rate derivative exposure when performing the rate shocks.

Corporate Credit Union A: 300 bp Increase in Interest Rates

	Weighted average life (years)	Modified duration	Par value	Market value
Assets:				
Private Label MBS (2)	3.00	0.083	$1,000,000	$997,510
ABS (3)	1.70	0.900	2,000,000	1,946,000
Corporate Bonds & Member Loans (3)	1.50	0.900	3,000,000	2,919,000
Cash and Cash Equivalent Investments (1)	0.10	0.100	3,850,000	3,838,450
Capital Instruments (PCC or NCA) (2)	3.00	0.083	50,000	49,876
Property	N/A	N/A	50,000	50,000
CUSO Equity	N/A	N/A	50,000	50,000
Total (Capital Notes and Property not included in WAL and duration)	1.16	0.500	10,000,000	9,850,836
Liabilities:				
Overnight and Short-Term Deposits (1)	0.10	0.10	7,500,000	7,477,500
Long-Term Certificates (1)	1.00	0.95	1,500,000	1,457,250
Borrowings (2)	2.00	0.24	500,000	496,400
Total	0.34	0.24	9,500,000	9,431,150
+300 Basis Point NEV				419,686
Capital Instruments (PCC or NCA) (2)	3.00	0.083	50,000	50,000
Retained Earnings	N/A	N/A	450,000	450,000

1—Fixed Rate, 2—Floating Rate, and 3—both Fixed and Floating Rate.

In the example above, Corporate A is shocked with a 300 basis point (bp) increase in interest rates. Its IRR NEV ratio falls to 4.26 percent ($419, 686/$9,850,836) and the plus 300 basis point IRR NEV volatility is 14.80 percent ([5.00% − 4.26%]/5.00%). Corporate A would have been within regulatory compliance since its IRR NEV ratio still exceeds 2 percent and its NEV volatility was lower than 15 percent.

The plus 300 bp shock above assumed that prepayment speeds for amortizing securities would slow in an up rate scenario. The slowdown in prepayment speeds would account for the extended average lives and durations in the MBS and ABS holdings.

The proposed AL NEV measure uses the framework of the IRR NEV, but modifies it to measure and limit the mismatch of average lives of the assets and liabilities related to a corporate's shares, certificates, and borrowings. A 300 basis point credit spread widening, as opposed to changes in interest rates, is used to shock the portfolio and determine if the average life mismatch between assets and liabilities is excessive for the corporate credit union's base net economic value. The proposal requires that the spread widening not result in NEV ratio declining below 2 percent or the NEV volatility of more than 15 percent

(expanded authorities allow for greater IRR NEV volatility). The proposal also requires a secondary AL NEV test with a 50 percent slowdown in prepayment speeds to determine if a corporate has excessive average life extension risk.

Corporate Credit Union A: 300 bp Spread Widening

	Weighted average life (years)	Modified duration	Par value	Market value
Assets:				
Private Label MBS (2)	2.00	0.083	$1,000,000	$943,600
ABS (3)	1.50	0.80	2,000,000	1,915,200
Corporate Bonds & Member Loans (3)	1.50	0.90	3,000,000	2,872,700
Cash and Cash Equivalent Investments (1)	0.10	0.10	3,850,000	3,838,450
Capital Instruments (PCC or NCA) (2)	N/A	N/A	50,000	50,000
Property	N/A	N/A	50,000	50,000
CUSO Equity	N/A	N/A	50,000	50,000
Total (Capital Notes and Property not included in WAL and duration)	1.01	0.48	10,000,000	9,719,950
Liabilities:				
Overnight and Short-Term Deposits (1)	0.10	0.10	7,500,000	7,477,500
Long-Term Certificates (1)	1.00	0.95	1,500,000	1,457,250
Borrowings (2)	2.00	0.24	450,000	425,000
Total	0.34	0.24	9,500,000	9,359,750
+300 Basis Point NEV				360,200
Capital Instruments (PCC or NCA) (2)	3.00	0.083	50,000	50,000
Retained Earnings	N/A	N/A	450,000	450,000

1—Fixed rate, 2—Floating Rate, and 3—both Fixed and Floating Rate.

In the example above, we see that, after a 300 bp spread widening, Corporate A's AL NEV ratio is 3.71 percent ($360,200/$9,719,950) and its AL NEV volatility is 25.80 percent ([5.00% − 3.71%]/5.00%). So Corporate A would have been within regulatory compliance with regard to its AL NEV ratio, but the corporate would have failed the AL NEV volatility portion of the proposed requirement.

This secondary AL NEV measurement that assumes a 50 percent slowdown in prepayment speeds helps model the effect of extension risk on the average life mismatches between assets and liabilities. Slower prepayment speeds will extend securities that amortize based on the payments of the underlying collateral. Securities with more sensitivity to changes in prepayment speeds will suffer greater declines in value when applying the spread widening and prepayment speed slowdown, all else being equal. The proposal permits additional volatility in this particular AL NEV test, from 15 percent to 25 percent (expanded authorities allow for greater AL NEV volatility in the 50 percent slowdown in prepayment speed measure), and also allows for a lower minimum NEV ratio requirement of 1 percent.

These new AL NEV measurements, unlike the IRR NEV measurement, do not include the effect of interest rate derivatives and capital note assets. Interest rate derivatives are excluded because they do not have principal cash flows. Capital instruments are also excluded from AL NEV calculations unless the associated cash inflows or outflows have a fixed date, i.e., they are without rolling or perpetual maturities.

The Board specifically invites comment on the proposed AL NEV limits as well as the assumptions used by NCUA in creating the hypothetical corporate portfolio used to model the effect of those limits.

Net Interest Income Modeling

The ANPR asked about additional testing by corporate credit unions to ensure adequate monitoring of the impact of changing market conditions on the overall balance sheet. For example, the ANPR asked about net interest income (NII), that is, the difference between a corporate's revenues on its assets and the cost of servicing its liabilities, and how NII is affected by changing interest rates. A large majority of commenters who addressed this issue supported incorporating NII modeling into the corporate rule.

The Board believes that NII modeling adds an additional, needed measurement of projected future earnings in multiple interest rate scenarios. Proper and realistic NII modeling will assist corporate management with its budgeting process and will provide an interest rate risk measurement tool if base case NEV declines sharply due to external market shocks. Accordingly, the proposal adds a new paragraph 704.8(g) requiring NII modeling. Corporates must model NII at least once each quarter, using multiple interest rate environments extended over a period of at least two years.

Two-Year Average Life

In addition to the proposed spread widening and NII modeling, the Board is proposing a new paragraph 704.8(h) that will limit the weighted average life (WAL) of a corporate's assets to two years. A corporate credit union must test its assets at least once a month for compliance with this WAL limitation and report noncompliance to the NCUA immediately. In calculating its average life, the proposal requires that a corporate assume that issuer options will not be exercised.

The Board believes that an excessive asset average life is inconsistent with a corporate's primary mission and subjects the corporate to unnecessary risks. The Board proposes to use a two year limit because that should give corporate adequate flexibility to manage their business while maintaining a risk profile consistent with the corporate mission.

Calculation of Duration at the Individual Asset/Liability Level

The proposal adds a new paragraph 704.8(i) that requires a corporate calculate the effective duration and

spread duration for each of its assets and liabilities where the values of these are affected by changes in interest rates or credit spreads. While the NEV tests described above implicitly require such calculation at the individual asset or liability level, the Board believes it important to state this requirement explicitly. This information about individual assets and liabilities will enable the credit union's auditors, board of directors, and NCUA examiners to determine if the corporate is performing these granular calculations correctly, particularly for those assets and liabilities that have embedded optionality resulting in more complex calculations.

Violations of NEV and NII Tests or Limits on Average Life of Assets

Proposed paragraph 704.8(j) has specific requirements pertaining to violations of the NEV and NII testing and the requirement to maintain an average asset life of two years or less.

If a corporate's decline in NEV, base case NEV ratio, or any other NEV ratio resulting from the IRR and AL NEV tests in 704.6 violates the associated regulatory limits, and the corporate cannot adjust its balance sheet so as to satisfy those limits within ten calendar days after detecting the violation, then operating management of the corporate credit union must immediately report this information to its board of directors, supervisory committee, and the NCUA.

If the corporate's regulatory violation persists for 30 or more calendar days, the corporate must submit an action plan to NCUA and is also subject to PCA reclassification. Immediately following the 30th day the corporate must submit a detailed, written action plan to the NCUA that sets forth the time needed and means by which the corporate intends to correct the violation and, if the NCUA determines that the plan is unacceptable, the corporate must immediately restructure its balance sheet to bring the exposure back within compliance or adhere to an alternative course of action determined by the NCUA. If the corporate is currently categorized as adequately capitalized or well capitalized for purposes of § 704.4 (prompt corrective action), the corporate will be immediately recategorized as undercapitalized until the violation is corrected. If the corporate is already in some undercapitalized category, the corporate will be reclassified as one category lower. The corporate must comply with all the PCA provisions relating to undercapitalization until such time as the corporate demonstrates to the satisfaction of the NCUA that the regulatory violation is corrected.

The proposal treats violation of the two-year average asset life requirement, and the NII testing requirement, in a similar fashion. Violations that persist for ten or more days must be reported as described above, and violations that persist for 30 or more days require the submission of an action plan to NCUA and a potential downgrade in PCA capital category.

Limitations on Investments From Single Member or Other Entity

The Board is concerned about risks to both individual corporates and individual natural person credit unions that arise from placing undue reliance on a single entity. For example, if a corporate relies too heavily on investments from one member, that member might decide to remove its funds which could cause severe liquidity problems at the corporate. Similarly, if a natural person credit union (NPCU) has too much money invested in a particular corporate, the NPCU is exposed to credit risk and, potentially, liquidity risk from that lack of diversification.

Accordingly, the proposal adds a new paragraph (k) to § 704.8 that prohibits the corporate from accepting from a member or other entity any investment, including shares, loans, PCC, or NCAs, if, following that investment, the aggregate of all investments from that entity in the corporate would exceed ten percent of the corporate's moving daily average net assets. The purpose of this provision is to prevent a corporate from being too exposed to any particular member or other entity in the event that the entity should suddenly decide to reduce its investments in the corporate.

The concentration limit in proposed paragraph (j) will not become effective for 30 months so as to allow affected corporates a deliberate and orderly transition. At the conclusion of this 30-month phase-in, an affected entity may not make new investments or new loans, or renew existing loans, or reinvest shares or dividends in the corporate, if the aggregate of all the entity's investments in the corporate immediately following such a transaction would exceed the 10 percent limit.

§ 704.9 Liquidity Management

The corporate system provides essential payment systems support to many NPCUs, but the current corporate rule says nothing about maintaining adequate liquidity to support the corporate's payment systems obligations. The proposal amends paragraph 704.9(a) to require that corporates demonstrate accessibility to sources of internal and external liquidity and that they keep a sufficient amount of cash and cash equivalents on hand to support their payment systems obligations.

The current rule places the following aggregate limitation on corporate borrowing:

> A corporate credit union may borrow up to 10 times capital or 50 percent of shares (excluding shares created by the use of member reverse repurchase agreements) and capital, whichever is greater. CLF borrowings and borrowed funds created by the use of member reverse repurchase agreements are excluded from this limit * * *.

12 CFR 704.9(b). The proposal modifies this aggregate limit to restrict corporate borrowing to the lower of ten times capital or 50 percent of capital and shares.

The Board also believes that corporates should be limited in their ability borrow on a secured basis for other than liquidity purposes. As demonstrated by recent events, secured borrowing can create additional risks for the corporate and the NCUSIF. Secured lenders require collateral to be valued at market and they impose an additional haircut (margin) to ensure the borrowing is fully and continuously collateralized. Market shocks can create short-term market values that are below long-term intrinsic values and which can magnify potential losses if collateral were to be seized and sold as permitted by the lending agreements.

Accordingly, the proposal permits secured borrowing for nonliquidity purposes only if the corporate is well capitalized, that is, its core capital exceeds five percent of its moving DANA. The proposal further restricts such borrowing to an amount equal to the difference between the corporate's core capital and five percent of its moving DANA.

Beyond the aggregate borrowing limit, the proposal does not restrict the amount of secured borrowing a corporate may do for liquidity purposes. The proposal does, however, restrict the maturity of any secured borrowing for liquidity purposes to a maximum of 30 days. This maturity limit will not preclude a corporate from renewing liquidity-related borrowings on a rolling basis.

These limits on aggregate borrowing and secured borrowing should help mitigate the consequences of future adverse market events for the corporates and the NCUSIF.

III.D. Phase-in of Part 704 Capital and PCA Requirements

The Board understands that the proposed amendments to Part 704

capital regulations are complex and that many corporates would not meet the targets upon issuance of the final rule. Instead of an immediate implementation, the Board proposes to phase-in the new capital and PCA requirements over a ten-year period of time. Most of the new provisions will be effective after one year, the minimum leverage ratio requirement will become effective after three years, and the provisions related to minimum retained earnings will become effective in the sixth through tenth years. This subsection III.D. discusses the phase-in and demonstrates how a hypothetical corporate might, while complying with the proposed investment and asset liability limitations described above, generate sufficient earnings to meet the capital requirements by the end of the phase-in periods.

None of the new provisions related to capital and PCA will be effective for a period of one year following the publication of the final rule in the **Federal Register**. During this time period, corporates must continue to comply with the existing § 704.3 capital ratio requirement and its associated capital definitions, within the guidance provided by NCUA. Also, while the Board will delay the effective date of the proposed capital and PCA requirements, the Board expects each corporate to begin calculating and reporting its new capital ratios upon publication of the final rule.

Beginning with the first anniversary of the final rule publication corporates will be subject to, and must be in compliance with, all of the new risk-based capital provisions and PCA provisions and their associated definitions. Between the first and third anniversaries, the corporate will continue to comply with the existing minimum total capital ratio in addition to the new risk-based capital ratios. The proposal accomplishes this transition to the new leverage ratio by employing an interim definition of leverage ratio in § 704.2, from the first to the third anniversaries, that tracks the current rule's minimum total capital ratio. Corporates will have several methods, or combination of methods, to achieve compliance with these new capital requirements prior to the third anniversary, including decreasing aggregate assets or portfolio risk or increasing NCAs, PCC, or retained earnings.

Beginning with the third anniversary, corporates will be subject to, and must be in compliance with, the new leverage ratio; however, corporates will not yet need to comply with the additional requirement that retained earnings constitute a specified minimum part of core capital for purposes of the capital ratios.[54] Corporates will have several methods, or combination of methods, to satisfy this new minimum leverage ratio prior to the seventh anniversary, including decreasing assets or increasing PCC or retained earnings.

Beginning with the sixth anniversary, corporates will be subject to, and must be in compliance with, the retained earnings part of the various capital ratios. Most importantly, the corporates must have at least 100bp of retained earnings to satisfy the adequately-capitalized four percent minimum leverage ratio, and 150bp of retained earnings to achieve a five percent leverage ratio and be considered well capitalized. Corporates can only achieve this retained earnings requirement by decreasing assets or increasing retained earnings.

In proposing this phase-in plan the Board analyzed (1) the current capital position of the various corporates, (2) the earning ability of the corporates, and (3) the impact and uncertainty associated with the existing, troubled MBS (discussed further below). The Board believes this phase-in period will encourage corporates to improve their capital base without encouraging overly aggressive strategies to accumulate retained earnings or solicit high cost capital. The Board invites comment on the reasonableness of the proposed phase-in plan and the following analysis.

Results—Current Capital Positions

NCUA analyzed each corporate's current capital under the proposed capital standards based upon 5310 data from August 2009. NCUA adjusted retail corporate credit union capital levels based on known losses at U.S. Central. After this adjustment, 18 retail corporates have zero retained earnings. Nine of the 18 face a complete elimination of PCC accounts and a partial elimination of existing NCA. Additional Other Than Temporary Impairment (OTTI) losses at U.S. Central may increase the number of corporates that fall into this category.

In certain cases, the data in the current 5310 reports do not contain the precision necessary to make an exact calculation. For example, the private label mortgage securities lack details to determine the precise risk-weight. NCUA used 50 percent, but a portion of these instruments will carry higher risk-weights in certain corporates. NCUA also made some assumptions with respect to the risk-weights of derivative portfolios. An accurate risk-weight in these cases requires the assignment of a risk-weight at the transaction level.

Under the proposed capital standards, only two of the 28 corporates would be considered well capitalized or adequately capitalized today, while 16 of 28 corporates would be considered critically undercapitalized. Only two corporates would currently meet the minimum four percent leverage ratio requirement.

The 18 retail corporates that have zero retained earnings will face a significant challenge in meeting the four percent leverage ratio requirement. At the end of year six they will need to have retained earnings equal to 1.0 percent of DANA. This will require earnings in the range of 0.15–0.2 percent of DANA, depending on asset growth. This will require adjustments to business plans and will limit the ability of these corporates to grow.

NCUA created a number of scenarios for recapitalization of the corporate system over this period. In all recapitalization scenarios, retained earnings growth is critical, particularly given the new investment and ALM limitations contained in the proposal. The ability to grow retained earnings is so critical that, before proceeding with the capital phase-in discussion, it is important to first discuss the ability of a corporate to grow its retained earnings under the proposal.

Ability to Grow Retained Earnings Under the Proposed Investment and ALM Limitations

As discussed above, to be adequately capitalized under the new capital rules will require a minimum leverage ratio of four percent (400 bp), consisting of a combination of PCC and retained earnings and measured in relation to 12-month DANA. One hundred of these 400 bp must, by the end of year six, consist of retained earnings. While NCUA believes it is essential to build retained earnings as a component of capital, it also considered whether this prescribed target was reasonable and attainable. Accordingly, NCUA staff analyzed the ability of a hypothetical corporate to obtain 100 bp of retained earnings within six years (measured in relation to 12-month DANA).

Assuming no retained earnings to start, and no asset growth, the corporate would have to earn about 17 bp of net income each year to reach this target. There are many variables that can impact actual earning, and there will be variability in specific corporate credit

[54] Beginning on the third anniversary, corporates that are not making adequate progress in accumulating retained earnings will have to submit a retained earnings accumulation plan, as described in proposed § 704.3(a)(3).

unions' abilities to meet this target. Nonetheless, NCUA determined that, within reasonable assumptions for future earnings and expenses, a corporate credit union could generate the minimum annual earnings necessary to reach the retained earnings target.

The table below presents a sample corporate portfolio with one possible investment mix. This particular portfolio of investments adheres to the proposed limits for investment concentrations and weighted average asset life (WAL).[55]

INVESTMENTS

Sector	Portfolio percentage	Total weighted average life (years)	LIBOR/EDSF spread
FFELP Student Loan ABS	20	1.000	25
Private Student Loan ABS	10	0.500	200
Auto ABS	20	0.600	25
Credit Card ABS	10	1.000	30
Other ABS	10	0.300	10
Overnight Investments	30	0.003	0
Total	100	0.501	34

In structuring this table, NCUA estimated interest income from current investment market data. Additionally:

- Spreads were obtained from Wall Street research, dealer offerings and Wall Street contacts for mid-October 2009.
- All ABS spreads are for AAA senior bonds.
- Overnight Investments include excess Fed Reserves, Repo and Overnight Corporate Deposits.

In preparing this analysis, NCUA also assumed the following corporate liabilities. Funding costs were approximated using a sample of current corporate credit union offerings.

LIABILITIES

Type	Total percentage	Total weighted average life (years)	LIBOR/EDSF spread
Overnight Shares	30	0.003	0
Term Certificates	70	0.500	0
Total	100	0.351	0

This liability mix, when combined with the assets above and assuming the corporate has 4 percent NEV and total capital, also satisfies the proposed asset liability cash flow mismatch sensitivity test.[56]

As demonstrated in the two tables above, this asset-liability mix is capable of generating a net interest income of 34 bp a year under the limitations of the proposed regulation. Using June 2009 corporate system averages for pro forma income and expenses would produce the following net income from operations:[57]

PRO FORMA INCOME USING JANUARY–JUNE 2009 SYSTEM AVERAGES

	Percent
Net Interest Income	0.34
Other Income	0.17
Total Operating Income	0.51
Total Operating Expenses	0.30
Net Income From Operations	0.21

The pro forma income projections above indicate that a corporate can, in fact, grow retained earnings at or above 20 bp a year and so achieve income from operations sufficient to build 100 bp of retained earnings in five to six years (assuming no asset growth).

In addition to the considerations discussed above, there are other factors that can positively affect a corporate's ability to build retained earnings. For example, a modest assumption of interest rate risk usually generates a stable and positive return. A slight mismatch between the modified duration of assets and liabilities can generate a source of positive spread between sources and uses of funds without creating an excessive exposure of earnings or capital at risk or assuming too much interest rate risk. Investments purchased during periods of upward sloping yield curves (i.e., when longer maturities have a higher yield than shorter maturities) usually generate additional earnings consistent with a modest level of interest rate risk. To the extent that the yield curve maintains its slope over the life of the investment, net interest income improves as investment average lives shorten and the book yield

[55] The investment concentration limits appear in proposed § 704.6(d). The two-year limit on weighted average asset life appears in proposed § 704.8(h). These limits are discussed in greater detail earlier in this preamble.

[56] The cash flow mismatch limit appears in proposed § 704.8(e). In the example, the mismatch of about 0.16 years (0.501 minus 0.351) equates to about two months. At four percent NEV, this two-month mismatch satisfies the requirement that the NEV ratio not decline below two percent, and the percentage decline in NEV not exceed fifteen percent, when spread widens 300 bp as specified in paragraphs 704.8(e)(1)(ii) and (iii). Again, this particular limit is discussed in more detail earlier in this preamble.

[57] NCUA derived the non-interest income and expenses from recent aggregate corporate system 5310 data.

is higher versus current market yields for comparable securities with the same remaining average life. This "roll down" effect can also occur due to lower benchmark yields and/or tighter credit spreads. Corporates also have some pricing power in service pricing or dividends paid that can positively affect the building of retained earnings.

Conversely, there are factors that may negatively affect a corporate's ability to build retained earnings. Future net interest investment income may be diminished by tighter credit spreads if a corporate doesn't have the ability to lower the dividend rates it pays, and an inverted yield curve may also have negative implication on a corporate's ability to build retained earnings.

Finally, NCUA realizes that some corporates may have difficulty at first in restructuring their existing portfolios to meet the requirements of the new regulation, particularly with regard to the new cash flow mismatch and WAL limitations. NCUA has the authority, in appropriate cases and within the context of a carefully crafted investment action plan, to permit individual corporates to operate outside these limitations while illiquid legacy investments amortize. Of course, to the extent that legacy investments have credit issues, and the corporate is forced to recognize OTTI, this OTTI will have a negative effect on the corporate's retained earnings growth.

Results: Projected Capital Positions

Having established that it is possible for a corporate to fashion a balance sheet that facilitates earnings growth under the proposed investment and ALM limitations, NCUA used a mix of earnings, growth, and capital contribution assumptions to build scenarios further analyzing the ability of corporates to reach adequate capitalization by year seven.

The different mix types lead NCUA to four scenarios, entitled A through D (for analysis cataloging only). In all scenarios, NCUA assumed that PCC and NCA would be used only to the extent that they qualify for inclusion in the proposed capital measures. In determining the pool of available PCC and NCA investments available, NCUA used an average asset size for natural person credit unions and applied that to the number of current members in each corporate. NCUA also assumed an equal amount of PCC and NCA accounts in all of the scenarios.

The scenario assumptions and results are summarized below.

1. "A" Case Assumptions—NCUA assumed that corporates would have zero growth beyond recapitalization deposits and annual earnings equal to 0.2 percent of DANA (20 bp). NCUA assumed that natural person credit unions would voluntarily recapitalize the corporate system at historical rates of 0.4 percent of assets.

2. "B" Case Assumptions—NCUA assumed that corporates would have zero growth beyond recapitalization deposits, and annual earnings equal to 0.1 percent of DANA (10 bp). NCUA also assumed that existing natural person credit unions would voluntarily recapitalize the corporate system at historical rates of 0.4 percent of assets.

3. "C" Case Assumptions—NCUA assumed that natural person credit unions would not voluntarily recapitalize the corporate system at historical rates. This scenario assumes that natural person credit unions would limit capital investments in the corporate system to 0.2 percent of assets. In the case of U.S. Central, the assumption was that other corporates would invest in capital accounts at one-half of historical levels. In this scenario, DANA and risk-weighted assets were reduced by 4 percent of each year, and earnings are 0.2 percent of DANA.

4. "D" Case Assumptions—NCUA assumed that corporates would have zero growth beyond recapitalization deposits for the first 3 years. Annual earnings would equal 0.2 percent of DANA and natural person credit unions would voluntarily recapitalize the corporate system at historical rates of 0.4 percent of assets. In year 4, DANA was immediately reduced by one third.

The table below illustrates the number of corporates that would achieve adequate capitalization, by year, over the next 7 years, under the various case assumptions.

	Year one	Year two	Year three	Year four	Year five	Year six	Year seven
"A" Case	5	6	7	8	24	25	25
"B" Case	5	5	5	7	7	7	8
"C" Case	4	5	6	6	18	21	24
"D" Case	5	6	7	23	24	24	26

A discussion about the results of each scenario follows.

The A case scenario would result in 25 of the 28 corporates reaching an adequate level of capitalization within six years. With zero growth and .2 percent of earnings each year, a corporate's retained earnings reaches the minimum 100 bp requirement by year five. Three of the corporates fail to meet the aggregate capital requirements by year six because their current assets and numbers of members produce a pool of available PPC and NCA accounts that is inadequate for these three corporates. It is possible that one or more of these three corporates would become adequately capitalized if they are able to obtain an appropriate level of PPC accounts.

Under the B case assumptions, 21 corporates (i.e., 28 minus seven) are unable to reach an adequate capitalization level within six years and 20 are unable to reach an adequate capitalization level within seven years. These institutions will need to further adjust assets, or adjust earnings to insure that return on DANA is significantly in excess 0.1 percent, or obtain member capital investments at amounts greater than historical industry averages.

The C case assumes a 0.2 percent earnings level but also assumes that natural person credit unions will not be willing to recapitalize the corporates at historical levels. In this scenario DANA shrinks by four percent each year, to correspond with the reduced availability of capital instruments. Seven of the 28 corporates are unable to reach adequate capital levels in the first six years. This scenario illustrates that at least a majority of corporates may still reach adequate capital levels even if natural person credit unions reduce the historic amount of capital invested in the corporate system. On the other hand, some corporates may find it difficult to achieve adequate capital levels if their natural person credit unions refuse to provide near historic levels of capital funding. The alternative for these corporates is to reduce assets.

The "D" case scenario represents another possible strategy. A corporate may attempt to maintain current assets, generate retained earnings on the current asset base for several years and

then shrink the balance sheet before the final leverage ratio requirement becomes effective. All but four corporates would reach adequate capitalization under this scenario by the end of year six. Implementation of this scenario may be challenging as it is difficult to shrink assets by this magnitude on the basis of rates alone. The corporate's members would need to actively assist the corporate for it to succeed in this strategy.

These particular scenarios do not reflect NCUA's classification of any specific corporate or its expected capital position during the phase-in period. Each corporate will need to complete a similar analysis with assumptions more specific to its own business plans and based on its own members' potential PCC and NCA contributions. Also, this analysis only goes out to seven years, and does not incorporate the final leverage requirement, effective at ten years, that PCC count only to the extent it is matched dollar for dollar by retained earnings. Corporates that meet the six year leverage requirement should be well-positioned to meet the ten year requirement, but numerical projections beyond six or seven years rely on too many assumptions to carry significant meaning.

These scenarios also make clear that many corporates will struggle to achieve the minimum capital ratios over the proposed phase in period. The minimum leverage ratio will be the most difficult ratio for corporates to achieve because improvements in this ratio require the corporate credit union to both solicit permanent capital and build retained earnings. But if corporates were limited to earnings only, and not able to solicit capital, many would not be able to reach the adequately capitalized level for a significant number of years—in some cases, twenty or more years.

Phase-In of Capital Provisions (Conclusion)

The most likely capital outcome for each corporate will depend on a number of factors unique to that corporate. These factors include the ability to raise capital from existing members and the level of earnings that the corporate is able to achieve. Achieving these new capital requirements may also require a corporate make significant changes in historic business plans and in the way it prices its services and deposit products.

Still, NCUA believes that well-managed corporates that have financial support from their members can in fact reach their capital targets within the proposed phase-in period. For a corporate that lacks good management or significant member support, however, these capital goals may not be achievable. Those corporates that struggle to grow their earnings or to convince members to invest capital will need to shrink their balance sheets, look for potential merger partners, or both.

In addition to general comments on the proposed capital phase-in, NCUA invites individual corporates to provide additional modeling information related to the effect of the proposed phase-in period on that corporate.

III.E. Proposed Rule: Hypothetical Effect on Recent Losses at WesCorp and U.S. Central

As discussed above, the primary purpose of these proposed changes to part 704 is to mitigate future risks to the corporate system so that the system can continue to provide valuable services to NPCUs in a safe and sound manner. Although the focus of the proposal is forward looking, NCUA realizes that it cannot avoid, to some extent, a look backwards. Accordingly, this subsection III.E. illustrates the hypothetical effects of the proposed rule on the balance sheets of WesCorp and U.S. Central as those entities existed in June 2007. NCUA chose WesCorp and U.S. Central for this illustration since their risk positions account for the vast majority of projected losses in the corporate system.

The following chart illustrates the effect of the proposed investment sector limits on the permissible amount of total non-agency residential mortgage backed securities (RMBS): [58]

Corporate	Non-agency RMBS percent of capital (2007)	Proposed rule limit as percent of capital	Exposure reduction under proposed rule [59]
WesCorp	990%	500%	Approximately 50%.
U.S. Central [60]	1,040%	500%	More than 50%.

Non-agency RMBS produced almost 100 percent of projected losses and OTTI in the corporate credit union system. Had it been in effect, the proposed rule would have limited the exposure to this sector by approximately 50 percent for WesCorp and U.S. Central. Using projected losses and the assumption that security selection would have been comparable in quality to what they hold now, WesCorp and U.S. Central losses would have been cut in half.

The following chart illustrates the effect of the proposed limit on the permissible amount of subordinated non-agency residential mortgage backed securities: [61]

Corporate	Subordinated non-agency RMBS as percent of capital (2007)	Proposed rule limit as percent of capital	Exposure reduction under proposed rule
WesCorp	More than 600%	100%	More than 80%.
U.S. Central	More than 150%	100%	More than 30%.

[58] Proposed § 704.6(d). NCUA used post-June June 2007 statistics where the June 2007 statistics were not available. The use of more recent statistics understates loss exposure and, therefore, understates the effects the proposed rule would have had on projected losses if it had been in effect.

[59] The proposed § 704.5(h) also prohibits Net Interest Margin securities (NIMs) and collateralized debt obligations (CDOs), and these are included in the loss projections and exposure reductions. Additionally, contributed capital by corporate credit unions in U.S. Central is excluded from the projected loss number since the losses are directly related to OTTI taken on non-agency RMBS at U.S. Central.

[60] Sandlot Funding assets are included due to the subsequent reconsolidation on U.S. Central's balance sheet and recent accounting changes related to ABCP conduits.

[61] Proposed § 704.6(e).

Subordinated non-agency RMBS produced approximately 70 percent of the combined projected losses and OTTI in WesCorp and U.S. Central.[62] The proposed rule would have lowered the exposure to subordinated non-agency RMBS by more than 80 percent in WesCorp and more than 30 percent in U.S. Central. Using projected losses and the assumption that security selection would have been comparable in quality, WesCorp's losses would have been reduced by more than 75 percent and U.S. Central's losses would have been reduced by more than 15 percent.

Combining the effects of the non-agency RMBS sector limitations, the subordinated non-agency RMBS, and the CDO and NIM prohibitions, aggregate WesCorp losses would have been reduced by approximately 80 percent and U.S. Central losses would have been reduced by approximately 45 percent. The following chart illustrates the effect of the proposed cash flow weighted average life (WAL) mismatch limit under the proposed rule:[63]

Corporate	Investment portfolio WAL (2007)	Liability WAL	Estimated asset and liability WAL mismatch	Proposed rule's approximate limit on WAL mismatch	Minimum estimated WAL reduction of investment WAL under proposed rule
WesCorp	2.88 years	0.97 years	1.91 years	0.40 years	1.51 years.
U.S. Central	2.93 years	0.93 years	2.00 years	0.30 years	1.70 years.

The proposal also limits the WAL of the aggregate investment portfolio to two years. Had they been in place, these proposed restrictions on the maximum average WAL mismatch and the absolute maximum investment WAL would have reduced the amount of liquidity risk and credit risk in the WesCorp and U.S. Central portfolios. The shorter average lives would have produced much quicker principal paydowns and shorter maturities than WesCorp and U.S. Central experienced since June 2007, strengthening system liquidity. Furthermore, the resulting shorter average lives, combined with the limits on WAL extension risk, would have lowered the risk in the allowable RMBS portfolio due to more stable cash flow characteristics.[64]

NCUA is comfortable that these provisions of the proposed rule, taken together, would have resulted in significantly lower corporate losses had they been in effect prior to the recent credit crisis. The reduced losses would have protected corporate credit unions with capital in U.S. Central from some, if not all, of the losses from depleted capital. Additionally, WesCorp's members would have seen lower write-downs of their capital in Wescorp, and WesCorp would have not caused any loss to the NCUSIF—and thus no losses to credit unions that were not WesCorp members.

III.F. Amendments to Part 704 Related to the Structure of the Corporate System

At present, the corporate system consists of twenty-seven corporates that provide retail service and support to natural person credit unions and one wholesale corporate that provides products and services only to the retail corporates. The ANPR discussed this configuration and solicited comment about whether this two-tier structure continues to make sense in the current marketplace. The ANPR asked what the role of the wholesale corporate should be and whether there should be any differentiation in powers and authorities between retail and wholesale corporates.

A slight majority of the commenters believe the two-tiered corporate system, with a network of retail corporates and a single wholesale corporate, U.S. Central, is outdated and unnecessary. Many commenters believe this two-tier structure has resulted in an aggregation of excessive risk at the top tier and that U.S. Central duplicates the investment and payment services that large retail corporates can provide at competitive cost and with greater diversification of risk. Some commenters stated the wholesale tier is redundant, inefficient, led to too much concentrated risk, and has resulted in the creation of an entity that has become "too big to fail." Others stated that elimination of the two-tiered system may lead to a necessary consolidation of the corporate credit union system, resulting in a system in which corporates are more economically viable.

Other commenters, predominantly smaller credit unions, believe that the wholesale tier is beneficial and necessary. Smaller credit unions believe that the level of services and support they receive from corporates, including investment expertise, is not readily available to them in the outside marketplace. Some of these commenters felt that the existence of U.S. Central created efficiencies in the system and that U.S. Central had the greatest level of investment expertise available to the system. Supporters of the status quo, however, typically felt greater regulatory oversight, risk mitigation, and higher capital standards for corporates were still necessary.

Existing § 704.19—Wholesale Corporate Credit Unions

The Board believes that having a third tier in the credit union system presents both an element of inefficiency and a systemic risk multiplier effect. The inefficiency arises from the added cost of having two layers of intermediation for the goods and services extended by the wholesale corporate through its retail corporate members to their natural person credit union members. The multiplier on risk results from the fact that each dollar of loss in excess of retained earnings at the wholesale level can result in as much two additional dollars of loss for the rest of the system: One dollar lost at the retail corporate level and one at the natural person credit union level.[65] Accordingly, the Board is moving towards eliminating regulatory and policy distinctions between wholesale and retail corporates.

The existing § 704.19 provides that wholesale corporates must strive to obtain a one percent retained earnings ratio, as opposed to the existing § 704.3(i), which requires that all other corporates strive to retain a two percent retained earnings ratio. The proposed capital revisions to § 704.3 eliminate the

[62] Subordinated securities include senior mezzanine tranches.

[63] Proposed § 704.8(e). As discussed above, the proposed rule also limits WAL mismatches based on three factors: (1) Current base net economic value (NEV); (2) Investment authorities, and; (3) Total capital. Furthermore, the proposed rule requires WALs be measured assuming: (1) issuer options are not exercised; and (2) further tests and limits for a slowdown in prepayment speeds are conducted.

[64] As discussed above, proposed § 704.8(f) contains an mismatch test that requires the corporate to assume a 50% slowdown in payment speeds.

[65] See, e.g., *Retail Corporates Apply U.S. Central Capital Losses*, Credit Union Times, August 3, 2009, at *www.cutimes.com*.

need for any earnings retention requirement. To ensure that the new capital requirements apply equally to both wholesale and retail corporates, the proposal eliminates both the current paragraph 704.3(i) and current § 704.19. The proposal also eliminate the unnecessary term "wholesale corporate credit union" from the definitions in § 704.2.

To further facilitate the elimination of the third tier, the proposal also amends the existing part 704 provisions on board representation to require that the board of every corporate have a majority of its members comprised of representatives of natural person credit unions. As a result, no corporate in the system will ever again be captive to other corporates. This amendment, and the associated transition period, are discussed in more detail below in connection with the proposed corporate governance amendments applicable to all corporates.

The Board has also directed OCCU to eliminate any distinctions between corporates in field of membership (FOM) policy, and so retail corporates will be allowed to offer services to other corporates and U.S. Central will be allowed to provide services to natural person credit unions.

III.G. Amendments to Part 704 Related to Corporate CUSOs

Part 704 currently permits corporates to invest in and lend to credit union service organizations (corporate CUSOs). A corporate CUSO is defined as an entity that is at least partly owned by a corporate credit union; primarily serves credit unions; restricts its services to those related to the normal course of business of credit unions; and is structured as a corporation, limited liability company, or limited partnership under state law. 12 CFR 704.11(a). Part 704 does not list the permissible activities for corporate CUSOs, unlike part 712, which does list the permissible activities for the CUSOs of natural person FCUs. 12 CFR 712.5(b).

The Board believes it is appropriate to tighten NCUA oversight over the activities of corporate CUSOs. A corporate CUSO may serve hundreds or even thousands of natural person credit unions, and so its activities can affect the entire credit union system. Additionally, as the corporate credit union system evolves in the coming years, some of the services that are currently accomplished in-house at a corporate may migrate to a corporate CUSO. The movement of these activities could increase the systemic risk associated with corporate CUSOs, and NCUA wants to ensure it has some oversight and control of these activities.

Accordingly, the proposal amends § 704.11 to require that, generally, a corporate CUSO must agree that it will limit is services to brokerage services, investment advisory services, and other categories of services as preapproved by NCUA and published on NCUA's Web site. A CUSO that desires to engage in an activity not preapproved by NCUA can apply to NCUA for that approval.

The current paragraph 704.11(e) prohibits a corporate CUSO from acquiring control, directly or indirectly, of another depository financial institution or to invest in shares, stocks, or obligations of an insurance company, trade association, liquidity facility, or similar organization. The proposal retains this prohibition, but moves it paragraph 704.11(g), which sets forth the contents of the mandatory written agreement between ever corporate and its CUSOs. The proposal also adds two other requirements to this mandatory agreement. First, the proposal requires the CUSO agree to expanded access for auditors, the corporate's directors, and NCUA. Currently, the CUSO must agree to permit access to the CUSO's "books, records, and other pertinent documentation," and the proposal expands this access to: "personnel, facilities, equipment, books, records, and any other documentation that the auditor, directors, or NCUA deem pertinent." Second, the proposal prescribes that the CUSO specifically agree to abide by all the requirements set forth in § 704.11.

The current paragraph 704.11(b) places limits on the aggregate amount of a corporate's investments in, and loans to, a CUSO. The proposal does not contain any changes to these limits. Still, data available to NCUA indicates that the level of corporate investment in CUSOs is significantly less than these 704.11(b) limits would allow, based on November 2008 corporate capital levels. The Board invites comment on whether, in the final rule, it should reduce the CUSO investment and loan limits in the current 704.11(b).

III.H. Amendments to Part 704 Related to Corporate Governance

As noted in the ANPR, corporate management requires a high level of sophistication and expertise. Successful corporate management also requires performance and practices that instill and inspire confidence by the membership in the integrity of those in positions of leadership and responsibility. With this proposal, NCUA intends to improve corporate governance standards and elevate confidence in corporate leadership, thereby supporting and strengthening the corporate system. As more fully developed below, the proposed rule sets out new provisions in the following areas:

- Qualifications for corporate directorship, including term limits and NPCU representation;
- Transparency of senior executive and director compensation arrangements; and
- Restrictions on certain severance and indemnification payments for senior executive officers.

§ 704.14 Representation

Qualifications of Directors

Corporate credit unions are complex entities that can, and do, have a significant impact on the functioning of the entire credit union system. The ANPR solicited comment on whether changes to the corporate rule are necessary to ensure a corporate credit union's governing board possesses the requisite degree of knowledge and expertise. One hundred fifty-seven commenters responded to NCUA's request for comment on this subject, and nearly three-quarters of these commenters—112—supported additional qualification standards for corporate directors.

Sophisticated corporate investment and operation strategies require directors with adequate levels of knowledge and experience to understand and provide oversight for these strategies. NCUA believes that the recent crisis in the corporate system was attributable, in part, to a failure on the part of the some corporate boards to understand the extent of the risk embedded in their balance sheets.

Those commenters who supported regulatory director qualifications thought such qualifications would ensure corporates are governed by knowledgeable individuals who are up-to-date on the most recent developments in the credit union system. Some commenters said that board candidates should be limited to either chief executive officers (CEOs) or chief financial officers (CFOs) of member credit unions. There was also some support that directors be required to obtain periodic training or continuing education. Other commenters suggested that the issue of director qualification be left to the discretion of the individual corporate and not be mandated by regulation. Some commenters said that, with respect to state charters, this issue is a function of state law and regulation. Others said that nothing presently prevents a board of directors from

retaining outside experts to assist its understanding on any issue that board may determine.

Some of those opposed to imposing minimum director qualifications stated that an emphasis on education may disqualify certain persons who have valuable experience, skills, or talents not attributable to formal education. Others opposed to regulatory qualifications noted that such qualifications are no assurance against the recurrence of the current corporate system problems, with one noting that all of the various proposed qualifications existed on a voluntary basis at one or more corporates, and those governance techniques had not protected those corporates from the effects of the current economic downturn.

Corporates have evolved into complicated entities with key roles in the credit union system. The Board believes, therefore, that individuals seeking a position on a corporate board should exhibit a minimum level of knowledge and expertise. Accordingly, the proposal adds a new paragraph 704.14(a)(2) to require, as qualification for directorship, that all candidates must currently hold the equivalent of a CEO, CFO, or chief operating officer (COO) position at the member institution (typically, though not always, a natural person credit union). The proposal phases this requirement in by applying it only to candidates at the time of election or reelection, and making the effective date of the proposal some four months after the effective date of the rule.

In lieu of such an experience requirement, the Board considered proposing that directors of corporates be required to obtain formal training on an annual or other periodic basis as a condition of service on a corporate board. The Board determined not to include that requirement in the proposal for a couple of reasons. First, as noted above, the Board believes limiting director eligibility to persons currently holding a CEO, CFO or COO position will help ensure qualified candidates are chosen for board positions. In addition, the Board does not believe it a good use of examiner resources to analyze training attendance records, the sufficiency of a particular corporate's training standards, or the effectiveness of the training.

Although the Board has determined not to impose by regulation a specific, and mandatory, training requirement, the Board believes director training is important and corporates should encourage such training. In 2005, NCUA stated:

> In today's environment directors must have considerable knowledge and devote sufficient time to have an adequate understanding of a corporate's operations. In many cases directors may need extensive training in the corporate's unique operations (i.e., sophisticated investments and asset liability management). The information provided by management is normally extensive and complex. Directors need to dedicate a significant amount of effort to becoming familiar with these concepts.

Corporate Credit Union Guidance Letter 2005–02 (April 5, 2005). These training principles are just as valid today as back in 2005. The standard FCU bylaws also state that FCUs will establish "a policy to address training for newly elected and incumbent directors and volunteer officials in areas such as ethics and fiduciary responsibility, regulatory compliance, and accounting * * *." Standard FCU Bylaws, Art. VI, § 6(d)(2006). Although corporates are not governed by these FCU bylaws, the Board could incorporate similar language into the standard corporate bylaws. The Board solicits comment as to whether such a change to the corporate bylaws would be appropriate.

Term Limits and Other Board Restrictions. The ANPR also solicited comment on whether NCUA should impose term limits for service on a corporate board. The majority of those who offered a comment, on this issue, 80 out of 145, supported the concept of corporate term limits. Those supporting term limits generally stated this would help to eliminate complacency on boards and ensure that corporates were run by the best qualified individuals. Others, in opposition to the idea, advocated that NCUA not impose mandatory term limits by regulation. One corporate opposed director term limits but supported term limits on officer positions within the board to ensure "adequate change in leadership while retaining experienced directors." Others who opposed term limits generally felt that this disrupted continuity and reduced efficiency by creating a continuous need to train new directors.

The Board has determined that some form of term limit will be beneficial. New directors are more likely, generally, than old directors to ask questions about existing policies and to generate suggestions for improvement. This, in turn, should help ensure that corporate policies are subject to continuous review and evaluation. Accordingly, the proposal adds a new paragraph 704.14(a)(3) to impose a six-year limit on continuous service as a corporate director.

Generally, corporate directors serve for staggered three-year terms, as provided in Art. VII, § 2, Corporate Credit Union Bylaws (2003), and the Board intends, for sitting directors, to phase in this new term limit requirement without undue disruption. Accordingly, the proposal would not require any current director to step down before the current term ends, regardless of the length of time served before the rule became effective. Instead, the proposal provides that no individual may stand for election to the board if, at the end of the term for which the individual seeks election, he or she would have served for more than six consecutive years as a director. Corporates should ensure that directors who run for reelection following the effective date of this rule will, in fact, be able to complete their entire term without exceeding the six-year term limit.

The rule also clarifies that, for purposes of calculating term limits, service on the board is determined by reference to the corporate member on whose behalf the individual is serving, and not simply by the number of years the particular individual has served. Thus, for example, if the CEO of an NPCU has served on the board of a corporate for six years, the CFO or COO of that NPCU may not follow on to the board in the next succeeding term. For purposes of the rule, all individuals representing a single member are treated as a single individual.

Given the importance of the role corporate directors fulfill in establishing the overall policy and direction for corporate credit unions, the Board is concerned that those individuals who are chosen for this role be in a position to devote the degree of time and attention necessary to effectively discharge their responsibilities. Accordingly, the proposed rule would establish that no individual may be elected or appointed to the board of one corporate while serving at the same time as a member of any other corporate credit union board. This restriction will help ensure that directors are undivided in their loyalty to the corporate for which they are serving and are not distracted from attending to the needs of their institution because of competing demands arising from another corporate.

The proposal would also prohibit any member of a corporate from having more than one of its officers sitting on the board of the corporate at one time. This provision will prevent a corporate from being dominated by any single member.

Representation by Natural Person Credit Unions

As discussed above, the Board intends to eliminate the distinction between wholesale and retail corporates. Accordingly, the proposal adds a new paragraph 704.14(a)(4) requiring that a majority of a corporate's directors, including the chair of the board, must serve on the board as representatives of natural person credit union members. Retail corporates should already satisfy this governance requirement. The proposal, however, delays the effective date of this provision for three years to allow U.S. Central, the only wholesale corporate, time to meet this new governance requirement.

Because of the addition of the new subparagraphs 704.14(a)(2), (3), and (4), as discussed above, the proposal renumbers the remaining subparagraphs of paragraph 704.14(a).

§ 704.19 Disclosure of Executive and Director Compensation

As noted in the ANPR, part 704 does not currently require any disclosure by a corporate to its members of senior executive compensation arrangements. The response to the ANPR contained a few comments on compensation transparency. Some who commented noted that disclosure of corporate compensation should be subject to the same guidance as applies to natural person credit unions. One commenter said corporates should provide transparency through existing filing requirements, such as the Internal Revenue Service Form 990—required for state charters, but not federal charters. Another commenter argued that executive compensation and disclosure of salary and benefit information have no bearing on the current crisis. This commenter stated that a number of publicly traded companies, each with their management compensation packages fully disclosed to the public, have gone bankrupt during this current crisis.

Debate over disclosure of credit union compensation has been ongoing for years. For example, in November 2005, Congress and the Government Accountability Office (GAO) raised questions about the lack of transparency regarding credit union senior executive compensation. In response, the NCUA undertook the Member Service Assessment Pilot Program to study, among other issues, the transparency of senior executive compensation. On November 3, 2006, NCUA completed its study and issued the *Member Service Assessment Pilot Program: A Study of Federal Credit Union Service* (MSAP), which recommended NCUA consider alternatives requiring FCUs to make periodic disclosure of executive compensation to their members.

Soon after the issuance of the MSAP, GAO also recommended "the Chairman of NCUA take action to ensure that information on federal credit union executive compensation is available to credit union members and the public for review and inspection." GAO, *Credit Unions: Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements* (GAO–07–29) (2006). The Board created an outreach task force which, although not focused specifically on corporate issues, did consider and make some recommendations focused on compensation transparency and related issues. One OTF recommendation was that NCUA "promulgate a regulation requiring federal credit unions and federal corporate credit unions to annually disclose individual senior executive officer compensation to their members." *Report to the NCUA Board from the Outreach Task Force*, p. 71, available at *http://www.ncua.gov/ReportAndPlans/plans-and-reports/2008/OutreachTFReport-022608.pdf.*

Addressing compensation disclosure requires a balancing of privacy interests against the ownership and financial interests of members. The basic question presented is whether an increased level of transparency would strengthen cooperative principles and accountability, and if so, whether those benefits outweigh the damage to individual privacy interests of the affected executives. In the corporate context particularly, the Board believes this balance can and should be struck in favor of increased transparency and disclosure to members. The member-owners of a corporate credit union have a strong financial interest in the corporate. The typical corporate member has large investments in the corporate and much of this investment is at risk, either in the form of perpetual contributed capital, nonperpetual contributed capital, or uninsured shares. The corporate member needs to have this investment properly managed and protected. Accordingly, the member wants the corporate to provide proper financial incentives to its managers and official to do a good job while ensuring that the corporate is also properly expending its funds—and both these interests are affected by compensation paid to corporate executives and officials. Corporate managers and officials, of course, do have privacy interests in their compensation, but those interests diminish the more senior the manager and the more responsibility the manager or official has for the performance of the corporate and for the attendant protection of the financial interests of the corporate's owners. In sum, the Board believes the interests that corporate members have in this compensation information outweighs any privacy interests the senior managers may have in that information.[66]

Accordingly, the proposal contain a new § 704.19 requiring corporates to provide to its members certain information about the compensation and benefits of senior executive officers and directors. Given the importance Congress and GAO placed on the disclosures required in IRS Form 990 (an annual informational filing required of many tax-exempt entities, including state chartered credit unions), much of § 704.19 mirrors the Form 990 information and access process. For purposes of the rule, however, the Board has concluded that completion of the Form 990 is not sufficient. The IRS determines the form and content of the Form 990 disclosure and so that may change in the future. In addition, even though Form 990 data is publicly available, the affirmative disclosure required by this proposal provides for greater transparency to members.

A paragraph-by-paragraph discussion of the new § 704.19 follows.

Proposed paragraph 704.19(a) requires each corporate to prepare and maintain the annual disclosure of executive and director compensation. As currently proposed, the rule would allow a corporate to choose the disclosure format it considers most appropriate, for example, through the use of a narrative, table, or chart. NCUA solicits comment on the question of whether the rule should specify the form that the disclosure should take, including, for example, the identification of specific categories that must be used, such as direct salary, bonus, deferred compensation, etc. In any case, the disclosure must specifically identify senior executive personnel by name, job title, and compensation. To the extent that members of the board of directors also receive compensation in exchange for or as an incident to their service on the board, the rule specifies that the corporate must disclose that compensation as well.

As discussed more fully below, the definition of compensation

[66] The financial interests of corporate members in their corporate are likely to be more significant than the financial interests of natural person members in their natural person credit union, because natural persons are less likely to have significant amounts of at-risk investments in their credit union than are members of corporates.

encompasses all benefits provided by the corporate to its senior executives or directors. The Board believes that, to be accurate, the disclosure must ascribe a dollar value to each component of compensation, and the proposed rule specifically requires this. The proposal contemplates each corporate will prepare the disclosure at approximately the same time each year, much like an annual tax filing. If senior executive or director compensation changes during the course of a year, a corporate will not be required to prepare a new or amended disclosure. In some instances requiring only an annual disclosure may result in some lag in updated information, but such a disclosure requirement more closely resembles the reporting made in annual tax filings for state chartered credit unions and lessens the disclosure burden on the corporate.

Proposed paragraph 704.19(b) provides that any member may obtain a copy of the most current disclosure, and all disclosures for the previous three years, on request made to the corporate in person or in writing. The corporate must provide the disclosure(s), at no cost to the requesting member, within five business days of receiving the request. In addition, the corporate must distribute the most current disclosure to all its members at least once a year, either in the annual report or in some other manner of the corporate's choosing.

The Board considered whether to impose some type of non-disclosure requirement on members as a condition to receiving the information, but ultimately determined not to impose such a condition, given the difficulty in enforcing such a requirement. The compensation information, however, is likely to be of interest only to members, and the Board anticipates that members will not likely disseminate the information to nonmembers.

Proposed paragraph 704.19(c) clarifies that a corporate may supplement the required disclosure, at its option, with information may put the disclosures in appropriate context. For example, a corporate could provide members with salary surveys, a discussion of compensation in relation to other credit union expenses, or compensation information from similarly sized credit unions or financial institutions.

In the case of merger, the Board is concerned that prospective merger partners may seek to improperly influence the deliberations of management or the board at a corporate seeking to merge. One way to deal with the potential for improper activity is transparency. Accordingly, proposed paragraph 704.19(d) provides that, where a corporate is considering a merger with another corporate, any arrangement resulting in a material increase in compensation (i.e., an increase in current compensation of more than 15 percent or $10,000, whichever is greater) for any senior executive officer or director of the merging corporate must be included in the annual disclosure form. In addition, the proposal specifies that corporates must describe in the merger plan submitted to the NCUA any financial arrangements providing for a material increase in compensation for any senior executive officer or director. The Board intends that all arrangements, formal and informal, be covered by this disclosure requirement. The scope of disclosure includes both arrangements that are written and those not immediately reduced to writing, as well as arrangements involving the deferred receipt of compensation.

Where a merging credit union is federally chartered, the proposal would also require an affirmative disclosure of the existence of a material increase in compensation to its members before their vote on the merger. State law governs whether members of a state-chartered credit union are entitled to vote; therefore, NCUA is only proposing this latter requirement for federally chartered corporate credit unions.

Section 704.2 contains two proposed definitions relating to the scope of the § 704.19 disclosures. First, the proposal eliminates the current definition of *senior management employee,* a term no longer used in part 704, and replaces that definition with a definition of *senior executive officer* as:

> [A] chief executive officer, any assistant chief executive officer (e.g., any assistant president, any vice president or any assistant treasurer/manager), and the chief financial officer (controller). This term also includes employees of any entity hired to perform the functions described above.

This definition is similar to that currently used in § 701.14 of NCUA's rules. 12 CFR 701.14. Second, since the Board believes it is important for complete accuracy to require disclosure of all forms of executive compensation, the proposal defines *compensation* as:

> [A]ll salaries, fees, wages, bonuses, severance payments paid, current year contributions to employee benefit plans (for example, medical, dental, life insurance, and disability), current year contributions to deferred compensation plans and future severance payments, including payments in connection with a merger or similar combination (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under Section 401(a) of the IRS Code). Compensation also includes expense accounts and other allowances (for example, the value of the personal use of housing, automobiles or other assets owned by the corporate credit union; expense allowances or reimbursements that recipients must report as income on their separate income tax return; payments made under indemnification arrangements; and payments made for the benefit of friends or relatives). In calculating required compensation disclosures, reasonable estimates may be used if precise cost figures are not readily available.

The Board is also concerned about the possibility of "reverse" mergers, where a larger credit union merges into a smaller credit union and the officers and directors of the merging entity assume control of the continuing entity. Accordingly, the Board invites comment about whether, and under what circumstances, the requirement to disclose merger-related compensation should be extended to the officers and directors of the continuing credit union as well as the merging credit union.

§ 704.20 Limitations on Golden Parachute and Indemnification Provisions

Section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990[67] (Fraud Act) amended the Federal Credit Union Act (Act) by adding a new section 206(t). Public Law 101–647, section 2523(b) (1990). Section 206(t) provides that "[t]he Board may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment." 12 U.S.C. 1786(t)(1).

Accordingly, the proposal adds a new § 704.20 to NCUA's corporate rule that prohibits golden parachutes, that is, payments made to an institution affiliated party (IAP) that are contingent on the termination of that person's employment and received when the corporate making the payment is troubled, undercapitalized, or insolvent. The proposal also prohibits a corporate, regardless of its financial condition, from paying or reimbursing an IAP's legal and other professional expenses incurred in administrative or civil proceedings instituted by NCUA or the appropriate state regulatory authority.

The new § 704.20 will be effective immediately upon the finalization of this rule. These limitations will apply to all new employment contracts entered into on or after that date, as well as

[67] The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 is title XXV of the Crime Control Act of 1990, S. 3266, which was passed by Congress on October 27, 1990 and signed into law on November 29, 1990.

existing contracts that are renewed or modified in any way after that date.

A paragraph-by-paragraph summary of the proposed § 704.20 follows:

Paragraph 704.20(a) Definitions

This proposal contains several definitions. The key definitions are discussed further below.

Paragraph 704.20(b) Golden Parachute Payments Prohibited

The proposal provides, generally, that no corporate credit union will make or agree to make any golden parachute payment, that is, a payment to an *institution-affiliated party* (IAP) that is contingent on the termination of that person's employment and received when the corporate making the payment is troubled, as defined in § 701.14(b)(4) of NCUA's rules. 12 CFR 701.14(b)(4); *see also* 12 U.S.C. 1790a; 12 U.S.C. 1786(r) (definition of IAP). The proposal also prohibits golden parachute payments in the event a corporate has become insolvent or "undercapitalized" for prompt corrective action purposes. *See* proposed § 704.4. This prohibition is intended to prevent IAPs who are substantially responsible for the troubled condition of a corporate from receiving an unwarranted benefit.

The proposed definition of golden parachute would also exclude certain payments pursuant to certain bona fide deferred compensation plans. Although the rule text is necessarily complex, the proposal provides that, in general, a plan funded by earned but deferred compensation is allowed. Also, certain types of elective plans are allowed if they are funded, were in effect more than one year prior to any of the events described in § 701.14(b)(4) of NCUA rules, and the party is vested in the plan. For example, payments made pursuant to qualified retirement plans; nondiscriminatory severance pay plans; benefit plans required by state statute, and death benefit arrangements would not be prohibited. Payments made pursuant to these exclusions, however, are generally limited in amount to 12 months of base salary.

Paragraph 704.20(c) Prohibited Indemnification Payments

Section 206(t) of the Act authorizes NCUA to prohibit or limit indemnification payments. 12 U.S.C. 1786(t)(5). The Act defines a *prohibited indemnification payment* as a payment by a corporate for the benefit of an IAP for any liability or legal expense sustained in connection with an administrative or civil enforcement action that results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the conduct of the affairs of an insured credit union, or required to cease and desist from or take any affirmative action described in § 206 of the FCU Act. 12 U.S.C. 1786. Accordingly, the proposed paragraph 704.20(d) generally prohibits a corporate, regardless of its financial condition, from paying or reimbursing an IAP's legal and other professional expenses incurred in proceedings instituted by NCUA or the appropriate state regulatory authority. Paragraph 704.20(e), discussed below, describes when a corporate can proceed to indemnify an IAP.

Paragraph 704.20(d) Permissible Golden Parachute Payments

The Board has determined that in certain, limited circumstances payments that otherwise satisfy the definition of golden parachute payments should be permitted. The proposal includes three exceptions to the general prohibition on golden parachutes:

- One exception permits the insertion of a golden parachute payment provision into an employment contract when a corporate which is already in troubled condition needs to hire a senior manager with expertise to help put the corporate back on a sound financial footing (the "white knight" exception). Without this white knight exception, a troubled corporate may not be able to attract qualified senior management. Before employing the white knight exception to make a payment, a corporate must notify and obtain the written permission of the Board.
- Another exception permits reasonable severance arrangements in the context of a merger for the management of the merging corporate. The merger must be unassisted, that is, at no cost to the NCUA; and any severance payments made cannot exceed twelve months salary. In addition, the NCUA Board must review and approve the payment in advance.
- Finally, there is a general exception that permits severance arrangements on an exceptional basis where the NCUA Board determines the payment is appropriate.

In applying to NCUA for any of the three exceptions above, the corporate credit union must assert to NCUA its belief that the IAP does not bear any responsibility for the troubled condition of the corporate. Specifically, the corporate must demonstrate that it does not possess, and is not aware of, any information that provides a reasonable basis to believe that:

- The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the corporate credit union that has had or is likely to have a material adverse effect on the corporate credit union;
- The IAP is substantially responsible for the insolvency of, the appointment of a conservator or liquidating agent for, or the troubled condition of the corporate credit union;
- The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the corporate credit union; or
- The IAP has violated or conspired to violate certain specified criminal provisions of the United States Code.

In determining whether to grant an application for any of these exceptions, the Board may also consider:

- Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;
- The length of time the IAP was affiliated with the corporate credit union; and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and
- Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 206(t) of the Act.

Paragraph 704.20(e) Permissible Indemnification Payments

Broadly speaking, Congress intended through the Fraud Act to limit the ability of IAPs who are responsible for losses sustained by an insured depository institution to avoid the consequences of that responsibility. Where, however, that responsibility has not yet been finally established, the Board does not intend to categorically prohibit corporates from advancing funds to pay or reimburse IAP's for reasonable legal or other professional expenses incurred in defending against an administrative or civil action brought by NCUA. Accordingly, paragraph 704.20(e) prescribes certain circumstances under which indemnification payments may be made.

The proposed rule provides that indemnification payments may be made where the corporate's board of directors makes a good faith determination, after due investigation, that:

- The IAP acted in good faith and in a manner he/she believed to be in the best interests of the corporate credit union;

• The payment of such expenses will not materially adversely affect the corporate credit union's safety and soundness;

• The indemnification payments ultimately do not become prohibited indemnification payments as defined in 704.20(a), that is, the administrative action does not result in a civil money penalty, removal order, or cease and desist order against the IAP; and

• The IAP agrees in writing to reimburse the corporate credit union, to the extent not covered by payments from insurance, for that portion of the advanced indemnification payments, if any, which subsequently becomes prohibited indemnification payments.

The proposed rule does permit a corporate to purchase commercial insurance policies or fidelity bonds, at a reasonable cost, to pay the future potential cost of defending an administrative proceeding or civil action. Such insurance cannot pay for any penalty or judgment against an IAP but may pay restitution to the corporate or its liquidating agent.

Paragraph 704.20(f) Filing Instructions

This paragraph provides procedures for corporate credit unions to request Board permission to make nondiscriminatory severance plan payments and golden parachute payments described in paragraph 704.20(d).

Paragraph 704.20(g) Applicability in the Event of Liquidation or Conservatorship

This paragraph clarifies how the restrictions in this section function in the event of conservatorship or liquidation. Any consent or approval of a golden parachute payment granted under the provisions of this part by the Board will not in any way bind any liquidating agent or conservator for a failed corporate credit union and will not in any way obligate the liquidating agent or conservator to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement.

Compensation Disclosure and Prohibition of Golden Parachutes: Application to Natural Person Credit Unions; Consideration of TARP Limitations

At this time, the Board is primarily concerned with recent problems exposed by the corporate financial crisis, including corporate governance problems. Accordingly, the Board intends to apply the requirements of proposed § 704.19 and 704.20 only to corporates, and not to natural person credit unions.[68]

The Board also notes that its proposals (i.e., on disclosure of compensation and prohibition of golden parachutes and indemnification arrangements) differ from the requirements in the Treasury's recent final rule applicable to entities receiving federal assistance under the Troubled Asset Relief Program (TARP) program. 74 FR 28394 (June 15, 2009). The Treasury rule imposes several substantive limits on senior executive compensation, including limits on bonuses and the use of compensation plans that would encourage earnings manipulation to enhance executive compensation. The Treasury rule also requires affected entities establish a compensation committee comprised of independent directors, prepare a written policy on luxury expenditures, disclose certain types of perquisites, and eliminate tax gross ups. The Board does not believe adoption of the Treasury approach for all corporate credit unions is necessary or desirable at this time, although the Board reserves the right to impose similar conditions in the future on any credit union that receives assistance from the NCUSIF.

IV. Regulatory Procedures

IV.A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities (those under $10 million in assets). The proposal only applies to corporates, all but one of which has assets well in excess of $10 million. Accordingly, the proposed amendments will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

IV.B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of a either a reporting or a recordkeeping requirement, both referred to as information collections. The Office of Management and Budget (OMB) has approved the current information collection requirements in part 704 and assigned them control number 3133–0129.

The proposed changes to part 704 modify existing information collection requirements and impose new information collection requirements. As required by the PRA, NCUA is submitting a copy of this proposed regulation to the Office of Management and Budget (OMB) for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed rule should submit them to the OMB at the address noted below.

Estimated PRA Burden: Capital and PCA Requirements

NCUA has determined that the following capital and PCA aspects of the proposed rule either modify or create new information collection requirements:

• The current rule imposes an obligation on a corporate to prepare and submit a capital restoration plan in the event the corporate's capital falls below certain specified measures. The proposed rule creates several new capital standards and requirements, and thereby increases the potential for additional circumstances under which a capital restoration plan, or revisions to a plan already submitted, may be required.

• Beginning with the first call report submitted by a corporate three years after the date of the final rule, if the ratio of the corporate's retained earnings to moving daily average net assets is less than .45 percent, the corporate must prepare and submit to NCUA a retained earnings accumulation plan. The plan must explain how the corporate intends to accumulate earnings sufficient to meet the minimum leverage ratio requirements established by the rule within the time frames set forth in the rule.

• The proposal generally requires a corporate to obtain the prior approval of NCUA before permitting the early redemption of any contributed capital.

• The proposal requires a corporate to notify NCUA within fifteen days after any material event has occurred that would cause the corporate to be placed in a lower capital category from the category assigned to it on the basis of the corporate's most recent call report or report of examination.

The NCUA estimates the burden associated with these capital and PCA information collections as follows.

[68] Natural person federal credit unions may provide for indemnification of officers and directors as set forth at § 701.33 of NCUA. To the extent that this proposed § 704.20 conflicts with § 701.33 or any other federal law or regulation, or state law or regulation (for state-chartered corporates), the corporate must comply with § 704.20. *See* 12 CFR 704.1.

The new capital standards will apply uniformly to all twenty-eight corporates. NCUA estimates that approximately twenty corporates will be required to prepare new or revised capital restoration plans in the coming year, and that the effort to prepare or revise a plan will involve fifty hours: 20 corporates × 50 hours = 1,000 total hours.

NCUA estimates that three corporates will be required to prepare retained earnings accumulation plans, and that the effort to prepare such a plan will involve fifty hours: 3 corporates × 50 hours = 150 total hours.

NCUA estimates ten corporates may have to notify NCUA about requests to redeem contributed capital, but that the burden of preparing and sending such a notice would be minimal: 10 corporates × 1 hour = 10 hours.

Similarly, NCUA anticipates that ten corporates may be required to notify NCUA about changes affecting their category under the prompt corrective action provisions of the rule; again, the burden of preparing the notice is minimal: 10 corporates × 1 hour = 10 hours.

Estimated PRA Burden: Investment Requirements

With respect to investments, the proposal requires that at least 90 percent of a corporate's investments have NRSRO ratings, increasing the associated PRA burden.

The change applies to all corporates, and NCUA estimates that all twenty-eight will be required to acquire additional ratings as part of their due investment due diligence. This effort should entail a minimal expenditure of time: 28 corporates × 2 hours = 56 hours.

Given the change in how NRSRO ratings are used, NCUA estimates that approximately ten corporates will encounter downgrades affecting their investments, which will trigger new investment action plans or amended investment action plans. Developing an investment action plan can take as much as twenty hours, with the following burden: 10 corporates × 20 hours = 200 hours.

Estimated PRA Burden: ALM Requirements

With respect to asset and liability management, the proposal requires new spread widening and net interest income testing, which are information collections. The additional testing, which must be done at least quarterly, will be required of and affect all corporates. The proposal also requires a corporate to calculate and record the effective and spread durations for individual assets and liabilities to support the test results. NCUA estimates that burden hours associated with compliance with this requirement would be as follows:

28 corporates × 168 hours (total for the four new tests per year) = 4,704 hours.

Estimated PRA Burden: New CUSO Procedures

The current rule does not set out categories of approved CUSO activity for corporate CUSOs, but instead simply indicates that CUSOs must primarily serve credit unions and may engage in activity that is related to the business of credit unions. Under the proposal, a corporate will be required to obtain the approval from the NCUA for proposed CUSO activities, except for brokerage services and investment advisory services, which are specifically pre-approved. Once an activity has been approved, NCUA will publish that fact on its Web site and the activity will thereafter be considered pre-approved for other CUSOs. NCUA estimates that two hours will be sufficient for corporates to prepare approval requests, and NCUA anticipates that twelve such requests will be made.

Estimated PRA Burden: Corporate Governance Requirements

With respect to corporate governance, the proposal requires:

- Corporates prepare and disseminate to members a disclosure document outlining the compensation arrangements for senior level employees.
- Merging corporates include certain compensation information in their filings with the NCUA and their notices to their members.
- Corporates obtain NCUA approval before making certain golden parachute payments.

These information collections would apply to all twenty-eight corporates. NCUA estimates that compliance with the annual compensation disclosure requirement will take approximately ten hours: 28 corporates × 10 hours = 280 hours.

NCUA estimates that four corporates will merge with other corporates each year, with another entity, and that preparing the required notice and disclosure forms will take 5 hours: 4 corporates × 5 hours = 20 hours.

NCUA also estimates that four corporates will need to solicit NCUA approval in advance of making a severance or golden parachute payment within the scope of the proposed rule, and that preparing the request for approval may take four hours: 4 corporates × 4 hours = 16 hours.

Summary of Collection Burden

NCUA estimates the total information collection burden represented by the proposal, calculated on an annual basis, as follows:

Capital restoration plans: 20 corporates × 50 hours = 1,000 hours.

Retained earnings accumulation plans: 3 corporates × 50 hours = 150 hours.

Notice of intent to redeem contributed capital: 10 corporates × 1 hour = 10 hours.

Notice of PCA category change: 10 corporates × 1 hour = 10 hours.

Ratings procurement: 28 corporates × 2 hours = 56 hours.

Investment action plans: 10 corporates × 20 hours = 200 hours.

ALM testing: 28 corporates × 168 hours = 4,704 hours.

CUSO approval requests: 12 corporates × 2 hours = 24 hours.

Compensation disclosures: 28 corporates × 10 hours = 280 hours.

Merger related disclosures: 4 corporates × 5 hours = 20 hours.

Requests to make golden parachute and severance payments: 4 corporates × 4 hours = 16 hours.

Total Burden Hours: 6,470 hours.

NCUA previously estimated the burden associated with the current rule, and approved by OMB under control number 3133–0129, at about 2,434 hours per corporate, and, for 31 corporates, a total burden of 75,454 hours. The number of corporates has since dropped from 31 to 28, reducing the estimated burden under the current rule to about 68,152 hours. As discussed above, the proposal would add about 6,470 hours to the current burden, bringing the total burden covered by OMB control number 3133–0129 to about 74,622 hours.

NCUA does not anticipate that compliance with any of the new information collection aspects of the proposed rule will require that corporates purchase any additional equipment or hire any additional staff. Accordingly, existing maintenance and service costs to corporates are likewise unaffected, and there should be no additional depreciation expense, since all corporates should be able to implement the new requirements using existing systems, equipment, and personnel. The proposal may require some corporates to incur additional marginal costs associated with the enhanced ALM testing requirements, to the extent that they are not already conducting these tests, and a few corporates will incur additional expense

associated with obtaining required credit ratings for certain investments. NCUA estimates the labor cost associated with this compliance at approximately $50 per hour. Multiplying this figure by the number of additional hours estimated for these burden categories yields an additional financial burden associated with the proposed rule of $8,500 per corporate.

The NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of the NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

The Paperwork Reduction Act requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the NCUA on the proposed regulation.

Comments should be sent to: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Washington, DC 20503; Attention: NCUA Desk Officer, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

IV.C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The executive order states that: "National action limiting the policymaking discretion of the states shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." NCUA has plenary statutory authority to regulate corporate credit unions. 12 U.S.C. 1766(a). Further, the risk of loss to federally-insured credit unions and the NCUSIF due to corporate activities are concerns of national scope. The proposed rule, if adopted, would apply to all corporates that accept funds from federally-insured credit unions, including some state chartered credit unions. NCUA believes that the protection of corporate credit unions, federally-insured credit unions, and ultimately the NCUSIF, warrants application of the proposed rule to all corporates.

The proposed rule does not impose additional costs or burdens on the states or affect the states' ability to discharge traditional state government functions. NCUA has determined that this proposal may have an occasional 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. However, the potential risk to the NCUSIF without the proposed changes justifies any such effects.

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

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

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 703

Credit unions, Investments.

12 CFR Part 704

Credit unions, Corporate credit unions, Reporting and recordkeeping requirements.

12 CFR Part 709

Credit unions, Liquidations.

12 CFR Part 747

Credit unions, Administrative practices and procedures.

By the National Credit Union Administration Board on November 19, 2009.

Mary F. Rupp,

Secretary of the Board.

Accordingly, NCUA proposes to amend 12 CFR parts 702, 703, 704, 709, and 747 as follows:

PART 702—PROMPT CORRECTIVE ACTION

1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

2. Effective [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], revise paragraph (d) of § 702.105 to read as follows:

§ 702.105 Weighted-average life of investments.

* * * * *

(d) *Capital in mixed-ownership Government corporations and corporate credit unions.* For capital stock in mixed-ownership Government corporations, as defined in 31. U.S.C. 9101(2), and perpetual and nonperpetual contributed capital in corporate credit unions, as defined in 12 CFR 704.2, the weighted-average life is defined as greater than one (1) year, but less than or equal to three years;

* * * * *

PART 703—INVESTMENTS AND DEPOSIT ACTIVITIES

3. The authority citation for part 703 continues to read as follows:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

4. Effective [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], revise paragraph (b) of § 703.14 to read as follows:

§ 703.14 Permissible investments.

* * * * *

(b) *Corporate credit union shares or deposits.* A Federal credit union may purchase shares or deposits in a corporate credit union, except where the NCUA Board has notified it that the corporate credit union is not operating in compliance with part 704 of this chapter. A Federal credit union's aggregate amount of perpetual and nonperpetual contributed capital, as defined in part 704 of this chapter, in one corporate credit union is limited to two percent of the federal credit union's assets measured at the time of investment or adjustment. A Federal credit union's aggregate amount of contributed capital in all corporate credit unions is limited to four percent

of assets measured at the time of investment or adjustment.

* * * * *

PART 704—CORPORATE CREDIT UNIONS

5. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1762, 1766(a), 1781, and 1789.

6. Revise § 704.2 to read as follows:

§ 704.2 Definitions.

Adjusted trading means any method or transaction whereby a corporate credit union sells a security to a vendor at a price above its current market price and simultaneously purchases or commits to purchase from the vendor another security at a price above its current market price.

Asset-backed security (ABS) means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders. Mortgage-backed securities are a type of asset-backed security.

Available to cover losses that exceed retained earnings means that the funds are available to cover operating losses realized, in accordance with generally accepted accounting principles (GAAP), by the corporate credit union that exceed retained earnings. Likewise, *available to cover losses that exceed retained earnings and paid-in capital* means that the funds are available to cover operating losses realized, in accordance with GAAP, by the corporate credit union that exceed retained earnings and perpetual contributed capital. Any such losses must be distributed *pro rata* at the time the loss is realized first among the holders of paid-in capital accounts (PIC), and when all PIC is exhausted, then *pro rata* among all membership capital accounts (MCAs), all subject to the optional prioritization described in Appendix A of this Part. To the extent that any contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances. In addition, contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

Capital means the sum of a corporate credit union's retained earnings, paid-in capital, and membership capital. For a corporate credit union that acquires another credit union in a mutual combination, capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

Capital ratio means the corporate credit union's capital divided by its moving daily average net assets.

Collateralized debt obligation (CDO) means a debt security collateralized by mortgage-backed securities, asset-backed securities, or corporate obligations in the form of loans or debt. Senior tranches of Re-REMIC's consisting of senior mortgage- and asset-backed securities are excluded from this definition.

Collateralized mortgage obligation (CMO) means a multi-class mortgage-backed security.

Core capital means the sum of the corporate credit union's retained earnings and paid-in capital.

Commercial mortgage-backed security (CMBS) means a mortgage-backed security collateralized primarily by multi-family and commercial property loans.

Compensation means all salaries, fees, wages, bonuses, severance payments paid, current year contributions to employee benefit plans (for example, medical, dental, life insurance, and disability), current year contributions to deferred compensation plans and future severance payments, including payments in connection with a merger or similar combination (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under Section 401(a) of the IRS Code). Compensation also includes expense accounts and other allowances (for example, the value of the personal use of housing, automobiles or other assets owned by the corporate credit union; expense allowances or reimbursements that recipients must report as income on their separate income tax return; payments made under indemnification arrangements; and payments made for the benefit of friends or relatives). In calculating required compensation disclosures, reasonable estimates may be used if precise cost figures are not readily available.

Contributed capital means either paid-in capital or membership capital accounts.

Core capital means the sum of:

(1) Retained earnings as calculated under GAAP;

(2) Paid-in capital; and

(3) The retained earnings of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination.

Core capital ratio means the corporate credit union's core capital divided by its moving daily average net assets.

Corporate credit union means an organization that:

(1) Is chartered under Federal or state law as a credit union;

(2) Receives shares from and provides loan services to credit unions;

(3) Is operated primarily for the purpose of serving other credit unions;

(4) Is designated by NCUA as a corporate credit union;

(5) Limits natural person members to the minimum required by state or federal law to charter and operate the credit union; and

(6) Does not condition the eligibility of any credit union to become a member on that credit union's membership in any other organization.

Daily average net assets means the average of net assets calculated for each day during the period.

Derivatives means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks.

Dollar roll means the purchase or sale of a mortgage-backed security to a counterparty with an agreement to resell or repurchase a substantially identical security at a future date and at a specified price.

Embedded option means a characteristic of certain assets and liabilities which gives the issuer of the instrument the ability to change the features such as final maturity, rate, principal amount and average life. Options include, but are not limited to, calls, caps, and prepayment options.

Equity investments means investments in real property and equity securities.

Equity security means any security representing an ownership interest in an enterprise (for example, common, preferred, or other capital stock) or the right to acquire (for example, warrants and call options) or dispose of (for example, put options) an ownership interest in an enterprise at fixed or determinable prices. However, the term does not include convertible debt or preferred stock that by its terms either must be redeemed by the issuing

enterprise or is redeemable at the option of the investor.

Exchangeable collateralized mortgage obligation means a class of a collateralized mortgage obligation (CMO) that, at the time of purchase, represents beneficial ownership interests in a combination of two or more underlying classes of the same CMO structure. The holder of an exchangeable CMO may pay a fee and take delivery of the underlying classes of the CMO.

Fair value means the amount at which an instrument could be exchanged in a current, arms-length transaction between willing parties, as opposed to a forced or liquidation sale. Quoted market prices in active markets are the best evidence of fair value. If a quoted market price in an active market is not available, fair value may be estimated using a valuation technique that is reasonable and supportable, a quoted market price in an active market for a similar instrument, or a current appraised value. Examples of valuation techniques include the present value of estimated future cash flows, option-pricing models, and option-adjusted spread models. Valuation techniques should incorporate assumptions that market participants would use in their estimates of values, future revenues, and future expenses, including assumptions about interest rates, default, prepayment, and volatility.

Federal funds transaction means a short-term or open-ended unsecured transfer of immediately available funds by one depository institution to another depository institution or entity.

Foreign bank means an institution which is organized under the laws of a country other than the United States, is engaged in the business of banking, and is recognized as a bank by the banking supervisory authority of the country in which it is organized.

Immediate family member means a spouse or other family member living in the same household.

Limited liquidity investment means a private placement or funding agreement.

Member reverse repurchase transaction means an integrated transaction in which a corporate credit union purchases a security from one of its member credit unions under agreement by that member credit union to repurchase the same security at a specified time in the future. The corporate credit union then sells that same security, on the same day, to a third party, under agreement to repurchase it on the same date on which the corporate credit union is obligated to return the security to its member credit union.

Membership capital means funds contributed by members that: Are adjustable balance with a minimum withdrawal notice of 3 years or are term certificates with a minimum term of 3 years; are available to cover losses that exceed retained earnings and paid-in capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

Mortgage-backed security (MBS) means a security backed by first or second mortgages secured by real estate upon which is located a dwelling, mixed residential and commercial structure, residential manufactured home, or commercial structure.

Moving daily average net assets means the average of daily average net assets for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

Nationally Recognized Statistical Rating Organization (NRSRO) means any entity that has applied for, and been granted permission, to be considered an NRSRO by the United States Securities and Exchange Commission.

NCUA means NCUA Board (Board), unless the particular action has been delegated by the Board.

Net assets means total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met.

Net economic value (NEV) means the fair value of assets minus the fair value of liabilities. All fair value calculations must include the value of forward settlements and embedded options. Paid-in capital, and the unamortized portion of membership capital, that is, the portion that qualifies as capital for purposes of any of the total capital ratio, is excluded from liabilities for purposes of this calculation. The NEV ratio is calculated by dividing NEV by the fair value of assets.

Net interest margin security means a security collateralized by residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in other asset-backed securities.

Obligor means the primary party obligated to repay an investment, e.g., the issuer of a security, the taker of a deposit, or the borrower of funds in a federal funds transaction. Obligor does not include an originator of receivables underlying an asset-backed security, the servicer of such receivables, or an insurer of an investment.

Official means any director or committee member.

Paid-in capital means accounts or other interests of a corporate credit union that: Are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

Pair-off transaction means a security purchase transaction that is closed out or sold at, or prior to, the settlement or expiration date.

Quoted market price means a recent sales price or a price based on current bid and asked quotations.

Repurchase transaction means a transaction in which a corporate credit union agrees to purchase a security from a counterparty and to resell the same or any identical security to that counterparty at a specified future date and at a specified price.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residential mortgage-backed security (RMBS) means a mortgage-backed security collateralized primarily by residential mortgage loans.

Residual interest means the ownership interest in remainder cash flows from a CMO or ABS transaction after payments due bondholders and trust administrative expenses have been satisfied.

Retained earnings means the total of the corporate credit union's undivided earnings, reserves, and any other appropriations designated by management or regulatory authorities. For purposes of this part, retained earnings does not include the allowance for loan and lease losses account, accumulated unrealized gains and losses on available for sale securities, or other comprehensive income items.

Retained earnings ratio means the corporate credit union's retained earnings divided by its moving daily average net assets. For a corporate credit union that acquires another credit union in a mutual combination, the numerator of the retained earnings ratio also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

Section 107(8) institution means an institution described in Section 107(8) of the Federal Credit Union Act (12 U.S.C. 1757(8)).

Securities lending means lending a security to a counterparty, either directly or through an agent, and accepting collateral in return.

Senior executive officer mean a chief executive officer, any assistant chief executive officer (e.g., any assistant president, any vice president or any assistant treasurer/manager), and the chief financial officer (controller). This term also includes employees of any entity hired to perform the functions described above.

Settlement date means the date originally agreed to by a corporate credit union and a counterparty for settlement of the purchase or sale of a security.

Short sale means the sale of a security not owned by the seller.

Small business related security means a security as defined in section 3(a)(53) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(53)), e.g., a security that is rated in 1 of the 4 highest rating categories by at least one nationally recognized statistical rating organization, and represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company. This definition does not include Small Business Administration securities permissible under Sec. 107(7) of the Act.

State means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Stripped mortgage-backed security means a security that represents either the principal-only or interest-only portion of the cash flows of an underlying pool of mortgages.

Subordinated security means a security that has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition.

Total assets means the sum of all a corporate credit union's assets as calculated under GAAP.

Total capital means the sum of a corporate credit union's core capital and its membership capital accounts.

Trade date means the date a corporate credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

Trigger means an event in a securitization that will redirect cash-flows if predefined thresholds are breached. Examples of triggers are delinquency and cumulative loss triggers.

Weighted average life means the weighted-average time to the return of a dollar of principal, calculated by multiplying each portion of principal received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of principal.

When-issued trading means the buying and selling of securities in the period between the announcement of an offering and the issuance and payment date of the securities.

7. Effective [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], revise § 704.2 to read as follows:

§ 704.2 Definitions.

Adjusted core capital means core capital modified as follows:

(1) Deduct an amount equal to the amount of the corporate credit union's intangible assets that exceed one half percent of the corporate credit union's moving daily average net assets, but the NCUA, on its own initiative, upon petition by the applicable state regulator, or upon application from a corporate credit union, may direct that a particular corporate credit union add some or all of these excess intangibles back to the credit union's adjusted core capital;

(2) Deduct investments, both equity and debt, in consolidated credit union service organizations (CUSOs);

(3) If the corporate credit union, on or after [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], contributes new capital or renews an existing capital contribution to another corporate credit union, deduct an amount equal to the aggregate of such new or renewed capital;

(4) Beginning on [DATE 72 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], and ending on [DATE 120 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], deduct any amount of perpetual contributed capital (PCC) that causes PCC minus retained earnings, all divided by moving daily net average assets, to exceed two percent; and

(5) Beginning after [DATE 120 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], deduct any amount of PCC that causes PCC to exceed retained earnings.

Adjusted total capital means *total capital* modified as follows: To the extent that nonperpetual contributed capital accounts are included in total capital, and the sum of those NCAs exceeds the aggregate of the corporate's PCC and retained earnings, the corporate will exclude the excess from adjusted total capital.

Adjusted trading means any method or transaction whereby a corporate credit union sells a security to a vendor at a price above its current market price and simultaneously purchases or commits to purchase from the vendor another security at a price above its current market price.

Applicable state regulator means the prudential state regulator of a state chartered corporate credit union.

Asset-backed commercial paper program (ABCP program) means a program that primarily issues commercial paper that has received a credit rating from an NRSRO and that is backed by assets or other exposures held in a bankruptcy-remote special purpose entity. The term *sponsor of an ABCP program* means a corporate credit union that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the asset pools to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

Asset-backed security (ABS) means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders. Mortgage-backed securities are a type of asset-backed security.

Available to cover losses that exceed retained earnings means that the funds are available to cover operating losses realized, in accordance with generally accepted accounting principles (GAAP), by the corporate credit union that exceed retained earnings. *Available to cover losses that exceed retained*

earnings and perpetual contributed capital means that the funds are available to cover operating losses realized, in accordance with GAAP, by the corporate credit union that exceed retained earnings and perpetual contributed capital. Any such losses must be distributed *pro rata* at the time the loss is realized first among the holders of perpetual contributed capital accounts (PCC), and when all PCC is exhausted, then *pro rata* among all nonperpetual contributed capital accounts (NCAs), all subject to the optional prioritization described in Appendix A of this Part. To the extent that any contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances. In addition, contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

Capital means the same as *total capital,* defined below.

Capital ratio means the corporate credit union's capital divided by its moving daily average net assets.

Collateralized debt obligation (CDO) means a debt security collateralized by mortgage-backed securities, asset-backed securities, or corporate obligations in the form of loans or debt. Senior tranches of Re-REMIC's consisting of senior mortgage- and asset-backed securities are excluded from this definition.

Collateralized mortgage obligation (CMO) means a multi-class mortgage-backed security.

Commercial mortgage-backed security (CMBS) means a mortgage-backed security collateralized primarily by multi-family and commercial property loans.

Compensation means all salaries, fees, wages, bonuses, severance payments paid, current year contributions to employee benefit plans (for example, medical, dental, life insurance, and disability), current year contributions to deferred compensation plans and future severance payments, including payments in connection with a merger or similar combination (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under Section 401(a) of the IRS Code). Compensation also includes expense accounts and other allowances (for example, the value of the personal use of housing, automobiles or other assets owned by the corporate credit union; expense allowances or reimbursements that recipients must report as income on their separate income tax return; payments made under indemnification arrangements; and payments made for the benefit of friends or relatives). In calculating required compensation disclosures, reasonable estimates may be used if precise cost figures are not readily available.

Consolidated Credit Union Service Organization (Consolidated CUSO) means any corporation, partnership, business trust, joint venture, association or similar organization in which a corporate credit union directly or indirectly holds an ownership interest (as permitted by § 704.11 of this Part) and the assets of which are consolidated with those of the corporate credit union for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, consolidated CUSOs are majority-owned CUSOs.

Contributed capital means either perpetual or nonperpetual contributed capital.

Core capital means the sum of:

(1) Retained earnings as calculated under GAAP;

(2) Perpetual contributed capital;

(3) The retained earnings of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination; and

(4) Minority interests in the equity accounts of CUSOs that are fully consolidated. However, minority interests in consolidated ABCP programs sponsored by a corporate credit union are excluded from the credit unions' core capital or total capital base if the corporate credit union excludes the consolidated assets of such programs from risk-weighted assets pursuant to Appendix C of this Part.

Core capital ratio means the corporate credit union's core capital divided by its moving daily average net assets.

Corporate credit union means an organization that:

(1) Is chartered under Federal or state law as a credit union;

(2) Receives shares from and provides loan services to credit unions;

(3) Is operated primarily for the purpose of serving other credit unions;

(4) Is designated by NCUA as a corporate credit union;

(5) Limits natural person members to the minimum required by state or federal law to charter and operate the credit union; and

(6) Does not condition the eligibility of any credit union to become a member on that credit union's membership in any other organization.

Credit-enhancing interest-only strip means an on-balance sheet asset that, in form or in substance:

(1) Represents the contractual right to receive some or all of the interest due on transferred assets; and

(2) Exposes the corporate credit union to credit risk directly or indirectly associated with the transferred assets that exceeds its *pro rata* share of the corporate credit union's claim on the assets whether through subordination provisions or other credit enhancement techniques.

NCUA reserves the right to identify other cash flows or related interests as a credit-enhancing interest-only strip. In determining whether a particular interest cash flow functions as a credit-enhancing interest-only strip, NCUA will consider the economic substance of the transaction.

Daily average net assets means the average of net assets calculated for each day during the period.

Daily average net risk-weighted assets means the average of net risk-weighted assets calculated for each day during the period.

Derivatives means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks.

Dollar roll means the purchase or sale of a mortgage-backed security to a counterparty with an agreement to resell or repurchase a substantially identical security at a future date and at a specified price.

Eligible ABCP liquidity facility means a legally binding commitment to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper and that meets the following criteria:

(1)(i) At the time of the draw, the liquidity facility must be subject to an asset quality test that precludes funding against assets that are 90 days or more past due or in default; and

(ii) If the assets that the liquidity facility is required to fund against are assets or exposures that have received a credit rating by a Nationally Recognized Statistical Rating Organization (NRSRO) at the time the inception of the facility, the facility can be used to fund only those assets or exposures that are rated investment grade by an NRSRO at the time of funding; or

(2) If the assets that are funded under the liquidity facility do not meet the criteria described in paragraph (1) of this definition, the assets must be guaranteed, conditionally or unconditionally, by the United States Government, its agencies, or the central government of an Organization for Economic Cooperation and Development OECD country.

Embedded option means a characteristic of certain assets and liabilities which gives the issuer of the instrument the ability to change the features such as final maturity, rate, principal amount and average life. Options include, but are not limited to, calls, caps, and prepayment options.

Equity investment means an investment in real property and equity securities.

Equity security means any security representing an ownership interest in an enterprise (for example, common, preferred, or other capital stock) or the right to acquire (for example, warrants and call options) or dispose of (for example, put options) an ownership interest in an enterprise at fixed or determinable prices. However, the term does not include convertible debt or preferred stock that by its terms either must be redeemed by the issuing enterprise or is redeemable at the option of the investor.

Exchangeable collateralized mortgage obligation means a class of a collateralized mortgage obligation (CMO) that, at the time of purchase, represents beneficial ownership interests in a combination of two or more underlying classes of the same CMO structure. The holder of an exchangeable CMO may pay a fee and take delivery of the underlying classes of the CMO.

Fair value means the amount at which an instrument could be exchanged in a current, arm's-length transaction between willing parties, as opposed to a forced or liquidation sale. Quoted market prices in active markets are the best evidence of fair value. If a quoted market price in an active market is not available, fair value may be estimated using a valuation technique that is reasonable and supportable, a quoted market price in an active market for a similar instrument, or a current appraised value. Examples of valuation techniques include the present value of estimated future cash flows, option-pricing models, and option-adjusted spread models. Valuation techniques should incorporate assumptions that market participants would use in their estimates of values, future revenues, and future expenses, including assumptions about interest rates, default, prepayment, and volatility.

Federal funds transaction means a short-term or open-ended unsecured transfer of immediately available funds by one depository institution to another depository institution or entity.

Foreign bank means an institution which is organized under the laws of a country other than the United States, is engaged in the business of banking, and is recognized as a bank by the banking supervisory authority of the country in which it is organized.

Immediate family member means a spouse or other family member living in the same household.

Intangible assets means assets considered to be intangible assets under GAAP. These assets include, but are not limited to, core deposit premiums, purchased credit card relationships, favorable leaseholds, and servicing assets (mortgage and non-mortgage). Interest-only strips receivable are not intangible assets under this definition.

Leverage ratio means, before [DATE 36 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], the ratio of adjusted total capital to moving daily average net assets.

Leverage ratio means, on or after [DATE 36 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], the ratio of adjusted core capital to moving daily average net assets.

Limited liquidity investment means a private placement or funding agreement.

Member reverse repurchase transaction means an integrated transaction in which a corporate credit union purchases a security from one of its member credit unions under agreement by that member credit union to repurchase the same security at a specified time in the future. The corporate credit union then sells that same security, on the same day, to a third party, under agreement to repurchase it on the same date on which the corporate credit union is obligated to return the security to its member credit union.

Mortgage-backed security (MBS) means a security backed by first or second mortgages secured by real estate upon which is located a dwelling, mixed residential and commercial structure, residential manufactured home, or commercial structure.

Moving daily average net assets means the average of daily average net assets for the month being measured and the previous eleven (11) months.

Moving daily average net risk-weighted assets means the average of daily average net assets risk-weighted for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

Nationally Recognized Statistical Rating Organization (NRSRO) means any entity that has applied for, and been granted permission, to be considered an NRSRO by the United States Securities and Exchange Commission.

NCUA means NCUA Board (Board), unless the particular action has been delegated by the Board.

Net assets means total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net assets.

Net economic value (NEV) means the fair value of assets minus the fair value of liabilities. All fair value calculations must include the value of forward settlements and embedded options. Perpetual contributed capital, and the unamortized portion of nonperpetual contributed capital that is, the portion that qualifies as capital for purposes of any of the minimum capital ratios, is excluded from liabilities for purposes of this calculation. The NEV ratio is calculated by dividing NEV by the fair value of assets.

Net interest margin security means a security collateralized by residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in other asset-backed securities.

Net risk-weighted assets means risk-weighted assets less Central Liquidity Facility (CLF) stock subscriptions, CLF loans guaranteed by the NCUSIF, U.S. Central CLF certificates, and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net risk-weighted assets.

Nonperpetual capital means funds contributed by members or nonmembers

that: are term certificates with a minimum term of five years or that have an indefinite term (i.e., no maturity) with a minimum withdrawal notice of five years; are available to cover losses that exceed retained earnings and perpetual contributed capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings. In the event the corporate is liquidated, the holders of nonperpetual capital accounts (NCAs) will claim equally. These claims will be subordinate to all other claims (including NCUSIF claims), except that any claims by the holders of perpetual contributed capital (PCC) will be subordinate to the claims of holders of NCAs.

Obligor means the primary party obligated to repay an investment, e.g., the issuer of a security, the taker of a deposit, or the borrower of funds in a federal funds transaction. Obligor does not include an originator of receivables underlying an asset-backed security, the servicer of such receivables, or an insurer of an investment.

Official means any director or committee member.

Pair-off transaction means a security purchase transaction that is closed out or sold at, or prior to, the settlement or expiration date.

Perpetual contributed capital (PCC) means accounts or other interests of a corporate credit union that: are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings. In the event the corporate is liquidated, any claims made by the holders of perpetual contributed capital will be subordinate to all other claims (including NCUSIF claims).

Quoted market price means a recent sales price or a price based on current bid and asked quotations.

Repurchase transaction means a transaction in which a corporate credit union agrees to purchase a security from a counterparty and to resell the same or any identical security to that counterparty at a specified future date and at a specified price.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residential mortgage-backed security (RMBS) means a mortgage-backed security collateralized primarily by residential mortgage loans.

Residual interest means the ownership interest in remainder cash flows from a CMO or ABS transaction after payments due bondholders and trust administrative expenses have been satisfied.

Retained earnings means the total of the corporate credit union's undivided earnings, reserves, and any other appropriations designated by management or regulatory authorities. For purposes of this part, retained earnings does not include the allowance for loan and lease losses account, accumulated unrealized gains and losses on available for sale securities, or other comprehensive income items.

Risk-weighted assets means a corporate credit union's risk-weighted assets as calculated in accordance with Appendix C of this part.

Section 107(8) institution means an institution described in Section 107(8) of the Federal Credit Union Act (12 U.S.C. 1757(8)).

Securities lending means lending a security to a counterparty, either directly or through an agent, and accepting collateral in return.

Securitization means the pooling and repackaging by a special purpose entity of assets or other credit exposures that can be sold to investors. Securitization includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

Senior executive officer mean a chief executive officer, any assistant chief executive officer (e.g., any assistant president, any vice president or any assistant treasurer/manager), and the chief financial officer (controller). This term also includes employees of any entity hired to perform the functions described above.

Settlement date means the date originally agreed to by a corporate credit union and a counterparty for settlement of the purchase or sale of a security.

Short sale means the sale of a security not owned by the seller.

Small business related security means a security as defined in section 3(a)(53) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(53)), e.g., a security that is rated in 1 of the 4 highest rating categories by at least one nationally recognized statistical rating organization, and represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company. This definition does not include Small Business Administration securities permissible under Sec. 107(7) of the Act.

State means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Stripped mortgage-backed security means a security that represents either the principal-only or interest-only portion of the cash flows of an underlying pool of mortgages.

Subordinated security means a security that has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition.

Supplementary Capital means the sum of the following items:

(1) Nonperpetual capital accounts, as amortized under § 704.3(b)(3);

(2) Allowance for loan and lease losses calculated under GAAP to a maximum of 1.25 percent of risk-weighted assets; and

(3) Forty-five percent of unrealized gains on available-for-sale equity securities with readily determinable fair values. Unrealized gains are unrealized holding gains, net of unrealized holding losses, calculated as the amount, if any, by which fair value exceeds historical cost. The NCUA may disallow such inclusion in the calculation of supplementary capital if the NCUA determines that the securities are not prudently valued.

Tier 1 capital means adjusted core capital.

Tier 2 capital means supplementary capital.

Tier 1 risk-based capital ratio means the ratio of Tier 1 capital to the moving daily average net risk-weighted assets.

Total assets means the sum of all a corporate credit union's assets as calculated under GAAP.

Total capital means the sum of a corporate credit union's adjusted core capital and its supplementary capital, less the corporate credit union's equity investments not otherwise deducted when calculating adjusted core capital.

Total risk-based capital ratio means the ratio of total capital to moving daily net risk-weighted assets.

Trade date means the date a corporate credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

Trigger means an event in a securitization that will redirect cash-flows if predefined thresholds are breached. Examples of triggers are

delinquency and cumulative loss triggers.

Weighted average life means the weighted-average time to the return of a dollar of principal, calculated by multiplying each portion of principal received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of principal.

When-issued trading means the buying and selling of securities in the period between the announcement of an offering and the issuance and payment date of the securities.

8. Effective [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], revise § 704.3 to read as follows:

§ 704.3 Corporate credit union capital.

(a) *Capital requirements.* (1) A corporate credit union must maintain at all times:

(i) A leverage ratio of 4.0 percent or greater;

(ii) A Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) A total risk-based capital ratio of 8.0 percent or greater.

(2) To ensure it meets its capital requirements, a corporate credit union must develop and ensure implementation of written short- and long-term capital goals, objectives, and strategies which provide for the building of capital consistent with regulatory requirements, the maintenance of sufficient capital to support the risk exposures that may arise from current and projected activities, and the periodic review and reassessment of the capital position of the corporate credit union.

(3) Beginning with the first call report submitted on or after [DATE 36 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a corporate credit union must calculate and report to NCUA the ratio of its retained earnings to its moving daily average net assets. If this ratio is less than 0.45 percent, the corporate credit union must, within 30 days, submit a retained earnings accumulation plan to the NCUA for NCUA's approval. The plan must contain a detailed explanation of how the corporate credit union will accumulate earnings sufficient to meet all its future minimum leverage ratio requirements, including specific semiannual milestones for accumulating retained earnings. If the corporate credit union fails to submit a plan acceptable to NCUA, or fails to comply with any element of a plan approved by NCUA, the corporate will immediately be classified as significantly undercapitalized or, if already significantly undercapitalized, as critically undercapitalized. The corporate credit union will be subject to all the associated prompt corrective actions under § 704.4.

(b) *Requirements for nonperpetual contributed capital* accounts (NCA)—(1) Form. NCA funds may be in the form of a term certificate or a no-maturity notice account.

(2) Disclosure. The terms and conditions of a nonperpetual contributed capital account must be disclosed to the recorded owner of the account at the time the account is opened and at least annually thereafter.

(i) The initial NCA disclosure must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board; and

(ii) The annual disclosure notice must be signed by the chair of the corporate credit union. The chair must sign a statement that certifies that the notice has been sent to all entities with NCAs. The certification must be maintained in the corporate credit union's files and be available for examiner review.

(3) Five-year remaining maturity. When a no-maturity NCA has been placed on notice, or a term account has a remaining maturity of less than five years, the corporate will reduce the amount of the account that can be considered as nonperpetual contributed capital by a constant monthly amortization that ensures the capital is fully amortized one year before the date of maturity or one year before the end of the notice period. The full balance of an NCA being amortized, not just the remaining non-amortized portion, is available to absorb losses in excess of the sum of retained earnings and perpetual contributed capital until the funds are released by the corporate credit union at the time of maturity or the conclusion of the notice period.

(4) Release. Nonperpetual contributed capital may not be released due solely to the merger, charter conversion, or liquidation of the account holder. In the event of a merger, the capital account transfers to the continuing entity. In the event of a charter conversion, the capital account transfers to the new institution. In the event of liquidation, the corporate may release a member capital account to facilitate the payout of shares, but only with the prior written approval of the NCUA.

(5) Redemption. A corporate credit union may redeem NCAs prior to maturity or prior to the end of the notice period only with the prior approval of the NCUA and, for state chartered corporate credit unions, the approval of the appropriate state regulator.

(6) Sale. A member may transfer its interest in a nonperpetual contributed capital account to a third party member or nonmember.

(7) Merger. In the event of a merger of a corporate credit union, nonperpetual capital will transfer to the continuing corporate credit union. The minimum five-year notice period for withdrawal of no-maturity capital remains in effect.

(c) *Requirements for perpetual contributed capital (PCC)*—(1) Disclosure. The terms and conditions of any perpetual contributed capital instrument must be disclosed to the recorded owner of the instrument at the time the instrument is created and must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board.

(2) Release. Perpetual contributed capital may not be released due solely to the merger, charter conversion or liquidation of a member credit union. In the event of a merger, the perpetual contributed capital transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital transfers to the new institution. In the event of liquidation, the perpetual contributed capital may be released to facilitate the payout of shares with NCUA's prior written approval.

(3) Callability. A corporate credit union may call perpetual contributed capital instruments only with the prior approval of the NCUA and, for state chartered corporate credit unions, the applicable state regulator. Perpetual contributed capital accounts are callable on a pro-rata basis across an issuance class.

(4) Perpetual contributed capital. PA corporate credit union may issue perpetual contributed capital to both members and nonmembers.

(5) The holder of a PCC instrument may freely transfer its interests in the instrument to a third party member or nonmember.

(d) *Individual minimum capital requirements.*

(1) *General.* The rules and procedures specified in this paragraph apply to the establishment of an individual minimum capital requirement for a corporate credit union that varies from any of the risk-based capital requirement(s) or leverage ratio requirements that would otherwise apply to the corporate credit union under this part.

(2) *Appropriate considerations for establishing individual minimum capital requirements.* Minimum capital levels higher than the risk-based capital requirements or the leverage ratio requirement under this part may be appropriate for individual corporate credit unions. The NCUA may establish increased individual minimum capital requirements, including modification of the minimum capital requirements related to being either significantly and critically undercapitalized for purposes of § 704.4 of this part, upon a determination that the corporate credit union's capital is or may become inadequate in view of the credit union's circumstances. For example, higher capital levels may be appropriate when NCUA determines that:

(i) A corporate credit union is receiving special supervisory attention;

(ii) A corporate credit union has or is expected to have losses resulting in capital inadequacy;

(iii) A corporate credit union has a high degree of exposure to interest rate risk, prepayment risk, credit risk, concentration risk, certain risks arising from nontraditional activities or similar risks, or a high proportion of off-balance sheet risk including standby letters of credit;

(iv) A corporate credit union has poor liquidity or cash flow;

(v) A corporate credit union is growing, either internally or through acquisitions, at such a rate that supervisory problems are presented that are not dealt with adequately by other NCUA regulations or other guidance;

(vi) A corporate credit union may be adversely affected by the activities or condition of its CUSOs or other persons or entities with which it has significant business relationships, including concentrations of credit;

(vii) A corporate credit union with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or has loans or securities in nonperforming status or on which borrowers fail to comply with repayment terms;

(viii) A corporate credit union has inadequate underwriting policies, standards, or procedures for its loans and investments;

(ix) A corporate credit union has failed to properly plan for, or execute, necessary retained earnings growth, or

(ix) A corporate credit union has a record of operational losses that exceeds the average of other, similarly situated corporate credit unions; has management deficiencies, including failure to adequately monitor and control financial and operating risks, particularly the risks presented by concentrations of credit and nontraditional activities; or has a poor record of supervisory compliance.

(3) *Standards for determination of appropriate individual minimum capital requirements.* The appropriate minimum capital levels for an individual corporate credit union cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based, in part, on subjective judgment grounded in agency expertise. The factors to be considered in NCUA's determination will vary in each case and may include, for example:

(i) The conditions or circumstances leading to the determination that a higher minimum capital requirement is appropriate or necessary for the corporate credit union;

(ii) The exigency of those circumstances or potential problems;

(iii) The overall condition, management strength, and future prospects of the corporate credit union and, if applicable, its subsidiaries, affiliates, and business partners;

(iv) The corporate credit union's liquidity, capital and other indicators of financial stability, particularly as compared with those of similarly situated corporate credit unions; and

(v) The policies and practices of the corporate credit union's directors, officers, and senior management as well as the internal control and internal audit systems for implementation of such adopted policies and practices.

(4) Procedures—(i) In the case of a state chartered corporate credit union, NCUA will consult with the appropriate state regulator when considering imposing a new minimum capital requirement.

(ii) When the NCUA determines that a minimum capital requirement is necessary or appropriate for a particular corporate credit union, it will notify the corporate credit union in writing of its proposed individual minimum capital requirement; the schedule for compliance with the new requirement; and the specific causes for determining that the higher individual minimum capital requirement is necessary or appropriate for the corporate credit union. The NCUA shall forward the notifying letter to the appropriate state supervisor if a state-chartered corporate credit union would be subject to an individual minimum capital requirement.

(iii) The corporate credit union's response must include any information that the credit union wants the NCUA to consider in deciding whether to establish or to amend an individual minimum capital requirement for the corporate credit union, what the individual capital requirement should be, and, if applicable, what compliance schedule is appropriate for achieving the required capital level. The responses of the corporate credit union and appropriate state supervisor must be in writing and must be delivered to the NCUA within 30 days after the date on which the notification was received. The NCUA may extend the time period for good cause. The time period for response by the insured corporate credit union may be shortened for good cause:

(A) When, in the opinion of the NCUA, the condition of the corporate credit union so requires, and the NCUA informs the corporate credit union of the shortened response period in the notice;

(B) With the consent of the corporate credit union; or

(C) When the corporate credit union already has advised the NCUA that it cannot or will not achieve its applicable minimum capital requirement.

(iv) Failure by the corporate credit union to respond within 30 days, or such other time period as may be specified by the NCUA, may constitute a waiver of any objections to the proposed individual minimum capital requirement or to the schedule for complying with it, unless the NCUA has provided an extension of the response period for good cause.

(v) After expiration of the response period, the NCUA will decide whether or not the proposed individual minimum capital requirement should be established for the corporate credit union, or whether that proposed requirement should be adopted in modified form, based on a review of the corporate credit union's response and other relevant information. The NCUA's decision will address comments received within the response period from the corporate credit union and the appropriate state supervisor (if a state-chartered corporate credit union is involved) and will state the level of capital required, the schedule for compliance with this requirement, and any specific remedial action the corporate credit union could take to eliminate the need for continued applicability of the individual minimum capital requirement. The NCUA will provide the corporate credit union and the appropriate state supervisor (if a state-chartered corporate credit union is involved) with a written decision on the individual minimum capital requirement, addressing the substantive comments made by the corporate credit union and setting forth the decision and the basis for that decision. Upon receipt of this decision by the corporate credit

union, the individual minimum capital requirement becomes effective and binding upon the corporate credit union. This decision represents final agency action.

(4) *Failure to comply.* Failure to satisfy any individual minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individual minimum capital requirement, will constitute a basis to take action as described in § 704.4.

(5) *Change in circumstances.* If, after a decision is made under paragraph (b)(3)(iv) of this section, there is a change in the circumstances affecting the corporate credit union's capital adequacy or its ability to reach its required minimum capital level by the specified date, the NCUA may amend the individual minimum capital requirement or the corporate credit union's schedule for such compliance. The NCUA may decline to consider a corporate credit union's request for such changes that are not based on a significant change in circumstances or that are repetitive or frivolous. Pending the NCUA's reexamination of the original decision, that original decision and any compliance schedule established in that decision will continue in full force and effect.

(e) *Reservation of authority.*

(1) *Transactions for purposes of evasion.* The NCUA may disregard any transaction entered into primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this section.

(2) *Period-end versus average figures.* The NCUA reserves the right to require a corporate credit union to compute its capital ratios on the basis of period-end, rather than average, assets when the NCUA determines appropriate to carry out the purposes of this part.

(3) *Reservation of authority.* (i) Notwithstanding the definitions of core and supplementary capital in paragraph (d) of this section, the NCUA may find that a particular asset or core or supplementary capital component has characteristics or terms that diminish its contribution to a corporate credit union's ability to absorb losses, and the NCUA may require the discounting or deduction of such asset or component from the computation of core, supplementary, or total capital.

(ii) Notwithstanding Appendix C of this Part, the NCUA will look to the substance of a transaction and may find that the assigned risk-weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the corporate credit union. The NCUA may require the corporate credit union to apply another risk-weight, credit equivalent amount, or credit conversion factor that NCUA deems appropriate.

(iii) If Appendix C does not specifically assign a risk-weight, credit equivalent amount, or credit conversion factor to a particular asset or activity of the corporate credit union, the NCUA may assign any risk-weight, credit equivalent amount, or credit conversion factor that it deems appropriate. In making this determination, NCUA will consider the risks associated with the asset or off-balance sheet item as well as other relevant factors.

(4) Where practicable, the NCUA will consult with the appropriate state regulator before taking any action under this paragraph (e) that involves a state chartered corporate credit union.

§ 704.4 [Redesignated as § 704.13]

9. Redesignate § 704.4, *Board responsibilities,* as § 704.13.

10. Effective [DATE 12 MONTHS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], add a new § 704.4 to read as follows:

§ 704.4 Prompt Corrective Action.

(a) *Purpose.* The principal purpose of this section is to define, for corporate credit unions that are not adequately capitalized, the capital measures and capital levels that are used for determining appropriate supervisory actions. This section establishes procedures for submission and review of capital restoration plans and for issuance and review of capital directives, orders, and other supervisory directives. In the case of a state-chartered corporate credit union, NCUA will consult with, and seek to work cooperatively with, the appropriate state regulator before taking any discretionary actions under this section.

(b) *Scope.* This section applies to corporate credit unions, including officers, directors, and employees.

(1) This section does not limit the authority of NCUA in any way to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. The NCUA may take action under this section independently of, in conjunction with, or in addition to any other enforcement action available to the NCUA, including issuance of cease and desist orders, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(2) Unless permitted by the NCUA or otherwise required by law, no corporate credit union may state in any advertisement or promotional material its capital category under this part or that the NCUA has assigned the corporate credit union to a particular category.

(3) Any group of credit unions applying for a new corporate credit union charter will submit, as part of the charter application, a detailed draft plan for soliciting contributed capital and building retained earnings. The draft plan will include specific levels of contributed capital and retained earnings and the anticipated timeframes for achieving those levels. The Board will review the draft plan and modify it as necessary. If the Board approves the plan, the Board will include any necessary waivers of this section or part.

(c) *Notice of capital category.* (1) Effective date of determination of capital category. A corporate credit union will be deemed to be within a given capital category as of the most recent date:

(i) A 5310 Financial Report is required to be filed with the NCUA;

(ii) A final NCUA report of examination is delivered to the corporate credit union; or

(iii) Written notice is provided by the NCUA to the corporate credit union that its capital category has changed as provided in paragraphs (c)(2) or (d)(3) of this section.

(2) Adjustments to reported capital levels and category—

(i) Notice of adjustment by corporate credit union. A corporate credit union must provide the NCUA with written notice that an adjustment to the corporate credit union's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the corporate credit union to be placed in a lower capital category from the category assigned to the corporate credit union for purposes of this section on the basis of the corporate credit union's most recent call report or report of examination.

(ii) Determination by the NCUA to change capital category. After receiving notice pursuant to paragraph (c)(1) of this section, or on its own initiative, the NCUA will determine whether to change the capital category of the corporate credit union and will notify the corporate credit union of the NCUA's determination.

(d) *Capital measures and capital category definitions.* (1) Capital

measures. For purposes of this section, the relevant capital measures are:

(i) The total risk-based capital ratio;

(ii) The Tier 1 risk-based capital ratio; and

(iii) The leverage ratio.

(2) Capital categories. For purposes of this section, a corporate credit union is:

(i) Well capitalized if the corporate credit union:

(A) Has a total risk-based capital ratio of 10.0 percent or greater; and

(B) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(C) Has a leverage ratio of 5.0 percent or greater; and

(D) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by NCUA to meet and maintain a specific capital level for any capital measure.

(ii) Adequately capitalized if the corporate credit union:

(A) Has a total risk-based capital ratio of 8.0 percent or greater; and

(B) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(C) Has:

(*1*)A leverage ratio of 4.0 percent or greater; and

(*2*) Does not meet the definition of a well capitalized corporate credit union.

(iii) Undercapitalized if the corporate credit union:

(A) Has a total risk-based capital ratio that is less than 8.0 percent; or

(B) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(C) Has a leverage ratio that is less than 4.0 percent.

(iv) Significantly undercapitalized if the corporate credit union has:

(A) A total risk-based capital ratio that is less than 6.0 percent; or

(B) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(C) A leverage ratio that is less than 3.0 percent.

(v) Critically undercapitalized if the corporate credit union has:

(A) A total risk-based capital ratio that is less than 4.0 percent; or

(B) A Tier 1 risk-based capital ratio that is less than 2.0 percent; or

(C) A leverage ratio that is less than 2.0 percent.

(3) Reclassification based on supervisory criteria other than capital. Notwithstanding the elements of paragraph (d)(2) of this section, the NCUA may reclassify a well capitalized corporate credit union as adequately capitalized, and may require an adequately capitalized or undercapitalized corporate credit union to comply with certain mandatory or discretionary supervisory actions as if the corporate credit union were in the next lower capital category, in the following circumstances:

(i) Unsafe or unsound condition. The NCUA has determined, after notice and opportunity for hearing pursuant to paragraph (h)(1) of this section, that the corporate credit union is in an unsafe or unsound condition; or

(ii) Unsafe or unsound practice. The NCUA has determined, after notice and an opportunity for hearing pursuant to paragraph (h)(1) of this section, that the corporate credit union received a less-than-satisfactory rating (i.e., three or lower) for any rating category (other than in a rating category specifically addressing capital adequacy) under the Corporate Risk Information System (CRIS) rating system and has not corrected the conditions that served as the basis for the less than satisfactory rating. Ratings under this paragraph (d)(3)(ii) refer to the most recent ratings (as determined either on-site or off-site by the most recent examination) of which the corporate credit union has been notified in writing.

(4) The NCUA may, for good cause, modify any of the percentages in paragraph (d)(2) of this section as described in § 704.3(d).

(e) *Capital restoration plans.* (1) Schedule for filing plan—

(i) In general. A corporate credit union must file a written capital restoration plan with the NCUA within 45 days of the date that the corporate credit union receives notice or is deemed to have notice that the corporate credit union is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the NCUA notifies the corporate credit union in writing that the plan is to be filed within a different period. An adequately capitalized corporate credit union that has been required pursuant to paragraph (d)(3) of this section to comply with supervisory actions as if the corporate credit union were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(ii) Additional capital restoration plans. Notwithstanding paragraph (e)(1)(i) of this section, a corporate credit union that has already submitted and is operating under a capital restoration plan approved under this section is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under paragraph (d)(3) of this section unless the NCUA notifies the corporate credit union that it must submit a new or revised capital plan. A corporate credit union that is notified that it must submit a new or revised capital restoration plan must file the plan in writing with the NCUA within 45 days of receiving such notice, unless the NCUA notifies the corporate credit union in writing that the plan is to be filed within a different period.

(2) Contents of plan. All financial data submitted in connection with a capital restoration plan must be prepared in accordance with the instructions provided on the call report, unless the NCUA instructs otherwise. The capital restoration plan must include all of the information required to be filed under paragraph (k)(2)(ii) of this section. A corporate credit union required to submit a capital restoration plan as the result of a reclassification of the corporate credit union pursuant to paragraph (d)(3) of this section must include a description of the steps the corporate credit union will take to correct the unsafe or unsound condition or practice.

(3) Failure to submit a capital restoration plan. A corporate credit union that is undercapitalized and that fails to submit a written capital restoration plan within the period provided in this section will, upon the expiration of that period, be subject to all of the provisions of this section applicable to significantly undercapitalized credit unions.

(4) Review of capital restoration plans. Within 60 days after receiving a capital restoration plan under this section, the NCUA will provide written notice to the corporate credit union of whether it has approved the plan. The NCUA may extend this time period.

(5) Disapproval of capital plan. If the NCUA does not approve a capital restoration plan, the corporate credit union must submit a revised capital restoration plan, when directed to do so, within the time specified by the NCUA. An undercapitalized corporate credit union is subject to the provisions applicable to significantly undercapitalized credit unions until it has submitted, and NCUA has approved, a capital restoration plan. If the NCUA directs that the corporate submit a revised plan, it must do so in time frame specified by the NCUA.

(6) Failure to implement a capital restoration plan. Any undercapitalized corporate credit union that fails in any material respect to implement a capital restoration plan will be subject to all of the provisions of this section applicable to significantly undercapitalized institutions.

(7) Amendment of capital plan. A corporate credit union that has filed an approved capital restoration plan may, after prior written notice to and

approval by the NCUA, amend the plan to reflect a change in circumstance. Until such time as NCUA has approved a proposed amendment, the corporate credit union must implement the capital restoration plan as approved prior to the proposed amendment.

(f) *Mandatory and discretionary supervisory actions.* (1) Mandatory supervisory actions.—

(i) Provisions applicable to all corporate credit unions. All corporate credit unions are subject to the restrictions contained in paragraph (k)(1) of this section on capital distributions.

(ii) Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized corporate credit unions. Immediately upon receiving notice or being deemed to have notice, as provided in paragraph (c) or (e) of this section, that the corporate credit union is undercapitalized, significantly undercapitalized, or critically undercapitalized, the corporate credit union will be subject to the following provisions of paragraph (k) of this section:

(A) Restricting capital distributions (paragraph (k)(1));

(B) NCUA monitoring of the condition of the corporate credit union (paragraph (k)(2)(i));

(C) Requiring submission of a capital restoration plan (paragraph (k)(2)(ii));

(D) Restricting the growth of the corporate credit union's assets (paragraph (k)(2)(iii)); and

(E) Requiring prior approval of certain expansion proposals (paragraph (k)(2)(iv)).

(iii) Additional provisions applicable to significantly undercapitalized, and critically undercapitalized corporate credit unions. In addition to the requirement described in paragraph (f)(1) of this section, immediately upon receiving notice or being deemed to have notice that the corporate credit union is significantly undercapitalized, or critically undercapitalized, or that the corporate credit union is subject to the provisions applicable to corporate credit unions that are significantly undercapitalized because the credit union failed to submit or implement in any material respect an acceptable capital restoration plan, the corporate credit union will become subject to the provisions of paragraph (k)(3)(iii) of this section that restrict compensation paid to senior executive officers of the institution.

(iv) Additional provisions applicable to critically undercapitalized corporate credit unions. In addition to the provisions described in paragraphs (f)(1)(ii) and (f)(1)(iii) of this section, immediately upon receiving notice or being deemed to have notice that the corporate credit union is critically undercapitalized, the corporate credit union will become subject to these additional provisions of paragraph (k) of this section:

(A) Restricting the activities of the corporate credit union ((k)(5)(i)); and

(B) Restricting payments on subordinated debt of the corporate credit union ((k)(5)(ii)).

(2) Discretionary supervisory actions. In taking any action under paragraph (k) of this section that is within the NCUA's discretion to take in connection with a corporate credit union that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or an action in connection with an officer or director of such corporate credit union; the NCUA will follow the procedures for issuing directives under paragraphs (g) and (i) of this section.

(g) *Directives to take prompt corrective action.* The NCUA will provide an undercapitalized, significantly undercapitalized, or critically undercapitalized corporate credit union prior written notice of the NCUA's intention to issue a directive requiring such corporate credit union to take actions or to follow proscriptions described in this part. Section 747.3002 of this chapter prescribes the notice content and associated process.

(h) *Procedures for reclassifying a corporate credit union based on criteria, other than capital.* When the NCUA intends to reclassify a corporate credit union or subject it to the supervisory actions applicable to the next lower capitalization category based on an unsafe or unsound condition or practice the NCUA will provide the credit union with prior written notice of such intent. Section 747.3003 of this chapter prescribes the notice content and associated process.

(i) *Order to dismiss a Director or senior executive officer.* When the NCUA issues and serves a directive on a corporate credit union requiring it to dismiss from office any director or senior executive officer under paragraphs (k)(3) of this section, the NCUA will also serve upon the person the corporate credit union is directed to dismiss (Respondent) a copy of the directive (or the relevant portions, where appropriate) and notice of the Respondent's right to seek reinstatement. Section 747.3004 of this chapter prescribes the content of the notice of right to seek reinstatement and the associated process.

(j) *Enforcement of directives.* Section 747.3005 of this chapter prescribes the process for enforcement of directives.

(k) *Remedial actions towards undercapitalized, significantly undercapitalized, and critically undercapitalized corporate credit unions.* (1) Provision applicable to all corporate credit unions. A corporate credit union is prohibited, unless it obtains NCUA's prior written approval, from making any capital distribution, including payment of dividends on perpetual and nonperpetual contributed capital accounts if, after making the distribution, the institution would be undercapitalized.

(2) Provisions applicable to undercapitalized corporate credit unions.

(i) Monitoring required. The NCUA will—

(A) Closely monitor the condition of any undercapitalized corporate credit union;

(B) Closely monitor compliance with capital restoration plans, restrictions, and requirements imposed under this section; and

(C) Periodically review the plan, restrictions, and requirements applicable to any undercapitalized corporate credit union to determine whether the plan, restrictions, and requirements are achieving the purpose of this section.

(ii) Capital restoration plan required.

(A) Any undercapitalized corporate credit union must submit an acceptable capital restoration plan to the NCUA.

(B) The capital restoration plan will—

(*1*) Specify—

(*i*) The steps the corporate credit union will take to become adequately capitalized;

(*ii*) The levels of capital to be attained during each year in which the plan will be in effect;

(*iii*) How the corporate credit union will comply with the restrictions or requirements then in effect under this section; and

(*iv*) The types and levels of activities in which the corporate credit union will engage; and

(*2*) Contain such other information as the NCUA may require.

(C) The NCUA will not accept a capital restoration plan unless the NCUA determines that the plan—

(*1*) Complies with paragraph (k)(2)(ii)(B) of this section;

(*2*) Is based on realistic assumptions, and is likely to succeed in restoring the corporate credit union's capital; and

(*3*) Would not appreciably increase the risk (including credit risk, interest-

rate risk, and other types of risk) to which the corporate credit union is exposed; and

(iii) Asset growth restricted. An undercapitalized corporate credit union must not permit its daily average net assets during any calendar month to exceed its moving daily average net assets unless—

(A) The NCUA has accepted the corporate credit union's capital restoration plan; and

(B) Any increase in total assets is consistent with the plan.

(iv) Prior approval required for acquisitions, branching, and new lines of business. An undercapitalized corporate credit union must not, directly or indirectly, acquire any interest in any entity, establish or acquire any additional branch office, or engage in any new line of business unless the NCUA has accepted the corporate credit union's capital restoration plan, the corporate credit union is implementing the plan, and the NCUA determines that the proposed action is consistent with and will further the achievement of the plan.

(v) Discretionary safeguards. The NCUA may, with respect to any undercapitalized corporate credit union, take one or more of the actions described in paragraph (k)(3)(ii) of this section if the NCUA determines those actions are necessary to carry out the purpose of this section.

(3) Provisions applicable to significantly undercapitalized corporate credit unions and undercapitalized corporate credit unions that fail to submit and implement capital restoration plans.

(i) In general. This paragraph applies with respect to any corporate credit union that—

(A) Is significantly undercapitalized; or

(B) Is undercapitalized and—

(*1*) Fails to submit an acceptable capital restoration plan within the time allowed by the NCUA under paragraph (e)(1) of this section; or

(*2*) Fails in any material respect to implement a plan accepted by the NCUA.

(ii) Specific actions authorized. The NCUA may take one or more of the following actions:

(A) Requiring recapitalization.

(*1*) Requiring the corporate credit union to seek and obtain additional contributed capital.

(*2*) Requiring the corporate credit union to increase its rate of earnings retention.

(*3*) Requiring the corporate credit union to combine, in whole or part, with another insured depository institution, if one or more grounds exist under this section or the Federal Credit Union Act for appointing a conservator or liquidating agent.

(B) Restricting any ongoing or future transactions with affiliates.

(C) Restricting interest rates paid.

(*1*) In general. Restricting the rates of dividends and interest that the corporate credit union pays on shares and deposits to the prevailing rates on shares and deposits of comparable amounts and maturities in the region where the institution is located, as determined by the NCUA.

(*2*) Retroactive restrictions prohibited. Paragraph (k)((3)(ii)(C) of this section does not authorize the NCUA to restrict interest rates paid on time deposits or shares made before (and not renewed or renegotiated after) the date the NCUA announced the restriction.

(D) Restricting asset growth. Restricting the corporate credit union's asset growth more stringently than in paragraph (k)(2)(iii) of this section, or requiring the corporate credit union to reduce its total assets.

(E) Restricting activities. Requiring the corporate credit union or any of its CUSOs to alter, reduce, or terminate any activity that the NCUA determines poses excessive risk to the corporate credit union.

(F) Improving management. Doing one or more of the following:

(*1*) New election of Directors. Ordering a new election for the corporate credit union's board of Directors.

(*2*) Dismissing Directors or senior executive officers. Requiring the corporate credit union to dismiss from office any Director or senior executive officer who had held office for more than 180 days immediately before the corporate credit union became undercapitalized.

(*3*) Employing qualified senior executive officers. Requiring the corporate credit union to employ qualified senior executive officers (who, if the NCUA so specifies, will be subject to approval by the NCUA).

(G) Requiring divestiture. Requiring the corporate credit union to divest itself of or liquidate any interest in any entity if the NCUA determines that the entity is in danger of becoming insolvent or otherwise poses a significant risk to the corporate credit union;

(H) Conserve or liquidate the corporate credit union if NCUA determines the credit union has no reasonable prospect of becoming adequately capitalized; and

(I) Requiring other action. Requiring the corporate credit union to take any other action that the NCUA determines will better carry out the purpose of this section than any of the actions described in this paragraph.

(iii) Senior executive officers' compensation restricted.

(A) In general. The corporate credit union is prohibited from doing any of the following without the prior written approval of the NCUA:

(*1*) Pay any bonus or profit-sharing to any senior executive officer.

(*2*) Provide compensation to any senior executive officer at a rate exceeding that officer's average rate of compensation (excluding bonuses and profit-sharing) during the 12 calendar months preceding the calendar month in which the corporate credit union became undercapitalized.

(B) Failing to submit plan. The NCUA will not grant approval with respect to a corporate credit union that has failed to submit an acceptable capital restoration plan.

(iv) Discretion to impose certain additional restrictions. The NCUA may impose one or more of the restrictions prescribed by regulation under paragraph (k)(5) of this section if the NCUA determines that those restrictions are necessary to carry out the purpose of this section.

(4) More stringent treatment based on other supervisory criteria.

(i) In general. If the NCUA determines, after notice and an opportunity for hearing as described in subpart M of part 747 of this chapter, that a corporate credit union is in an unsafe or unsound condition or deems the corporate credit union to be engaging in an unsafe or unsound practice, the NCUA may—

(A) If the corporate credit union is well capitalized, reclassify the corporate credit union as adequately capitalized;

(B) If the corporate credit union is adequately capitalized (but not well capitalized), require the corporate credit union to comply with one or more provisions of paragraphs (k)(1) and (k)(2) of this section, as if the corporate credit union were undercapitalized; or

(C) If the corporate credit union is undercapitalized, take any one or more actions authorized under paragraph (k)(3)(ii) of this section as if the corporate credit union were significantly undercapitalized.

(ii) Contents of plan. Any plan required under paragraph (k)(4)(i) of this section will specify the steps that the corporate credit union will take to correct the unsafe or unsound condition or practice. Capital restoration plans, however, will not be required under paragraph (k)(4)(i)(B) of this section.

(5) Provisions applicable to critically undercapitalized corporate credit unions.

(i) Activities restricted. Any critically undercapitalized corporate credit union must comply with restrictions prescribed by the NCUA under paragraph (k)(6) of this section.

(ii) Payments on contributed capital and subordinated debt prohibited. A critically undercapitalized corporate credit union must not, beginning no later than 60 days after becoming critically undercapitalized, make any payment of dividends on contributed capital or any payment of principal or interest on the corporate credit union's subordinated debt unless the NCUA determines that an exception would further the purpose of this section. Interest, although not payable, may continue to accrue under the terms of any subordinated debt to the extent otherwise permitted by law. Dividends on contributed capital do not, however, continue to accrue.

(iii) Conservatorship, liquidation, or other action. The NCUA may, at any time, conserve or liquidate any critically undercapitalized corporate credit union or require the credit union to combine, in whole or part, with another institution. NCUA will consider, not later than 90 days after a corporate credit union becomes critically undercapitalized, whether NCUA should liquidate, conserve, or combine the institution.

(6) Restricting activities of critically undercapitalized corporate credit unions. To carry out the purpose of this section, the NCUA will, by order—

(i) Restrict the activities of any critically undercapitalized corporate credit union; and

(ii) At a minimum, prohibit any such corporate credit union from doing any of the following without the NCUA's prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action.

(B) Extending credit for any transaction NCUA determines to be highly leveraged.

(C) Amending the corporate credit union's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order.

(D) Making any material change in accounting methods.

(E) Paying compensation or bonuses NCUA determines to be excessive.

(F) Paying interest on new or renewed liabilities at a rate that would increase the corporate credit union's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the corporate credit union's normal market areas.

11. Revise § 704.5 to read as follows:

§ 704.5 Investments.

(a) *Policies.* A corporate credit union must operate according to an investment policy that is consistent with its other risk management policies, including, but not limited to, those related to credit risk management, asset and liability management, and liquidity management. The policy must address, at a minimum:

(1) Appropriate tests and criteria for evaluating investments and investment transactions before purchase; and

(2) Reasonable and supportable concentration limits for limited liquidity investments in relation to capital.

(b) *General.* All investments must be U.S. dollar-denominated and subject to the credit policy restrictions set forth in § 704.6.

(c) *Authorized activities.* A corporate credit union may invest in:

(1) Securities, deposits, and obligations set forth in Sections 107(7), 107(8), and 107(15) of the Federal Credit Union Act, 12 U.S.C. 1757(7), 1757(8), and 1757(15), except as provided in this section;

(2) Deposits in, the sale of federal funds to, and debt obligations of corporate credit unions, Section 107(8) institutions, and state banks, trust companies, and mutual savings banks not domiciled in the state in which the corporate credit union does business;

(3) Corporate CUSOs, as defined in and subject to the limitations of § 704.11;

(4) Marketable debt obligations of corporations chartered in the United States. This authority does not apply to debt obligations that are convertible into the stock of the corporation; and

(5) Domestically-issued asset-backed securities.

(d) *Repurchase agreements.* A corporate credit union may enter into a repurchase agreement provided that:

(1) The corporate credit union, directly or through its agent, receives written confirmation of the transaction, and either takes physical possession or control of the repurchase securities or is recorded as owner of the repurchase securities through the Federal Reserve Book-Entry Securities Transfer System;

(2) The repurchase securities are legal investments for that corporate credit union;

(3) The corporate credit union, directly or through its agent, receives daily assessment of the market value of the repurchase securities and maintains adequate margin that reflects a risk assessment of the repurchase securities and the term of the transaction; and

(4) The corporate credit union has entered into signed contracts with all approved counterparties and agents, and ensures compliance with the contracts. Such contracts must address any supplemental terms and conditions necessary to meet the specific requirements of this part. Third party arrangements must be supported by tri-party contracts in which the repurchase securities are priced and reported daily and the tri-party agent ensures compliance; and

(e) *Securities Lending.* A corporate credit union may enter into a securities lending transaction provided that:

(1) The corporate credit union, directly or through its agent, receives written confirmation of the loan, obtains a first priority security interest in the collateral by taking physical possession or control of the collateral, or is recorded as owner of the collateral through the Federal Reserve Book-Entry Securities Transfer System;

(2) The collateral is a legal investment for that corporate credit union;

(3) The corporate credit union, directly or through its agent, receives daily assessment of the market value of collateral and maintains adequate margin that reflects a risk assessment of the collateral and terms of the loan; and

(4) The corporate credit union has entered into signed contracts with all agents and, directly or through its agent, has executed a written loan and security agreement with the borrower. The corporate or its agent ensures compliance with the agreements.

(f) *Investment companies.* A corporate credit union may invest in an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a), or a collective investment fund maintained by a national bank under 12 CFR 9.18 or a mutual savings bank under 12 CFR 550.260, provided that the company or fund prospectus restricts the investment portfolio to investments and investment transactions that are permissible for that corporate credit union.

(g) *Investment settlement.* A corporate credit union may only contract for the purchase or sale of an investment if the transaction is settled on a delivery versus payment basis within 60 days for mortgage-backed securities, within 30 days for new issues (other than mortgage-backed securities), and within three days for all other securities.

(h) *Prohibitions.* A corporate credit union is prohibited from:

(1) Purchasing or selling derivatives, except for embedded options not required under GAAP to be accounted for separately from the host contract or forward sales commitments on loans to be purchased by the corporate credit union;

(2) Engaging in trading securities unless accounted for on a trade date basis;

(3) Engaging in adjusted trading or short sales; and

(4) Purchasing mortgage servicing rights, small business related securities, residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in asset-backed securities; and

(5) Purchasing net interest margin securities;

(6) Purchasing collateralized debt obligations; and

(7) Purchasing stripped mortgage-backed securities (SMBS), or securities that represent interests in SMBS, except as described in subparagraphs (i) and (iii) below.

(i) A corporate credit union may invest in exchangeable collateralized mortgage obligations (exchangeable CMOs) representing beneficial ownership interests in one or more interest-only classes of a CMO (IO CMOs) or principal-only classes of a CMO (PO CMOs), but only if:

(A) At the time of purchase, the ratio of the market price to the remaining principal balance is between .8 and 1.2, meaning that the discount or premium of the market price to par must be less than 20 points;

(B) The offering circular or other official information available at the time of purchase indicates that the notional principal on each underlying IO CMO should decline at the same rate as the principal on one or more of the underlying non-IO CMOs, and that the principal on each underlying PO CMO should decline at the same rate as the principal, or notional principal, on one or more of the underlying non-PO CMOs; and

(C) The credit union investment staff has the expertise dealing with exchangeable CMOs to apply the conditions in paragraphs (h)(5)(i)(A) and (B) of this section.

(ii) A corporate credit union that invests in an exchangeable CMO may exercise the exchange option only if all of the underlying CMOs are permissible investments for that credit union.

(iii) A corporate credit union may accept an exchangeable CMO representing beneficial ownership interests in one or more IO CMOs or PO CMOs as an asset associated with an investment repurchase transaction or as collateral in a securities lending transaction. When the exchangeable CMO is associated with one of these two transactions, it need not conform to the conditions in paragraphs (h)(5)(i)(A) or (B) of this section.

(i) *Conflicts of interest.* A corporate credit union's officials, employees, and immediate family members of such individuals, may not receive pecuniary consideration in connection with the making of an investment or deposit by the corporate credit union. Employee compensation is exempt from this prohibition. All transactions not specifically prohibited by this paragraph must be conducted at arm's length and in the interest of the corporate credit union.

(j) *Grandfathering.* A corporate credit union's authority to hold an investment is governed by the regulation in effect at the time of purchase. However, all grandfathered investments are subject to the requirements of §§ 704.8 and 704.9.

12. Revise § 704.6 to read as follows:

§ 704.6 Credit risk management.

(a) *Policies.* A corporate credit union must operate according to a credit risk management policy that is commensurate with the investment risks and activities it undertakes. The policy must address at a minimum:

(1) The approval process associated with credit limits;

(2) Due diligence analysis requirements;

(3) Maximum credit limits with each obligor and transaction counterparty, set as a percentage of capital. In addition to addressing deposits and securities, limits with transaction counterparties must address aggregate exposures of all transactions including, but not limited to, repurchase agreements, securities lending, and forward settlement of purchases or sales of investments; and

(4) Concentrations of credit risk (e.g., originator of receivables, servicer of receivables, insurer, industry type, sector type, geographic, collateral type, and tranche priority).

(b) *Exemption.* The limitations and requirements of this section do not apply to certain assets, whether or not considered investments under this part, including fixed assets, individual loans and loan participation interests, investments in CUSOs, investments that are issued or fully guaranteed as to principal and interest by the U.S. government or its agencies or its sponsored enterprises (excluding subordinated debt), and investments that are fully insured or guaranteed (including accumulated dividends and interest) by the NCUSIF or the Federal Deposit Insurance Corporation.

(c) *Issuer Concentration limits*—(1) General rule. The aggregate of all investments in any single obligor is limited to 25 percent of capital or $5 million, whichever is greater.

(2) Exceptions.

(i) Aggregate investments in repurchase and securities lending agreements with any one counterparty are limited to 200 percent of capital;

(ii) Investments in non-money market registered investment companies are limited to 50 percent of capital in any single obligor;

(iii) Investments in money market registered investment companies are limited to 100 percent of capital in any single obligor; and

(iv) Investments in corporate CUSOs are subject to the limitations of § 704.11.

(3) For purposes of measurement, each new credit transaction must be evaluated in terms of the corporate credit union's capital at the time of the transaction. An investment that fails a requirement of this section because of a subsequent reduction in capital will be deemed non-conforming. A corporate credit union is required to exercise reasonable efforts to bring nonconforming investments into conformity within 90 calendar days. Investments that remain nonconforming for 90 calendar days will be deemed to fail a requirement of this section, and the corporate credit union will have to comply with § 704.10.

(d) *Sector Concentration Limits.* (1) A corporate credit union must establish sector limits that do not exceed the following maximums:

(i) Residential mortgage-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(ii) Commercial mortgage-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(iii) FFELP student loan asset-backed securities—the lower of 1000 percent of capital or 50 percent of assets;

(iv) Private student loan asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(v) Auto loan/lease asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(vi) Credit card asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(vii) Other asset-backed securities not listed in paragraphs (ii) through (vi)—the lower of 500 percent of capital or 25 percent of assets;

(viii) Corporate debt obligations—the lower of 1000 percent of capital or 50 percent of assets; and

(ix) Municipal securities—the lower of 1000 percent of capital or 50 percent of assets.

(2) Registered investment companies—A corporate credit union must limit its investment in registered investment companies to the lower of 1000 percent of capital or 50 percent of assets. In addition to applying the limit in this paragraph (d)(2), a corporate credit union must also include the underlying assets in each registered investment company in the relevant sectors described in paragraph (d)(1) of this section when calculating those sector limits.

(3) A corporate credit union will limit its aggregate holdings in any investments not described in paragraphs (d)(1) or (d)(2) to the lower of 100 percent of capital or 5 percent of assets. The NCUA may approve a higher percentage in appropriate cases.

(4) The following investments are also excluded from the concentration limits in paragraphs (d)(1), (d)(2), and (d)(3): Investments in other federally insured credit unions, deposits in other depository institutions, and investment repurchase agreements.

(e) *Subordinated securities.* A corporate credit union may not hold subordinated securities in excess of the lower of 100 percent of capital or 5 percent of assets in any single investment sector described in paragraphs (d)(1) and (d)(2) or in excess of the lower of 400 percent of capital or 20 percent of assets in all investment sectors described in paragraph (d).

(f) *Credit ratings.*—(1) All investments, other than in another depository institution, must have an applicable credit rating from at least one nationally recognized statistical rating organization (NRSRO). At a minimum, 90 percent of all such investments, by book value, must have a rating by at least two NRSROs. Corporate credit unions may use either public or nonpublic NRSRO ratings to satisfy this requirement.

(2) At the time of purchase, investments with long-term ratings must be rated no lower than AA– (or equivalent) by every NRSRO that provides a publicly available long-term rating on that investment, and investments with short-term ratings must be rated no lower than A–1 (or equivalent) by every NRSRO that provides a publicly available short-term rating on that investment. If the corporate credit union obtains a nonpublic NRSRO rating, that rating must also be no lower than AA–, or A–1, for long-term and short-term ratings, respectively.

(3) All rating(s) relied upon to meet the requirements of this part must be identified at the time of purchase and must be monitored for as long as the corporate owns the investment. Corporate credit unions must identify and monitor any new post-purchase NRSRO ratings on investments they hold.

(4) Investments are subject to the requirements of § 704.10 if:

(i) An NRSRO that rates the investment downgrades that rating, after purchase, below the minimum rating requirements of this part; or

(ii) The investment is part of an asset class or group of investments that exceeds the sector or obligor concentration limits of this section.

(g) *Reporting and documentation.* (1) At least annually, a written evaluation of each credit limit with each obligor or transaction counterparty must be prepared and formally approved by the board or an appropriate committee. At least monthly, the board or an appropriate committee must receive an investment watch list of existing and/or potential credit problems and summary credit exposure reports, which demonstrate compliance with the corporate credit union's risk management policies.

(2) At a minimum, the corporate credit union must maintain:

(i) A justification for each approved credit limit;

(ii) Disclosure documents, if any, for all instruments held in portfolio. Documents for an instrument that has been sold must be retained until completion of the next NCUA examination; and

(iii) The latest available financial reports, industry analyses, internal and external analyst evaluations, and rating agency information sufficient to support each approved credit limit.

13. Revise § 704.8 to read as follows:

§ 704.8 Asset and liability management.

(a) *Policies.* A corporate credit union must operate according to a written asset and liability management policy which addresses, at a minimum:

(1) The purpose and objectives of the corporate credit union's asset and liability activities;

(2) The maximum allowable percentage decline in net economic value (NEV), compared to base case NEV;

(3) The minimum allowable NEV ratio;

(4) Policy limits and specific test parameters for the NEV sensitivity analysis requirements set forth in paragraphs (d), (e), and (f) of this section;

(5) The modeling of indexes that serve as references in financial instrument coupon formulas; and

(6) The tests that will be used, prior to purchase, to estimate the impact of investments on the percentage decline in NEV compared to base case NEV. The most recent NEV analysis, as determined under paragraph (d)(1)(i), (e)(1)(i), and (f)(1)(i) of this section may be used as a basis of estimation.

(b) *Asset and liability management committee (ALCO).* A corporate credit union's ALCO must have at least one member who is also a member of the board of directors. The ALCO must review asset and liability management reports on at least a monthly basis. These reports must address compliance with Federal Credit Union Act, NCUA Rules and Regulations (12 CFR chapter VII), and all related risk management policies.

(c) *Penalty for early withdrawals.* A corporate credit union that permits early share certificate withdrawals must redeem at the lesser of book value plus accrued dividends or the value based on a market-based penalty sufficient to cover the estimated replacement cost of the certificate redeemed. This means the minimum penalty must be reasonably related to the rate that the corporate credit union would be required to offer to attract funds for a similar term with similar characteristics.

(d) *Interest rate sensitivity analysis.* (1) A corporate credit union must:

(i) Evaluate the risk in its balance sheet by measuring, at least quarterly, the impact of an instantaneous, permanent, and parallel shock in the yield curve of plus and minus 100, 200, and 300 bp on its NEV and NEV ratio. If the base case NEV ratio falls below 3 percent at the last testing date, these tests must be calculated at least monthly until the base case NEV ratio again exceeds 3 percent;

(ii) Limit its risk exposure to levels that do not result in a base case NEV ratio or any NEV ratio resulting from the tests set forth in paragraph (d)(1)(i) of this section below 2 percent; and

(iii) Limit its risk exposures to levels that do not result in a decline in NEV of more than 15 percent.

(2) A corporate credit union must assess annually if it should conduct periodic additional tests to address market factors that may materially impact that corporate credit union's NEV. These factors should include, but are not limited to, the following:

(i) Changes in the shape of the Treasury yield curve;

(ii) Adjustments to prepayment projections used for amortizing securities to consider the impact of

significantly faster/slower prepayment speeds; and

(iii) Adjustments to volatility assumptions to consider the impact that changing volatilities have on embedded option values.

(e) *Cash flow mismatch sensitivity analysis.*

(1) A corporate credit union must:

(i) Evaluate the risk in its balance sheet by measuring, at least quarterly, the impact of an instantaneous spread widening of both asset and liabilities by 300 basis points, assuming that issuer options will not be exercised, on its NEV and NEV ratio. If the base case NEV ratio falls below 3 percent at the last testing date, these tests must be calculated at least monthly until the base case NEV ratio again exceeds 3 percent;

(ii) Limit its risk exposure to levels that do not result in a base case NEV ratio or any NEV ratio resulting from the tests set forth in paragraph (e)(1)(i) of this section below 2 percent; and

(iii) Limit its risk exposures to levels that do not result in a decline in NEV of more than 15 percent.

(2) All investments must be tested, excluding derivatives and equity investments. All borrowings and shares must be tested, but not contributed capital.

(3) A corporate credit union must also test for the effects of failed triggers on its NEV and NEV ratios while testing the cash flow sensitivity analysis.

(f) *Cash flow mismatch sensitivity analysis with 50 percent slowdown in prepayment speeds.* (1) A corporate credit union must:

(i) Evaluate the risk in its balance sheet by measuring, at least quarterly, the impact of an instantaneous spread widening of both asset and liabilities by 300 basis points, assuming that issuer options will not be exercised and prepayment speeds will slow by 50 percent, on its NEV and NEV ratio. If the base case NEV ratio falls below 2 percent at the last testing date, these tests must be calculated at least monthly until the base case NEV ratio again exceeds 2 percent;

(ii) Limit its risk exposure to levels that do not result in a base case NEV ratio or any NEV ratio resulting from the tests set forth in paragraph (f)(1)(i) of this section below 1 percent; and

(iii) Limit its risk exposures to levels that do not result in a decline in NEV of more than 25 percent.

(2) All investments must be tested, excluding derivatives and equity investments. All borrowings and shares must be tested, but not contributed capital.

(3) A corporate credit union must also test for the effects of failed triggers on its NEV and NEV while testing the cash flow sensitivity analysis.

(g) *Net interest income modeling.* A corporate credit union must perform net interest income (NII) modeling to project earnings in multiple interest rate environments for a period of no less than 2 years. NII modeling must, at minimum, be performed quarterly.

(h) *Weighted average asset life.* The weighted average life (WAL) of a corporate credit union's investment portfolio, excluding derivative contracts and equity investments, may not exceed 2 years. A corporate credit union must test its investments at least quarterly for compliance with this WAL limitation. When calculating its WAL, a corporate credit union must assume that no issuer options will be exercised.

(i) *Effective and spread durations.* A corporate credit union must measure at least once a quarter the effective duration and spread durations of each of its assets and liabilities, where the values of these are affected by changes in interest rates or credit spreads.

(j) *Regulatory violations.* (1) (i) If a corporate credit union's decline in NEV, base case NEV ratio or any NEV ratio resulting from the tests set forth in paragraphs (d), (e), and (f) of this section violate the limits established in those paragraphs, or the corporate credit union is unable to satisfy the tests in paragraphs (g) and (h) of this section; and

(ii) The corporate cannot adjust its balance sheet so as to satisfy the requirements of paragraph (d), (e), (f), (g), or (h) of this section within 10 calendar days after detecting the violation, then:

(iii) The operating management of the corporate credit union must immediately report this information to its board of directors, supervisory committee, and the NCUA.

(2) If any violation described in paragraph (j)(1)(i) persists for 30 or more calendar days, the corporate credit union:

(i) Must immediately submit a detailed, written action plan to the NCUA that sets forth the time needed and means by which it intends to correct the violation and, if the NCUA determines that the plan is unacceptable, the corporate credit union must immediately restructure its balance sheet to bring the exposure back within compliance or adhere to an alternative course of action determined by the NCUA; and

(ii) If presently categorized as adequately capitalized or well capitalized for PCA purposes, immediately be recategorized as: Undercapitalized until the violation is corrected, and

(iii) If presently less than adequately capitalized, immediately be downgraded one additional capital category.

(k) *Overall limit on business generated from individual credit unions.* On or after [DATE 30 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], a corporate credit union is prohibited from accepting from a member or other entity any investment, including shares, loans, PCC, or NCAs if, following that investment, the aggregate of all investments from that member or entity in the corporate would exceed 10 percent of the corporate credit union's moving daily average net assets.

14. Revise § 704.9 to read as follows:

§ 704.9 Liquidity management.

(a) *General.* In the management of liquidity, a corporate credit union must:

(1) Evaluate the potential liquidity needs of its membership in a variety of economic scenarios;

(2) Regularly monitor and demonstrate accessibility to sources of internal and external liquidity;

(3) Keep a sufficient amount of cash and cash equivalents on hand to support its payment system obligations;

(4) Demonstrate that the accounting classification of investment securities is consistent with its ability to meet potential liquidity demands; and

(5) Develop a contingency funding plan that addresses alternative funding strategies in successively deteriorating liquidity scenarios. The plan must:

(i) List all sources of liquidity, by category and amount, that are available to service an immediate outflow of funds in various liquidity scenarios;

(ii) Analyze the impact that potential changes in fair value will have on the disposition of assets in a variety of interest rate scenarios; and

(iii) Be reviewed by the board or an appropriate committee no less frequently than annually or as market or business conditions dictate.

(b) *Borrowing limits.* A corporate credit union may borrow up to the lower of 10 times capital or 50 percent of capital and shares (excluding shares created by the use of member reverse repurchase agreements).

(1) *Secured borrowings.* A corporate credit union may borrow on a secured basis for liquidity purposes, but the maturity of the borrowing may not exceed 30 days. Only a credit union with core capital in excess of five percent of its moving DANA may borrow on a secured basis for

nonliquidity purposes, and the outstanding amount of secured borrowing for nonliquidity purposes may not exceed an amount equal to the difference between core capital and five percent of moving DANA.

(2) *Exclusions.* CLF borrowings and borrowed funds created by the use of member reverse repurchase agreements are excluded from this limit.

15. Revise § 704.11 to read as follows:

§ 704.11 Corporate Credit Union Service Organizations (Corporate CUSOs).

(a) A corporate CUSO is an entity that:

(1) Is at least partly owned by a corporate credit union;

(2) Primarily serves credit unions;

(3) Restricts its services to those related to the normal course of business of credit unions as specified in paragraph (e) of this section; and

(4) Is structured as a corporation, limited liability company, or limited partnership under state law.

(b) *Investment and loan limitations.* (1) The aggregate of all investments in member and non-member corporate CUSOs must not exceed 15 percent of a corporate credit union's capital.

(2) The aggregate of all investments in and loans to member and nonmember corporate CUSOs must not exceed 30 percent of a corporate credit union's capital. A corporate credit union may lend to member and nonmember corporate CUSOs an additional 15 percent of capital if the loan is collateralized by assets in which the corporate has a perfected security interest under state law.

(3) If the limitations in paragraphs (b)(1) and (b)(2) of this section are reached or exceeded because of the profitability of the CUSO and the related GAAP valuation of the investment under the equity method without an additional cash outlay by the corporate, divestiture is not required. A corporate credit union may continue to invest up to the regulatory limit without regard to the increase in the GAAP valuation resulting from the corporate CUSO's profitability.

(c) *Due diligence.* A corporate credit union must comply with the due diligence requirements of §§ 723.5 and 723.6(f) through (j) of this chapter for all loans to corporate CUSOs. This requirement does not apply to loans excluded under § 723.1(b).

(d) *Separate entity.* (1) A corporate CUSO must be operated as an entity separate from a corporate credit union.

(2) A corporate credit union investing in or lending to a corporate CUSO must obtain a written legal opinion that concludes the corporate CUSO is organized and operated in a manner that the corporate credit union will not reasonably be held liable for the obligations of the corporate CUSO. This opinion must address factors that have led courts to "pierce the corporate veil," such as inadequate capitalization, lack of corporate identity, common boards of directors and employees, control of one entity over another, and lack of separate books and records.

(e). *Permissible activities.* A corporate CUSO must agree to limit its activities to:

(1) Brokerage services;

(2) Investment advisory services, and

(3) Other categories of services as approved in writing by NCUA and published on NCUA's Web site.

(f) An official of a corporate credit union which has invested in or loaned to a corporate CUSO may not receive, either directly or indirectly, any salary, commission, investment income, or other income, compensation, or consideration from the corporate CUSO. This prohibition also extends to immediate family members of officials.

(g) Prior to making an investment in or loan to a corporate CUSO, a corporate credit union must obtain a written agreement that the CUSO:

(1) Will follow GAAP;

(2) Will provide financial statements to the corporate credit union at least quarterly;

(3) Will obtain an annual CPA opinion audit and provide a copy to the corporate credit union. A wholly owned or majority owned CUSO is not required to obtain a separate annual audit if it is included in the corporate credit union's annual consolidated audit;

(4) Will not acquire control, directly or indirectly, of another depository financial institution or to invest in shares, stocks, or obligations of an insurance company, trade association, liquidity facility, or similar organization;

(5) Will allow the auditor, board of directors, and NCUA complete access to its personnel, facilities, equipment, books, records, and any other documentation that the auditor, directors, or NCUA deem pertinent; and

(6) Will comply with all the requirements of this section.

(h) Corporate credit union authority to invest in or loan to a CUSO is limited to that provided in this section. A corporate credit union is not authorized to invest in or loan to a CUSO under part 712 of this chapter.

16. Revise § 704.14 to read as follows:

§ 704.14 Representation.

(a) *Board representation.* The board will be determined as stipulated in its bylaws governing election procedures, provided that:

(1) At least a majority of directors, including the chair of the board, must serve on the board as representatives of member credit unions;

(2) On or after [DATE 4 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], only individuals who currently hold the position of chief executive officer, chief financial officer, or chief operating officer at a member may seek election or re-election to the board;

(3) No individual may be elected to the board if, at the expiration of the term to which the individual is seeking election, the individual will have served as a director for more than six consecutive years. For purposes of calculating the six-year period, any consecutive prior service on the board by representatives of the same corporate member must be counted as though the individual seeking election had fulfilled that service. Accordingly, a corporate member may not circumvent the term limit provisions by putting forward a new candidate for directorship after one or more of its prior representatives has served on the board for six consecutive years;

(4) No individual may be elected or appointed to serve on the board if, after such election or appointment, the individual would be a director at more than one corporate credit union;

(5) No individual may be elected or appointed to serve on the board if, after such election or appointment, any member of the corporate credit union would have more than one representative on the board of the corporate;

(6) The chair of the board may not serve simultaneously as an officer, director, or employee of a credit union trade association;

(7) A majority of directors may not serve simultaneously as officers, directors, or employees of the same credit union trade association or its affiliates (not including chapters or other subunits of a state trade association);

(8) For purposes of meeting the requirements of paragraphs (a)(6) and (a)(7) of this section, an individual may not serve as a director or chair of the board if that individual holds a subordinate employment relationship to another employee who serves as an officer, director, or employee of a credit union trade association;

(9) In the case of a corporate credit union whose membership is composed of more than 25 percent non credit unions, the majority of directors serving as representatives of member credit unions, including the chair, must be

elected only by member credit unions, and

(10) After [DATE 36 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], at least a majority of directors of every corporate credit union, including the chair of the board, must serve on the board as representatives of natural person credit union members.

17. Revise § 704.19 to read as follows:

§ 704.19 Disclosure of executive and director compensation.

(a) Annual disclosure. Corporate credit unions must annually prepare and maintain a disclosure of the compensation, in dollar terms, of each senior executive officer and director.

(b) *Availability of disclosure.* Any member may obtain a copy of the most current disclosure, and all disclosures for the previous three years, on request made in person or in writing. The corporate credit union must provide the disclosure(s), at no cost to the member, within five business days of receiving the request. In addition, the corporate must distribute the most current disclosure to all its members at least once a year, either in the annual report or in some other manner of the corporate's choosing.

(c) *Supplemental information.* In providing the disclosure required by this section, a corporate credit union may also provide supplementary information to put the disclosure in context, for example, salary surveys, a discussion of compensation in relation to other credit union expenses, or compensation information from similarly sized credit unions or financial institutions.

(d) *Special rule for mergers.* With respect to any merger involving a corporate credit union that would result in a material increase in compensation, i.e., an increase of more than 15 percent or $10,000, whichever is greater, for any senior executive officer or director of the merging corporate, the corporate must: (i) describe the compensation arrangement in the merger plan documents submitted to NCUA for approval of the merger, pursuant to § 708b of this part; and (ii) in the case of any federally chartered corporate credit union, describe the compensation arrangement in the materials provided to the membership of the merging credit union before the member vote on approving the merger.

18. Add a new § 704.20 to read as follows:

§ 704.20 Limitations on golden parachute and indemnification payments.

(a) *Definitions.* The following definitions apply for this section:

(1) *Board* means the National Credit Union Administration Board.

(2) *Benefit plan* means any plan, contract, agreement or other arrangement which is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term does not include any plan intended to be subject to paragraphs (a)(4)(iv)(C) and (E) of this section.

(3) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(i) An institution-affiliated party (IAP) voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to the IAP at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the corporate credit union either:

(A) Recognizes compensation expense and accrues a liability for the benefit payments according to Generally Accepted Accounting Principles (GAAP); or

(B) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(ii) A corporate credit union establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (a)(3)(i) of this section:

(A) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 USC 415, 401(a)(17), 402(g)); or

(B) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (4)(ii)(E) of this section and permissible golden parachute payments described in § 704.20(d); and

(iii) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (a)(3)(i) and (ii) of this section, the following requirements will apply:

(A) The plan was in effect at least one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(B) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(C) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(D) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(E) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(F) The corporate credit union has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the corporate credit union's creditors in the case of insolvency; and

(G) Payments pursuant to such plans must not be in excess of the accrued liability computed in accordance with GAAP.

(4) *Golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any corporate credit union for the benefit of any current or former IAP pursuant to an obligation of such corporate credit union that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such IAP's primary employment or affiliation with the corporate credit union; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the corporate that is making the payment; or

(B) The appointment of any conservator or liquidating agent for such corporate credit union; or

(C) A determination by the Board or the appropriate state supervisory authority (in the case of a corporate credit union chartered by a state) respectively, that the corporate credit union is in a troubled condition; or

(D) The corporate credit union is undercapitalized, as defined in § 704.4; or

(E) The corporate credit union is subject to a proceeding to terminate or suspend its share account insurance; and

(iii) Is payable to an IAP whose employment by or affiliation with the corporate is terminated at a time when the corporate credit union by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (a)(4)(ii)(A) through (E) of this section, or in contemplation of any of these conditions.

(iv) *Exceptions.* The term *golden parachute payment* does not include:

(A) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. § 401); or

(B) Any payment made pursuant to a benefit plan as that term is defined in paragraph (a)(2) of this section; or

(C) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (a)(3) of this section; or

(D) Any payment made by reason of death or by reason of termination caused by the disability of an IAP; or

(E) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; provided, however, that no employee will receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Board will consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement must not have been adopted or modified to increase the amount or scope of severance benefits at a time when the corporate credit union was in a condition specified in paragraph (4)(ii) of this section or in contemplation of such a condition without the prior written consent of the Board; or

(F) Any severance or similar payment which is required to be made pursuant to a state statute which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(G) Any other payment which the Board determines to be permissible in accordance with § 704.20(d).

(5) *Institution-affiliated party* (IAP) means any individual meeting the criteria specified in § 206(r) of the Act (12 U.S.C. § 1786(r)).

(6) *Liability or legal expense* means:

(i) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(ii) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(iii) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(7) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of a corporate credit union who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(8) *Payment* means:

(i) Any direct or indirect transfer of any funds or any asset;

(ii) Any forgiveness of any debt or other obligation;

(iii) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; or

(iv) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(A) The determination, after such date, of the liability for the payment of such amount; or

(B) The liquidation, after such date, of the amount of such payment.

(9) *Prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any corporate credit union for the benefit of any person who is or was an IAP of such corporate credit union, to pay or reimburse such person for any civil money penalty, judgment or other liability or legal expense resulting from any administrative or civil action instituted by the Board or any appropriate state regulatory authority that results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the corporate credit union; or

(iii) Is required to cease and desist from or take any affirmative action described in Section 206 of the Act with respect to such corporate credit union.

(iv) *Exceptions.* The term *prohibited indemnification payment* does not include any reasonable payment by a corporate credit union that:

(A) is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond must not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by NCUA or the appropriate state supervisory authority (in the case of a state chartered corporate), but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the corporate credit union or its liquidating agent; or

(B) represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

(10) *Troubled Condition* means that the corporate credit union:

(i) *Has been assigned:*

(A) A 4 or 5 Corporate Risk Information System (CRIS) rating by NCUA in either the Financial Risk or Risk Management composites, in the case of a federal corporate credit union, or

(B) An equivalent 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by the state supervisor in the case of a federally insured, state-chartered corporate credit union in a state that has adopted the CRIS system, or an equivalent 4 or 5 CAMEL composite rating by the state supervisor in the case of a federally insured, state-chartered corporate credit union in a state that uses the CAMEL system, or

(C) A 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by NCUA based on core work papers received from the state supervisor in the case of a federally insured, state-chartered credit union in a state that does not use either the CRIS or CAMEL system. In this case, the state supervisor will be notified in writing by the Director of the Office of Corporate Credit Unions that the corporate credit union has been designated by NCUA as a troubled institution; or

(ii) has been granted assistance as outlined under Sections 208 or 216 of the Federal Credit Union Act.

(b) *Golden parachute payments prohibited.*

No corporate credit union will make or agree to make any golden parachute payment, except as otherwise provided in this section.

(c) *Prohibited indemnification payments.* No corporate credit union will make or agree to make any prohibited indemnification payment, except as provided in this section.

(d) *Permissible golden parachute payments.* (1) A corporate credit union may agree to make or may make a golden parachute payment if and to the extent that:

(i) Such an agreement is made in order to hire a person to become an IAP either at a time when the corporate credit union satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § (a)(4)(ii), and the Board, consents in writing to the amount and terms of the golden parachute payment. Such consent by the Board must not improve the IAP's position in the event of the insolvency of the corporate credit union since such consent can neither bind a liquidating agent nor affect the provability of claims in liquidation. In the event that the institution is placed into conservatorship or liquidation, the conservator or the liquidating agent, as the case may be, will not be obligated to pay the promised golden parachute and the IAP will not be accorded preferential treatment on the basis of such prior approval; or

(ii) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a merger with another corporate credit union; provided, however, that a corporate credit union must obtain the consent of the Board, before making such a payment and this paragraph (d)(1)(iii) does not apply to any merger between corporates that results from an assisted transaction as described in section 208 of the Act (12 U.S.C. 1788) or the corporate credit union being placed into conservatorship or liquidation; or

(iii) The Board, with the written concurrence of the appropriate state supervisory authority (in the case of a state-chartered corporate), determines that such a payment or agreement is permissible.

(2) A corporate credit union making a request pursuant to paragraphs (d)(1)(i) through (iii) of this section must demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the corporate credit union that has had or is likely to have a material adverse effect on the corporate credit union;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or liquidating agent for, or the troubled condition, as defined by § 701.14(b)(4), of the corporate credit union;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the corporate credit union; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(3) In making a determination under paragraphs (d)(1)(i) through (iii) of this section, the Board may consider:

(i) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(ii) The length of time the IAP was affiliated with the corporate credit union, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(iii) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 206(t) of the Act or this part.

(e) *Permissible indemnification payments.* (1) A corporate credit union may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by NCUA or a state regulatory authority if:

(i) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(ii) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(iii) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in § 704.20(c); and

(iv) The IAP agrees in writing to reimburse the corporate credit union, to the extent not covered by payments from insurance or bonds purchased pursuant to § 704.20(a)(9)(iv)(A), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 704.20(a)(9).

(2) An IAP seeking indemnification payments must not participate in any way in the board's discussion and approval of such payments; provided, however, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(3) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have

been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(4) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board will authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

(f) *Filing instructions.* Requests to make excess nondiscriminatory severance plan payments pursuant to § 704.20(a)(4)(iv)(E) and golden parachute payments permitted by § 704.20(d) must be submitted in writing to the Board. The request must be in letter form and must contain all relevant factual information as well as the reasons why such approval should be granted.

(g) *Applicability in the event of liquidation or conservatorship.* The provisions of this part, or any consent or approval granted under the provisions of this part by the Board, will not in any way bind any liquidating agent or conservator for a failed corporate credit union and will not in any way obligate the liquidating agent or conservator to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits that are contingent, even if otherwise vested, when a liquidating agent or conservator is appointed for any corporate credit union, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such liquidating agent or conservator. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1786(t)(3).

19. Revise Appendix A to part 704 to read as follows:

Appendix A to Part 704—Capital Prioritization and Model Forms

Part I—Optional Capital Prioritization

Notwithstanding any other provision in this chapter, a corporate credit union, at its option, may determine that capital contributed to the corporate on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] will have priority, for purposes of availability to absorb losses and payout in liquidation, over capital contributed to the corporate before that date. The board of directors at a corporate credit union that desires to make this determination must:

(a) On or before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], adopt a resolution implementing its determination.

(b) Inform the credit union's members and NCUA, in writing and as soon as practicable after adoption of the resolution, of the contents of the board resolution.

(c) Ensure the credit union uses the appropriate initial and periodic Model Form disclosures in Part II below.

Part II—Model Forms

Part II contains model forms intended for use by corporate credit unions to aid in compliance with the capital disclosure requirements of § 704.3 and Part I of this Appendix.

Model Form A

Terms and Conditions of Membership Capital Account

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix.

(1) A membership capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A membership capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the membership capital account transfers to the continuing credit union. In the event of a charter conversion, the membership capital account transfers to the new institution. In the event of liquidation, the membership capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) A member credit union may withdraw membership capital with three years' notice.

(4) Membership capital cannot be used to pledge borrowings.

(5) Membership capital is available to cover losses that exceed retained earnings and paid-in capital.

(6) Where the corporate credit union is liquidated, membership capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF.

(7) Where the corporate credit union is merged into another corporate credit union, the membership capital account will transfer to the continuing corporate credit union. The three-year notice period for withdrawal of the membership capital account will remain in effect.

(8) If an adjusted balance account—: The membership capital balance will be adjusted—(1 or 2)—time(s) annually in relation to the member credit union's—(assets or other measure)—as of—(date(s))—. If a term certificate—: The membership capital account is a term certificate that will mature on—(date)—.

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the membership capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with membership capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form B

Terms and Conditions of Membership Capital Account

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix.

(1) A membership capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A membership capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the membership capital account transfers to the continuing credit union. In the event of a charter conversion, the membership capital account transfers to the new institution. In the event of liquidation, the membership capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) A member credit union may withdraw membership capital with three years' notice.

(4) Membership capital cannot be used to pledge borrowings.

(5)(a) Membership capital that is issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], is available to cover losses that exceed retained earnings, contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], and perpetual capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses will be distributed *pro rata*, at the time the loss is realized, among membership capital account holders with accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Membership capital that is issued before [DATE 60 DAYS AFTER DATE OF

PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is available to cover losses that exceed retained earnings and perpetual capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses will be distributed *pro rata,* at the time the loss is realized, among membership capital account holders with accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of NCA the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) If the corporate credit union is liquidated:

(a) Membership capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] and perpetual capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, membership capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(b) Membership capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including perpetual capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, membership capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the membership capital account will transfer to the continuing corporate credit union. The three-year notice period for withdrawal of the membership capital account will remain in effect.

(8) If an adjusted balance account—: The membership capital balance will be adjusted—(1 or 2)—time(s) annually in relation to the member credit union's—(assets or other measure)—as of—(date(s))—. If a term certificate—: The membership capital account is a term certificate that will mature on—(date)—.

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the membership capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with membership capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form C

Terms and Conditions of Nonperpetual Contributed Capital

Note: This form is for use on and after [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix. Also, corporate credit unions should ensure that existing membership capital accounts that do not meet the qualifying conditions for nonperpetual contributed capital are modified so as to meet those conditions.

Terms and Conditions of Nonperpetual Contributed Capital Account

(1) A nonperpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A nonperpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the nonperpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the nonperpetual contributed capital account transfers to the new institution. In the event of liquidation, the nonperpetual contributed capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) If the nonperpetual contributed capital account is a notice account, a member credit union may withdraw the nonperpetual contributed capital with a minimum of five years' notice. If the nonperpetual contributed capital account is a term instrument it may be redeemed only at maturity. The corporate credit union may not redeem any account prior to the expiration of the notice period, or maturity, without the prior written approval of the NCUA.

(4) Nonperpetual contributed capital cannot be used to pledge borrowings.

(5) Nonperpetual contributed capital is available to cover losses that exceed retained earnings and perpetual contributed capital. Any such losses will be distributed *pro rata* among nonperpetual contributed capital account holders at the time the loss is realized. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(6) Where the corporate credit union is liquidated, nonperpetual contributed capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF. However, nonperpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the nonperpetual contributed capital account will transfer to the continuing corporate credit union. For notice accounts, the five-year notice period for withdrawal of the nonperpetual contributed capital account will remain in effect. For term accounts, the original term will remain in effect.

(8) If a term certificate—: The nonperpetual contributed capital account is a term certificate that will mature on—(date)—(insert date with a minimum five-year original maturity).

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the nonperpetual contributed capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with nonperpetual contributed capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form D

Terms and Conditions of Nonperpetual Contributed Capital

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix. Also, corporate credit unions should ensure that existing membership capital accounts that do not meet the qualifying conditions for nonperpetual contributed capital are modified so as to meet those conditions.

Terms and Conditions of Nonperpetual Contributed Capital Account

(1) A nonperpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A nonperpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the nonperpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the nonperpetual contributed capital account transfers to the new institution. In the event of liquidation, the nonperpetual contributed capital account may be released to facilitate

the payout of shares with the prior written approval of NCUA.

(3) If the nonperpetual contributed capital account is a notice account, a member credit union may withdraw the nonperpetual contributed capital with a minimum of five years' notice. If the nonperpetual contributed capital account is a term instrument it may be redeemed only at maturity. The corporate credit union may not redeem any account prior to the expiration of the notice period, or maturity, without the prior written approval of the NCUA.

(4) Nonperpetual contributed capital cannot be used to pledge borrowings.

(5)(a) Nonperpetual contributed capital that is issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is available to cover losses that exceed retained earnings, all contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], and perpetual capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses will be distributed *pro rata,* at the time the loss is realized, among nonperpetual contributed capital account holders with accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Nonperpetual contributed capital that is before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], is available to cover losses that exceed retained earnings and perpetual capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses will be distributed *pro rata,* at the time the loss is realized, among nonperpetual contributed capital account holders with accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of NCA the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) If the corporate credit union is liquidated:

(a) Nonperpetual contributed capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] or perpetual capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, nonperpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(b) Nonperpetual contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including perpetual capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, nonperpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the nonperpetual contributed capital account will transfer to the continuing corporate credit union. For notice accounts, the five-year notice period for withdrawal of the nonperpetual contributed capital account will remain in effect. For term accounts, the original term will remain in effect.

(8) If a term certificate—: The nonperpetual contributed capital account is a term certificate that will mature on—(date)—(insert date with a minimum five-year original maturity).

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the nonperpetual contributed capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with nonperpetual contributed capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form E

Terms and Conditions of Paid-In Capital

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix.

Terms and Conditions of Paid-In Capital

(1) A paid-in capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A paid-in capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the paid-in capital account transfers to the continuing credit union. In the event of a charter conversion, the paid-in capital account transfers to the new institution. In the event of liquidation, the paid-in capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain NCUA's approval before the corporate calls any paid-in capital.

(4) Paid-in capital cannot be used to pledge borrowings.

(5) Paid-in capital is available to cover losses that exceed retained earnings.

(6) Where the corporate credit union is liquidated, paid-in capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, and membership capital holders.

(7) Where the corporate credit union is merged into another corporate credit union, the paid-in capital account will transfer to the continuing corporate credit union.

(8) Paid-in capital is perpetual maturity and noncumulative dividend.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the paid-in capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form F

Terms and Conditions of Paid-In Capital

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix.

Terms and Conditions of Paid-In Capital

(1) A paid-in capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A paid-in capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the paid-in capital account transfers to the continuing credit union. In the event of a charter conversion, the paid-in capital account transfers to the new institution. In the event of liquidation, the paid-in capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain NCUA's approval before the corporate calls any paid-in capital.

(4) Paid-in capital cannot be used to pledge borrowings.

(5) Availability to cover losses.

(a) Paid-in capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is

available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata*, at the time the loss is realized, among holders of paid-in capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that paid-in capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Paid-in capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is available to cover losses that exceed retained earnings and any contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses must be distributed *pro rata*, at the time the loss is realized, among holders of paid-in capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that paid-in capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of perpetual capital the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) Where the corporate credit union is liquidated:

(a) Paid-in capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, paid-in capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(b) Paid-in capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, nonperpetual accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] and contributed capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, paid-in capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the paid-in capital account will transfer to the continuing corporate credit union.

(8) Paid-in capital is perpetual maturity and noncumulative dividend.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the paid-in capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form G

Terms and Conditions of Perpetual Contributed Capital

Note: This form is for use on and after [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix. Also, capital previously issued under the nomenclature "paid-in capital" is considered perpetual contributed capital.

(1) A perpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A perpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the perpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital account transfers to the new institution. In the event of liquidation, the perpetual contributed capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain the prior, written approval of the NCUA before releasing any perpetual contributed capital funds.

(4) Perpetual contributed capital cannot be used to pledge borrowings.

(5) Perpetual contributed capital is perpetual maturity and noncumulative dividend.

(6) Perpetual contributed capital is available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata* among perpetual contributed capital holders at the time the loss is realized. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(7) Where the corporate credit union is liquidated, perpetual contributed capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, and nonperpetual contributed capital holders. However, perpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the perpetual contributed capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form H

Terms and Conditions of Perpetual Contributed Capital

Note: This form is for use before [DATE 12 MONTHS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix. Also, capital previously issued under the nomenclature "paid-in capital" is considered perpetual contributed capital.

(1) A perpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A perpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the perpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital account transfers to the new institution. In the event of liquidation, the perpetual contributed capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain the prior, written approval of the NCUA before releasing any perpetual contributed capital funds.

(4) Perpetual contributed capital cannot be used to pledge borrowings.

(5) Perpetual contributed capital is perpetual maturity and noncumulative dividend.

(6) Availability to cover losses.

(a) Perpetual contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata*, at the time the loss is realized, among holders of perpetual contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Perpetual contributed capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] is available to cover losses that exceed retained earnings and any contributed capital issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. Any such losses must be distributed *pro rata*, at the time the loss is realized, among holders of perpetual contributed capital issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN

FEDERAL REGISTER]. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of perpetual capital the credit union has with the corporate credit union in each of the categories described in paragraphs (6)(a) and (6)(b) above.

(7) Where the corporate credit union is liquidated:

(a) Perpetual contributed capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, perpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

(b) Perpetual contributed capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**] are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, nonperpetual capital accounts issued before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], and all contributed capital accounts issued on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**]. However, perpetual contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the perpetual contributed capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

21. Revise Appendix B to Part 704 to read as follows:

Appendix B to Part 704—Expanded Authorities and Requirements

A corporate credit union may obtain all or part of the expanded authorities contained in this Appendix if it meets the applicable requirements of Part 704 and Appendix B, fulfills additional management, infrastructure, and asset and liability requirements, and receives NCUA's written approval. Additional guidance is set forth in the NCUA publication Guidelines for Submission of Requests for Expanded Authority.

A corporate credit union seeking expanded authorities must submit to NCUA a self-assessment plan supporting its request. A corporate credit union may adopt expanded authorities when NCUA has provided final approval. If NCUA denies a request for expanded authorities, it will advise the corporate credit union of the reason(s) for the denial and what it must do to resubmit its request. NCUA may revoke these expanded authorities at any time if an analysis indicates a significant deficiency. NCUA will notify the corporate credit union in writing of the identified deficiency. A corporate credit union may request, in writing, reinstatement of the revoked authorities by providing a self-assessment plan detailing how it has corrected the deficiency.

Minimum Requirement

In order to participate in any of the authorities set forth in Base-Plus, Part I, Part II, Part III, or Part IV of this Appendix, a corporate credit union must evaluate monthly the changes in NEV, NEV ratio, and WAL for the tests set forth in paragraphs (d)(1)(i), (e)(1((i), (f)(1)(i), and (h) of § 704.8.

Base-Plus

A corporate that has met the requirements for this Base-plus authority may, in performing the rate stress tests set forth in 704.8(d)(1)(i) and (e)(1)(i), allow its NEV to decline as much as 20 percent, and in performing the rate stress tests set forth in 704.8(f)(1)(i), allow its NEV to decline as much as 30 percent.

Part I

(a) A corporate credit union that has met all the requirements established by NCUA for this Part I, including a minimum capital ratio of at least six percent, may:

(1) Purchase investments with long-term ratings no lower than A – (or equivalent);

(2) Purchase investments with short-term ratings no lower than A–2 (or equivalent), provided that the issuer has a long-term rating no lower than A – (or equivalent) or the investment is a domestically-issued asset-backed security;

(3) Engage in short sales of permissible investments to reduce interest rate risk;

(4) Purchase principal only (PO) stripped mortgage-backed securities to reduce interest rate risk; and

(5) Enter into a dollar roll transaction.

(b) In performing the rate stress tests set forth in § 704.8(d) and (e), the NEV of a corporate credit union that has met the requirements of this Part I may decline as much as:

(1) 20 percent;

(2) 28 percent if the corporate credit union has a seven percent minimum capital ratio and is specifically approved by NCUA; or

(3) 35 percent if the corporate credit union has an eight percent minimum capital ratio and is specifically approved by NCUA.

(c) In performing the rate stress tests set forth in § 704.8(f), the NEV of a corporate credit union that has met the requirements of this Part I may decline as much as:

(1) 30 percent;

(2) 38 percent if the corporate credit union has a seven percent minimum capital ratio and is specifically approved by NCUA; or

(3) 45 percent if the corporate credit union has an eight percent minimum capital ratio and is specifically approved by NCUA.

(d) The maximum aggregate amount in unsecured loans and lines of credit to any one member credit union, excluding pass-through and guaranteed loans from the CLF and the NCUSIF, must not exceed 100 percent of the corporate credit union's capital. The board of directors must establish the limit, as a percent of the corporate credit union's capital plus pledged shares, for secured loans and lines of credit.

(e) The aggregate total of investments purchased under the authority of Part I (a)(1) and Part I (a)(2) may not exceed the lower of 500 percent of the corporate credit union's capital or 25 percent of assets.

(f) On or after [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF FINAL RULE IN **FEDERAL REGISTER**], corporate credit unions will substitute "leverage ratio" for "capital ratio" wherever it appears in Part I.

Part II

(a) A corporate credit union that has met the requirements of Part I of this Appendix and the additional requirements established by NCUA for Part II may invest in:

(1) Debt obligations of a foreign country;

(2) Deposits and debt obligations of foreign banks or obligations guaranteed by these banks;

(3) Marketable debt obligations of foreign corporations. This authority does not apply to debt obligations that are convertible into the stock of the corporation; and

(4) Foreign issued asset-backed securities.

(b) All foreign investments are subject to the following requirements:

(1) Investments must be rated no lower than the minimum permissible domestic rating under the corporate credit union's Part I or Part II authority;

(2) A sovereign issuer, and/or the country in which an obligor is organized, must have a long-term foreign currency (non-local currency) debt rating no lower than AA – (or equivalent);

(3) For each approved foreign bank line, the corporate credit union must identify the specific banking centers and branches to which it will lend funds;

(4) Obligations of any single foreign obligor may not exceed 50 percent of capital; and

(5) Obligations in any single foreign country may not exceed 250 percent of capital.

Part III

(a) A corporate credit union that has met the requirements established by NCUA for this Part III may enter into derivative transactions specifically approved by NCUA to:

(1) Create structured products;

(2) Mitigate interest rate risk and credit risk on its own balance sheet; and

(3) Hedge the balance sheets of its members.

(b) Credit Ratings:

(1) All derivative transactions are subject to the following requirements:

(i) If the counterparty is domestic, the counterparty rating must be no lower than the minimum permissible rating for comparable term permissible investments; and

(ii) If the counterparty is foreign, the corporate must have Part II expanded

authority and the counterparty rating must be no lower than the minimum permissible rating for a comparable term investment under Part II Authority.

(iii) Any rating(s) relied upon to meet the requirements of this part must be identified at the time the transaction is entered into and must be monitored for as long as the contract remains open.

(iv) Section 704.10 of this part if:

(A) One rating was relied upon to meet the requirements of this part and that rating is downgraded below the minimum rating requirements of this part; or

(B) Two or more ratings were relied upon to meet the requirements of this part and at least two of those ratings are downgraded below the minimum rating requirements of this part.

(2) Exceptions. Credit ratings are not required for derivative transactions with:

(i) Domestically chartered credit unions;

(ii) U.S. government sponsored enterprises; or

(iii) Counterparties if the transaction is fully guaranteed by an entity with a minimum permissible rating for comparable term investments.

Part IV

A corporate credit union that has met all the requirements established by NCUA for this Part IV may participate in loans with member natural person credit unions as approved by the NCUA and subject to the following:

(a) The maximum aggregate amount of participation loans with any one member credit union must not exceed 25 percent of capital; and

(b) The maximum aggregate amount of participation loans with all member credit unions will be determined on a case-by-case basis by the NCUA.

22. Add a new Appendix C to Part 704 to read as follows:

Appendix C to Part 704—Risk-Based Capital Credit Risk-Weight Categories

Table of Contents

Part I: Introduction

Section I.

(a) *Scope.*

(1) This Appendix explains how a corporate credit union must compute its risk-weighted assets for purposes of determining its capital ratios.

(2) Risk-weighted assets equal risk-weighted on-balance sheet assets (computed under Section II(a) of this Appendix), plus risk-weighted off-balance sheet activities (computed under Section II(b) of this Appendix), plus risk-weighted recourse obligations, direct credit substitutes, and certain other positions (computed under Section II(c) of this Appendix).

(3) Assets not included (i.e., deducted from capital) for purposes of calculating capital under part 704 are not included in calculating risk-weighted assets.

(4) Although this Appendix describes risk-weightings for various assets and activities, this Appendix does not provide authority for corporate credit unions to invest in or purchase any particular type of asset or to engage in any particular type of activity. A corporate credit union must have other identifiable authority for any investment it makes or activity it engages in.

(b) *Definitions.*

The following definitions apply to this Appendix. Additional definitions, applicable to this entire Part, are located in § 704.2 of this Part.

Cash items in the process of collection means checks or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation; U.S. Government checks that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation; and unposted debits.

Commitment means any arrangement that obligates a corporate credit union to:

(1) Purchase loans or securities;

(2) Extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, home equity lines of credit, eligible ABCP liquidity facilities, or similar transactions.

Depository institution means a financial institution that engages in the business of providing financial services; that is recognized as a bank or a credit union by the supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the United States, this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institutions. Bank holding companies and savings and loan holding companies are excluded from this definition. For the purposes of assigning risk-weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

Direct credit substitute means an arrangement in which a corporate credit union assumes, in form or in substance, credit risk associated with an on-balance sheet or off-balance sheet asset or exposure that was not previously owned by the corporate credit union (third-party asset) and the risk assumed by the corporate credit union exceeds the *pro rata* share of the corporate credit union's interest in the third-party asset. If a corporate credit union has no claim on the third-party asset, then the corporate credit union's assumption of any credit risk is a direct credit substitute. Direct credit substitutes include:

(1) Financial standby letters of credit that support financial claims on a third party that exceed a corporate credit union's *pro rata* share in the financial claim;

(2) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims that exceed a corporate credit union's *pro rata* share in the financial claim;

(3) Purchased subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets, including any tranche of asset-backed securities that is not the most senior tranche;

(4) Credit derivative contracts under which the corporate credit union assumes more than its *pro rata* share of credit risk on a third-party asset or exposure;

(5) Loans or lines of credit that provide credit enhancement for the financial obligations of a third party;

(6) Purchased loan servicing assets if the servicer is responsible for credit losses or if the servicer makes or assumes credit-enhancing representations and warranties with respect to the loans serviced. Servicer cash advances as defined in this section are not direct credit substitutes;

(7) Clean-up calls on third party assets. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate credit union are not direct credit substitutes; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Exchange rate contracts means cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the NCUA, may give rise to similar risks.

Face amount means the notational principal, or face value, amount of an off-balance sheet item or the amortized cost of an on-balance sheet asset.

Financial asset means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

Financial standby letter of credit means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(1) To repay money borrowed by, or advanced to, or for the account of, a second party (the account party); or

(2) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

OECD-based country means a member of that grouping of countries that are full members of the Organization for Economic Cooperation and Development (OECD) plus countries that have concluded special lending arrangements with the International

Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. This term excludes any country that has rescheduled its external sovereign debt within the previous five years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

Original maturity means, with respect to a commitment, the earliest date after a commitment is made on which the commitment is scheduled to expire (i.e., it will reach its stated maturity and cease to be binding on either party), provided that either:

(1) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(2) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the member at the time of the extension or renewal and upon a new, bona fide credit analysis utilizing current information on financial condition and trends.

Performance-based standby letter of credit means any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by a third party in the performance of a nonfinancial or commercial obligation. Such letters of credit include arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

Prorated assets means the total assets (as determined in the most recently available GAAP report but in no event more than one year old) of a consolidated CUSO multiplied by the corporate credit union's percentage of ownership of that consolidated CUSO.

Qualifying mortgage loan means a loan that:

(1) Is fully secured by a first lien on a one- to four-family residential property;

(2) Is underwritten in accordance with prudent underwriting standards, including standards relating the ratio of the loan amount to the value of the property (LTV ratio), as presented in the *Interagency Guidelines for Real Estate Lending Policies,* 57 FR 62890 (December 31, 1992). A nonqualifying mortgage loan that is paid down to an appropriate LTV ratio (calculated using value at origination, appraisal obtained within the prior six months, or updated value using an automated valuation model) may become a qualifying loan if it meets all other requirements of this definition;

(3) Maintains an appropriate LTV ratio based on the amortized principal balance of the loan; and

(4) Is performing and is not more than 90 days past due.

If a corporate credit union holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the LTV ratio and the appropriate risk-weight under Appendix C. Also, a loan to an individual borrower for the construction of the borrower's home may be included as a qualifying mortgage loan.

Qualifying multifamily mortgage loan means a loan secured by a first lien on multifamily residential properties consisting of 5 or more dwelling units, provided that:

(1) The amortization of principal and interest occurs over a period of not more than 30 years;

(2) The original minimum maturity for repayment of principal on the loan is not less than seven years;

(3) When considering the loan for placement in a lower risk-weight category, all principal and interest payments have been made on a timely basis in accordance with its terms for the preceding year;

(4) The loan is performing and not 90 days or more past due;

(5) The loan is made in accordance with prudent underwriting standards; and

(6) If the interest rate on the loan does not change over the term of the loan, the current loan balance amount does not exceed 80 percent of the value of the property securing the loan, and for the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution; or

(7) If the interest rate on the loan changes over the term of the loan, the current loan balance amount does not exceed 75 percent of the value of the property securing the loan, and for the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution.

For purposes of paragraphs (6) and (7) of this definition, the term value of the property means, at origination of a loan to purchase a multifamily property, the lower of the purchase price or the amount of the initial appraisal, or if appropriate, the initial evaluation. In cases not involving purchase of a multifamily loan, the value of the property is determined by the most current appraisal, or if appropriate, the most current evaluation.

In cases where a borrower refinances a loan on an existing property, as an alternative to paragraphs (3), (6), and (7) of this definition:

(1) All principal and interest payments on the loan being refinanced have been made on a timely basis in accordance with the terms of that loan for the preceding year; and

(2) The net income on the property for the preceding year would support timely principal and interest payments on the new loan in accordance with the applicable debt service requirement.

Qualifying residential construction loan, also referred to as a residential bridge loan, means a loan made in accordance with sound lending principles satisfying the following criteria:

(1) The builder must have substantial project equity in the home construction project;

(2) The residence being constructed must be a 1–4 family residence sold to a home purchaser;

(3) The lending entity must obtain sufficient documentation from a permanent lender (which may be the construction lender) demonstrating that the home buyer intends to purchase the residence and has the ability to obtain a permanent qualifying mortgage loan sufficient to purchase the residence;

(4) The home purchaser must have made a substantial earnest money deposit;

(5) The construction loan must not exceed 80 percent of the sales price of the residence;

(6) The construction loan must be secured by a first lien on the lot, residence under construction, and other improvements;

(7) The lending credit union must retain sufficient undisbursed loan funds throughout the construction period to ensure project completion;

(8) The builder must incur a significant percentage of direct costs (i.e., the actual costs of land, labor, and material) before any drawdown on the loan;

(9) If at any time during the life of the construction loan any of the criteria of this rule are no longer satisfied, the corporate must immediately recategorize the loan at a 100 percent risk-weight and must accurately report the loan in the corporate's next quarterly call report;

(10) The home purchaser must intend that the home will be owner-occupied;

(11) The home purchaser(s) must be an individual(s), not a partnership, joint venture, trust corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing the home(s) for speculative purposes; and

(12) The loan must be performing and not more than 90 days past due.

The NCUA retains the discretion to determine that any loans not meeting sound lending principles must be placed in a higher risk-weight category. The NCUA also reserves the discretion to modify these criteria on a case-by-case basis provided that any such modifications are not inconsistent with the safety and soundness objectives of this definition.

Qualifying securities firm means:

(1) A securities firm incorporated in the United States that is a broker-dealer that is registered with the Securities and Exchange Commission (SEC) and that complies with the SEC's net capital regulations (17 CFR 240.15c3(1)); and

(2) A securities firm incorporated in any other OECD-based country, if the corporate credit union is able to demonstrate that the securities firm is subject to consolidated supervision and regulation (covering its subsidiaries, but not necessarily its parent

organizations) comparable to that imposed on depository institutions in OECD countries. Such regulation must include risk-based capital requirements comparable to those imposed on depository institutions under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998).

Recourse means a corporate credit union's retention, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with Generally Accepted Accounting Principles) that exceeds a *pro rata* share of that corporate credit union's claim on the asset. If a corporate credit union has no claim on a asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when a corporate credit union transfers assets in a sale and retains an explicit obligation to repurchase assets or to absorb losses due to a default on the payment of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may also exist implicitly if a corporate credit union provides credit enhancement beyond any contractual obligation to support assets it has sold. Recourse obligations include:

(1) Credit-enhancing representations and warranties made on transferred assets;

(2) Loan servicing assets retained pursuant to an agreement under which the corporate credit union will be responsible for losses associated with the loans serviced. Servicer cash advances as defined in this section are not recourse obligations;

(3) Retained subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(5) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(6) Credit derivatives that absorb more than the corporate credit union's *pro rata* share of losses from the transferred assets;

(7) Clean-up calls on assets the corporate credit union has sold. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate credit union are not recourse arrangements; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Replacement cost means, with respect to interest rate and exchange-rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. This mark-to-market process must incorporate changes in both interest rates and counterparty credit quality.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residual interest means any on-balance sheet asset that:

(1) Represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with Generally Accepted Accounting Principles) of financial assets, whether through a securitization or otherwise; and

(2) Exposes a corporate credit union to credit risk directly or indirectly associated with the transferred asset that exceeds a *pro rata* share of that corporate credit union's claim on the asset, whether through subordination provisions or other credit enhancement techniques.

Residual interests generally include credit-enhancing interest-only strips, spread accounts, cash collateral accounts, retained subordinated interests (and other forms of overcollateralization), and similar assets that function as a credit enhancement. Residual interests further include those exposures that, in substance, cause the corporate credit union to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold. Residual interests generally do not include assets purchased from a third party, but a credit-enhancing interest-only strip that is acquired in any asset transfer is a residual interest.

Corporate credit unions will use this definition of the term "residual interests," and not the definition in § 704.2, for purposes of applying this Appendix.

Risk participation means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (e.g., a direct credit substitute), notwithstanding that another party has acquired a participation in that obligation.

Risk-weighted assets means the sum total of risk-weighted on-balance sheet assets, as calculated under Section II(a) of this Appendix, and the total of risk-weighted off-balance sheet credit equivalent amounts. The total of risk-weighted off-balance sheet credit equivalent amounts equals the risk-weighted off-balance sheet activities as calculated under Section II(b) of this Appendix plus the risk-weighted recourse obligations, risk-weighted direct credit substitutes, and certain other risk-weighted positions as calculated under Section II(c) of this Appendix.

Servicer cash advance means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A servicer cash advance is not a recourse obligation or a direct credit substitute if:

(1) The servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(2) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal amount on that loan.

Structured financing program means a program where receivable interests and asset- or mortgage-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured financing programs allocate credit risk, generally, between the participants and credit enhancement provided to the program.

Traded position means a position retained, assumed, or issued in connection with a securitization that is rated by a NRSRO, where there is a reasonable expectation that, in the near future, the rating will be relied upon by:

(1) Unaffiliated investors to purchase the security; or

(2) An unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

Unconditionally cancelable means, with respect to a commitment-type lending arrangement, that the corporate credit union may, at any time, with or without cause, refuse to advance funds or extend credit under the facility.

United States Government or its agencies means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

United States Government-sponsored agency or corporation means an agency or corporation originally established or chartered to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

Part II: Risk-Weightings

Section II.

(a) *On-balance sheet assets.*

Except as provided in Section II(b) of this Appendix, risk-weighted on-balance sheet assets are computed by multiplying the on-balance sheet asset amounts times the appropriate risk-weight categories. The risk-weight categories are:

(1) Zero percent Risk-Weight (Category 1).

(i) Cash, including domestic and foreign currency owned and held in all offices of a corporate credit union or in transit. Any foreign currency held by a corporate credit union must be converted into U.S. dollar equivalents;

(ii) Securities issued by and other direct claims on the U.S. Government or its agencies (to the extent such securities or claims are unconditionally backed by the full faith and credit of the United States Government) or the central government of an OECD country;

(iii) Notes and obligations issued or guaranteed by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund and backed by the full faith and credit of the United States Government;

(iv) Deposit reserves at, claims on, and balances due from Federal Reserve Banks;

(v) The book value of paid-in Federal Reserve Bank stock;

(vi) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(viii) Claims on, and claims guaranteed by, a qualifying securities firm that are

collateralized by cash on deposit in the corporate credit union or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country. To be eligible for this risk-weight, the corporate credit union must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a corporate credit union's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(2) 20 percent Risk-Weight (Category 2).

(i) Cash items in the process of collection;

(ii) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country,

(iii) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States government or its agencies, or the central government of an OECD country;

(iv) Securities (not including equity securities) issued by and other claims on the U.S. Government or its agencies which are not backed by the full faith and credit of the United States Government;

(v) Securities (not including equity securities) issued by, or other direct claims on, United States Government-sponsored agencies;

(vi) That portion of assets guaranteed by United States Government-sponsored agencies;

(vii) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(viii) Claims on, and claims guaranteed by, a qualifying securities firm, subject to the following conditions:

(A) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the corporate credit union must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(B) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (a) if the claim arises under a contract that:

(*1*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*2*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*3*) Is marked-to-market daily;

(*4*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*5*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 207(c)(8) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)) or section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(C) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk-weight under this paragraph II(a)(2)(viii);

(ix) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;

(x) Balances due from and all claims on domestic depository institutions. This includes demand deposits and other transaction accounts, savings deposits and time certificates of deposit, federal funds sold, loans to other depository institutions, including overdrafts and term federal funds, holdings of the corporate credit union's own discounted acceptances for which the account party is a depository institution, holdings of bankers acceptances of other institutions and securities issued by depository institutions, except those that qualify as capital;

(xi) The book value of paid-in Federal Home Loan Bank stock;

(xii) Deposit reserves at, claims on and balances due from the Federal Home Loan Banks;

(xiii) Assets collateralized by cash held in a segregated deposit account by the reporting corporate credit union;

(xiv) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member;[69]

(xv) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(xvi) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the member or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category;

(xvii) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less;

(xviii) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the corporate credit union has local currency liabilities in that country.

(3) 50 percent Risk-Weight (Category 3).

(i) Revenue bonds issued by any public-sector entity in an OECD country for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;

(ii) Qualifying mortgage loans and qualifying multifamily mortgage loans;

(iii) Privately-issued mortgage-backed securities (i.e., those that do not carry the guarantee of the U.S. government, U.S. government agency, or U.S. government sponsored enterprise) representing an interest in qualifying mortgage loans or qualifying multifamily mortgage loans. If the security is backed by qualifying multifamily mortgage loans, the corporate credit union must receive timely payments of principal and interest in accordance with the terms of the security. Payments will generally be considered timely if they are not 30 days past due; and

(iv) Qualifying residential construction loans.

(4) 100 percent Risk-Weight (Category 4).

All assets not specified above or deducted from calculations of capital pursuant to § 704.2 and § 704.3 of this part, including, but not limited to:

(i) Consumer loans;

(ii) Commercial loans;

(iii) Home equity loans;

(iv) Non-qualifying mortgage loans;

(v) Non-qualifying multifamily mortgage loans;

(vi) Residential construction loans;

(vii) Land loans;

(viii) Nonresidential construction loans;

(ix) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligations, e.g., industrial development bonds;

(x) Debt securities not specifically risk-weighted in another category;

(xi) Investments in fixed assets and premises;

(xii) Servicing assets;

(xiii) Interest-only strips receivable, other than credit-enhancing interest-only strips;

(xiv) Equity investments;

(xv) The prorated assets of subsidiaries (except for the assets of consolidated CUSOs) to the extent such assets are included in adjusted total assets;

[69] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

(xvi) All repossessed assets or assets that are more than 90 days past due; and

(xix) Intangible assets not specifically weighted in some other category.

(5) Indirect ownership interests in pools of assets. Assets representing an indirect holding of a pool of assets, e.g., mutual funds, are assigned to risk-weight categories under this section based upon the risk-weight that would be assigned to the assets in the portfolio of the pool. An investment in shares of a mutual fund whose portfolio consists primarily of various securities or money market instruments that, if held separately, would be assigned to different risk-weight categories, generally is assigned to the risk-weight category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the investment objectives set forth in its prospectus. The corporate credit union may, at its option, assign the investment on a *pro rata* basis to different risk-weight categories according to the investment limits in its prospectus. In no case will an investment in shares in any such fund be assigned to a total risk-weight less than 20 percent. If the corporate credit union chooses to assign investments on a *pro rata* basis, and the sum of the investment limits of assets in the fund's prospectus exceeds 100 percent, the corporate credit union must assign the highest *pro rata* amounts of its total investment to the higher risk categories. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk-weight, such securities will generally be disregarded in determining the risk-weight category into which the corporate credit union's holding in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk-weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk-weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk-weight category.

(6) Derivatives. Certain transactions or activities, such as derivatives transactions, may appear on corporate's balance sheet but are not specifically described in the Section II(a) on-balance sheet risk-weight categories. These items will be assigned risk-weights as described in Section II(b) or II(c) below.

(b) *Off-balance sheet items.*

Except as provided in Section II(c) of this Appendix, risk-weighted off-balance sheet items are determined by the following two-step process. First, the face amount of the off-balance sheet item must be multiplied by the appropriate credit conversion factor listed in this Section II(b). This calculation translates the face amount of an off-balance sheet exposure into an on- balance sheet credit-equivalent amount. Second, the credit-equivalent amount must be assigned to the appropriate risk-weight category using the criteria regarding obligors, guarantors, and collateral listed in Section II(a) of this Appendix. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(1) 100 percent credit conversion factor (Group A).

(i) Risk participations purchased in bankers' acceptances;

(ii) Forward agreements and other contingent obligations with a certain draw down, e.g., legally binding agreements to purchase assets at a specified future date. On the date a corporate credit union enters into a forward agreement or similar obligation, it should convert the principal amount of the assets to be purchased at 100 percent as of that date and then assign this amount to the risk-weight category appropriate to the obligor or guarantor of the item, or the nature of the collateral;

(iii) Indemnification of members whose securities the corporate credit union has lent as agent. If the member is not indemnified against loss by the corporate credit union, the transaction is excluded from the risk-based capital calculation. When a corporate credit union lends its own securities, the transaction is treated as a loan. When a corporate credit union lends its own securities or is acting as agent, agrees to indemnify a member, the transaction is assigned to the risk-weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf; and

(iv) Unused portions of ABCP liquidity facilities that do not meet the definition of an eligible ABCP liquidity facility. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3) of this Appendix, if applicable.

(2) 50 percent credit conversion factor (Group B).

(i) Transaction-related contingencies, including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction;

(ii) Unused portions of commitments (including home equity lines of credit and eligible ABCP liquidity facilities) with an original maturity exceeding one year except those listed in paragraph II(b)(5) of this Appendix. For eligible ABCP liquidity facilities, the resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3) of this Appendix, if applicable; and

(iii) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the corporate credit union's CUSO or member can issue short-term debt obligations in its own name, but for which the corporate credit union has a legally binding commitment to either:

(A) Purchase the obligations the member is unable to sell by a stated date; or

(B) Advance funds to its member, if the obligations cannot be sold.

(3) 20 percent credit conversion factor (Group C). Trade-related contingencies, i.e., short-term, self-liquidating instruments used to finance the movement of goods and collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(4) 10 percent credit conversion factor (Group D). Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3) of this Appendix, if applicable;

(5) Zero percent credit conversion factor (Group E). (i) Unused portions of commitments with an original maturity of one year or less, except for eligible ABCP liquidity facilities;

(ii) Unused commitments with an original maturity greater than one year, if they are unconditionally cancelable at any time at the option of the corporate credit union and the corporate credit union has the contractual right to make, and in fact does make, either:

(A) A separate credit decision based upon the borrower's current financial condition before each drawing under the lending facility; or

(B) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(iii) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the corporate credit union in accordance with applicable law.

(6) Off-balance sheet contracts; interest rate and foreign exchange rate contracts (Group F).—

(i) Calculation of credit equivalent amounts. The credit equivalent amount of an off-balance sheet interest rate or foreign exchange rate contract that is not subject to a qualifying bilateral netting contract in accordance with paragraph II(b)(6)(ii) of this Appendix is equal to the sum of the current credit exposure, i.e., the replacement cost of the contract, and the potential future credit exposure of the off-balance sheet rate contract. The calculation of credit equivalent amounts is measured in U.S. dollars, regardless of the currency or currencies specified in the off-balance sheet rate contract.

(A) Current credit exposure. The current credit exposure of an off-balance sheet rate contract is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a

corporate credit union may net positive and negative mark-to-market values of off-balance sheet rate contracts if subject to a bilateral netting contract as provided in paragraph II(b)(6)(ii) of this Appendix.

(B) Potential future credit exposure. The potential future credit exposure of an off-balance sheet rate contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal by a credit conversion factor.[70] Corporate credit unions, subject to examiner review, should use the effective rather than the apparent or stated notional amount in this calculation. The conversion factors are: [71]

Remaining maturity	Interest rate contracts (percents)	Foreign exchange rate contracts (percents)
One year or less	0.0	1.0
Over one year	0.5	5.0

(ii) Off-balance sheet rate contracts subject to bilateral netting contracts. In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a corporate credit union may net off-balance sheet rate contracts subject to a bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(A) The bilateral netting contract is in writing;

(B) The bilateral netting contract creates a single legal obligation for all individual off-balance sheet rate contracts covered by the bilateral netting contract. In effect, the bilateral netting contract provides that the corporate credit union has a single claim or obligation either to receive or pay only the net amount of the sum of the positive and negative mark-to-market values on the individual off-balance sheet rate contracts covered by the bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the bilateral netting contract has been validly assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances;

(C) The corporate credit union obtains a written and reasoned legal opinion(s) representing, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the corporate credit union's exposure to be the net amount under:

(*1*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*2*) The law that governs the individual off-balance sheet rate contracts covered by the bilateral netting contract; and

(*3*) The law that governs the bilateral netting contract;

(D) The corporate credit union establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the bilateral netting contract continues to satisfy the requirements of this section; and

(E) The corporate credit union maintains in its files documentation adequate to support the netting of an off-balance sheet rate contract.[72]

(iii) Walkaway clause. A bilateral netting contract that contains a walkaway clause is not eligible for netting for purposes of calculating the current credit exposure amount. The term "walkaway clause" means a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

(iv) Risk-weighting. Once the corporate credit union determines the credit equivalent amount for an off-balance sheet rate contract, that amount is assigned to the risk-weight category appropriate to the counterparty, or, if relevant, to the nature of any collateral or guarantee. Collateral held against a netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the netting contract. However, the maximum risk-weight for the credit equivalent amount of such off-balance sheet rate contracts is 50 percent.

(v) Exceptions. The following off-balance sheet rate contracts are not subject to the above calculation, and therefore, are not part of the denominator of a corporate credit union's risk-based capital ratio:

(A) A foreign exchange rate contract with an original maturity of 14 calendar days or less; and

(B) Any interest rate or foreign exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(C) Asset-backed commercial paper programs.

(*1*) A corporate credit union that qualifies as a primary beneficiary and must consolidate an ABCP program that is a variable interest entity under Generally Accepted Accounting Principles may exclude the consolidated ABCP program assets from risk-weighted assets if the corporate credit union is the sponsor of the ABCP program.

(*2*) If a corporate credit union excludes such consolidated ABCP program assets from risk-weighted assets, the corporate credit union must assess the appropriate risk-based capital requirement against any exposures of the corporate credit union arising in connection with such ABCP programs, including direct credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans, in accordance with sections II(a), II(b), and II(c) of this Appendix.

(*3*) If a corporate credit union bank has multiple overlapping exposures (such as a program-wide credit enhancement and a liquidity facility) to an ABCP program that is not consolidated for risk-based capital purposes, the corporate credit union is not required to hold duplicative risk-based capital under this part against the overlapping position. Instead, the corporate credit union should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

(c) *Recourse obligations, direct credit substitutes, and certain other positions.*

(1) In general. Except as otherwise permitted in this Section II(c), to determine the risk-weighted asset amount for a recourse obligation or a direct credit substitute (but not a residual interest):

(i) Multiply the full amount of the credit-enhanced assets for which the corporate credit union directly or indirectly retains or assumes credit risk by a 100 percent conversion factor. (For a direct credit substitute that is an on-balance sheet asset (e.g., a purchased subordinated security), a corporate credit union must use the amount of the direct credit substitute and the full amount of the asset it supports, i.e., all the more senior positions in the structure); and

[70] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts, in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

[71] No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

[72] By netting individual off-balance sheet rate contracts for the purpose of calculating its credit equivalent amount, a corporate credit union represents that documentation adequate to support the netting of an off-balance sheet rate contract is in the corporate credit union's files and available for inspection by the NCUA. Upon determination by the NCUA that a corporate credit union's files are inadequate or that a bilateral netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs II(b)(5)(ii) of this Appendix, the underlying indivudual off-balance sheet rate contracts may not be netted for the purposes of this section.

(ii) Assign this credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. Section II(a) lists the risk-weight categories.

(2) Residual interests. Except as otherwise permitted under this Section II(c), a corporate credit union must maintain risk-based capital for residual interests as follows:

(i) Credit-enhancing interest-only strips. A corporate credit union must maintain risk-based capital for a credit-enhancing interest-only strip equal to the remaining amount of the strip even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred.

(ii) Other residual interests. A corporate credit union must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest, even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred.

(iii) Residual interests and other recourse obligations. Where a corporate credit union holds a residual interest (including a credit-enhancing interest-only strip) and another. recourse obligation in connection with the same transfer of assets, the corporate credit union must maintain risk-based capital equal to the greater of:

(A) The risk-based capital requirement for the residual interest as calculated under Section II(c)(2)(i) through (ii) of this Appendix; or

(B) The full risk-based capital requirement for the assets transferred, subject to the low-level recourse rules under Section II(c)(5) of this Appendix.

(3) Ratings-based approach—(i) Calculation. A corporate credit union may calculate the risk-weighted asset amount for an eligible position described in Section II(c)(3)(ii) of this section by multiplying the face amount of the position by the appropriate risk-weight determined in accordance with Table A or B of this section.

TABLE A

Long term rating category	Risk-weight (In percent)
Highest or second highest investment grade	20
Third highest investment grade	50
Lowest investment grade	100
One category below investment grade	200

TABLE B

Short term rating category	Risk-weight (In percent)
Highest investment grade	20
Second highest investment grade	50
Lowest investment grade	100

(ii) Eligibility.

(A) Traded positions. A position is eligible for the treatment described in paragraph II(c)(3)(i) of this Appendix if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security and is not a credit-enhancing interest-only strip;

(*2*) The position is a traded position; and

(*3*) The NRSRO has rated a long term position as one grade below investment grade or better or a short term position as investment grade. If two or more NRSROs assign ratings to a traded position, the corporate credit union must use the lowest rating to determine the appropriate risk-weight category under paragraph (3)(i).

(B) Non-traded positions. A position that is not traded is eligible for the treatment described in paragraph(3)(i) if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security extended in connection with a securitization and is not a credit-enhancing interest-only strip;

(*2*) More than one NRSRO rate the position;

(*3*) All of the NRSROs that rate the position rate it as no lower than one grade below investment grade (for long term position) or no lower than investment grade (for short term investments). If the NRSROs assign different ratings to the position, the corporate credit union must use the lowest rating to determine the appropriate risk-weight category under paragraph (3)(i);

(*4*) The NRSROs base their ratings on the same criteria that they use to rate securities that are traded positions; and

(*5*) The ratings are publicly available.

(C) Unrated senior positions. If a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security is not rated by an NRSRO, but is senior or preferred in all features to a traded position (including collateralization and maturity), the corporate credit union may risk-weight the face amount of the senior position under paragraph (3)(i) of this section, based on the rating of the traded position, subject to supervisory guidance. The corporate credit union must satisfy NCUA that this treatment is appropriate. This paragraph (3)(i)(c) applies only if the traded position provides substantive credit support to the unrated position until the unrated position matures.

(4) Certain positions that are not rated by NRSROs. (i) Calculation. A corporate credit union may calculate the risk-weighted asset amount for eligible position described in paragraph II(c)(4)(ii) of this section based on the corporate credit union's determination of the credit rating of the position. To risk-weight the asset, the corporate credit union must multiply the face amount of the position by the appropriate risk-weight determined in accordance with Table C of this section.

TABLE C

Rating category	Risk-weight (In percent)
Investment grade	100
One category below investment grade	200

(ii) Eligibility. A position extended in connection with a securitization is eligible for the treatment described in paragraph II(c)(4)(i) of this section if it is not rated by an NRSRO, is not a residual interest, and meets the one of the three alternative standards described in paragraphs (A), (B), or (C) below:

(A) Position rated internally. A direct credit substitute, but not a purchased credit-enhancing interest-only strip, is eligible for the treatment described under paragraph II(c)(4)(i) of this Appendix, if the position is assumed in connection with an asset-backed commercial paper program sponsored by the corporate credit union. Before it may rely on an internal credit risk rating system, the corporate must demonstrate to NCUA's satisfaction that the system is adequate. Acceptable internal credit risk rating systems typically:

(*1*) Are an integral part of the corporate credit union's risk management system that explicitly incorporates the full range of risks arising from the corporate credit union's participation in securitization activities;

(*2*) Link internal credit ratings to measurable outcomes, such as the probability that the position will experience any loss, the expected loss on the position in the event of default, and the degree of variance in losses in the event of default on that position;

(*3*) Separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of the particular securitization transaction;

(*4*) Identify gradations of risk among "pass" assets and other risk positions;

(*5*) Use clear, explicit criteria to classify assets into each internal rating grade, including subjective factors;

(*6*) Employ independent credit risk management or loan review personnel to assign or review the credit risk ratings;

(*7*) Include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the corporate credit union's established criteria;

(*8*) Monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and

(*9*) Make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(B) Program ratings.

(*1*) A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph II(c)(4)(i) of this Appendix, if the position is retained or assumed in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal or external credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the corporate credit union may apply the rating category applicable to the option that corresponds to the corporate credit union's position.

(2) To rely on a program rating, the corporate credit union must demonstrate to NCUA's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The corporate credit union must also demonstrate to NCUA's satisfaction that the criteria underlying the assignments for the program are satisfied by the particular position.

(3) If a corporate credit union participates in a securitization sponsored by another party, NCUA may authorize the corporate credit union to use this approach based on a program rating obtained by the sponsor of the program.

(C) Computer program. A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph II(c)(4)(i) of this Appendix, if the position is extended in connection with a structured financing program and the corporate credit union uses an acceptable credit assessment computer program to determine the rating of the position. An NRSRO must have developed the computer program and the corporate credit union must demonstrate to NCUA's satisfaction that the ratings under the program correspond credibly and reliably with the rating of traded positions.

(5) Limitations on risk-based capital requirements—

(i) Low-level exposure rule. If the maximum contractual exposure to loss retained or assumed by a corporate credit union is less than the effective risk-based capital requirement, as determined in accordance with this Section II(c), for the assets supported by the corporate credit union's position, the risk-based capital requirement is limited to the corporate credit union's contractual exposure less any recourse liability account established in accordance with Generally Accepted Accounting Principles. This limitation does not apply when a corporate credit union provides credit enhancement beyond any contractual obligation to support assets it has sold.

(ii) Mortgage-related securities or participation certificates retained in a mortgage loan swap. If a corporate credit union holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, it must hold risk-based capital to support the recourse obligation and that percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of risk-based capital required for the security (or certificate) and the recourse obligation is limited to the risk-based capital requirement for the underlying loans, calculated as if the corporate credit union continued to hold these loans as an on-balance sheet asset.

(iii) Related on-balance sheet assets. If an asset is included in the calculation of the risk-based capital requirement under this Section II(c) and also appears as an asset on the corporate credit union's balance sheet, the corporate credit union must risk-weight the asset only under this Section II(c), except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the corporate credit union must separately risk-weight the on-balance sheet servicing asset and the related recourse obligations and direct credit substitutes under this section, and incorporate these amounts into the risk-based capital calculation.

(6) Obligations of CUSOs. All recourse obligations and direct credit substitutes retained or assumed by a corporate credit union on the obligations of CUSOs in which the corporate credit union has an equity investment are risk-weighted in accordance with this Section II(c), unless the corporate credit union's equity investment is deducted from credit union's capital and assets under § 704.2 and § 704.3.

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATION

23. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

24. Revise paragraphs (b)(7) and (b)(9) of § 709.5 to read as follows:

§ 709.5 Payout priorities in involuntary liquidation.

* * * * *

(b) * * *

(7) in a case involving liquidation of a corporate credit union, holders of nonperpetual contributed capital accounts or instruments, subject to the capital priority option described in Appendix A of Part 704 of this chapter;

* * * * *

(9) in a case involving liquidation of a corporate credit union, holders of perpetual contributed capital instruments, subject to the capital priority option described in Appendix A of this chapter;

* * * * *

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

25. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1786, 1787; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134.

26. Add a new subpart M to part 747 to read as follows:

Subpart M—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporate Credit Unions

Sec.

Subpart M—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporate Credit Unions

§ 747.3001 Scope.

(a) *Independent review process.* The rules and procedures set forth in this subpart apply to corporate credit unions, which are subject to discretionary supervisory actions under section 704.4 of this chapter and to reclassification under § 704.4(d)(3) of this chapter, to facilitate prompt corrective action, and to senior executive officers and directors of such corporate credit unions who are dismissed pursuant to a discretionary supervisory action imposed under section 704.4 of this chapter. Section 747.3002 of this subpart provides an independent appellate process to challenge such decisions.

(b) *Notice to State officials.* With respect to a State-chartered corporate credit union under §§ 747.3002, 747.3003 and 747.3004 of this subpart, any notices, directives and decisions on appeal served upon a corporate credit union, or a dismissed director or officer thereof, by the NCUA will also be served upon the appropriate State official. Responses, requests for a hearing and to present witnesses, requests to modify or rescind a discretionary supervisory action and requests for reinstatement served upon the NCUA by a corporate credit union, or any dismissed director or officer of a corporate credit union, will also be served upon the appropriate State official.

§ 747.3002 Review of orders imposing discretionary supervisory action.

(a) *Notice of intent to issue directive.*—

(1) *Generally.* Whenever the NCUA intends to issue a directive imposing a discretionary supervisory action under §§ 704.4(k)(2)(v) and 704.4(k)(3) of this chapter on a corporate credit union classified "undercapitalized" or lower, the NCUA will give the corporate credit union prior notice of the proposed action and an opportunity to respond.

(2) *Immediate issuance of directive without notice.* The NCUA may issue a directive to take effect immediately under paragraph (a)(1) of this section

without notice to the corporate credit union if the NCUA finds it necessary in order to carry out the purposes of § 704.4 of this chapter. A corporate credit union that is subject to a directive which takes effect immediately may appeal the directive in writing to the NCUA Board (Board). Such an appeal must be received by the Board within 14 calendar days after the directive was issued, unless the Board permits a longer period. Unless ordered by the NCUA, the directive will remain in effect pending a decision on the appeal. The Board will consider any such appeal, if timely filed, within 60 calendar days of receiving it.

(b) *Contents of notice.* The NCUA's notice to a corporate credit union of its intention to issue a directive imposing a discretionary supervisory action will state:

(1) The corporate credit union's capital measures and capital category classification;

(2) The specific restrictions or requirements that the Board intends to impose, and the reasons therefore;

(3) The proposed date when the discretionary supervisory action would take effect and the proposed date for completing the required action or terminating the action; and

(4) That a corporate credit union must file a written response to a notice within 14 calendar days from the date of the notice, or within such shorter period as the Board determines is appropriate in light of the financial condition of the corporate credit union or other relevant circumstances.

(c) *Contents of response to notice.* A corporate credit union's response to a notice under paragraph (b) of this section must:

(1) Explain why it contends that the proposed discretionary supervisory action is not an appropriate exercise of discretion under this section;

(2) Request the Board to modify or to not issue the proposed directive; and

(3) Include other relevant information, mitigating circumstances, documentation, or other evidence in support of the corporate credit union's position regarding the proposed directive.

(d) *NCUA Board consideration of response.* The Board, or an independent person designated by the Board to act on the Board's behalf, after considering a response under paragraph (c) of this section, may:

(1) Issue the directive as originally proposed or as modified;

(2) Determine not to issue the directive and to so notify the corporate credit union; or

(3) Seek additional information or clarification from the corporate credit union or any other relevant source.

(e) *Failure to file response.* A corporate credit union which fails to file a written response to a notice of the Board's intention to issue a directive imposing a discretionary supervisory action, within the specified time period, will be deemed to have waived the opportunity to respond, and to have consented to the issuance of the directive.

(f) *Request to modify or rescind directive.* A corporate credit union that is subject to an existing directive imposing a discretionary supervisory action may request in writing that the Board reconsider the terms of the directive, or rescind or modify it, due to changed circumstances. Unless otherwise ordered by the Board, the directive will remain in effect while such request is pending. A request under this paragraph which remains pending 60 days following receipt by the Board is deemed granted.

§ 747.3003 Review of order reclassifying a corporate credit union on safety and soundness criteria.

(a) *Notice of proposed reclassification based on unsafe or unsound condition or practice.* When the Board proposes to reclassify a corporate credit union or subject it to the supervisory actions applicable to the next lower capitalization category pursuant to § 704.4(d)(3) of this chapter (such action hereinafter referred to as "reclassification"), the Board will issue and serve on the corporate credit union reasonable prior notice of the proposed reclassification.

(b) *Contents of notice.* A notice of intention to reclassify a corporate credit union based on unsafe or unsound condition or practice will state:

(1) The corporate credit union's current capital ratios and the capital category to which the corporate credit union would be reclassified;

(2) The unsafe or unsound practice(s) and/or condition(s) justifying reasons for reclassification of the corporate credit union;

(3) The date by which the corporate credit union must file a written response to the notice (including a request for a hearing), which date will be no less than 14 calendar days from the date of service of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the corporate credit union or other relevant circumstances; and

(4) That a corporate credit union which fails to—

(i) File a written response to the notice of reclassification, within the specified time period, will be deemed to have waived the opportunity to respond, and to have consented to reclassification;

(ii) Request a hearing will be deemed to have waived any right to a hearing; and

(iii) Request the opportunity to present witness testimony will be deemed have waived any right to present such testimony.

(c) *Contents of response to notice.* A corporate credit union's response to a notice under paragraph (b) of this section must:

(1) Explain why it contends that the corporate credit union should not be reclassified;

(2) Include any relevant information, mitigating circumstances, documentation, or other evidence in support of the corporate credit union's position;

(3) If desired, request an informal hearing before the Board under this section; and

(4) If a hearing is requested, identify any witness whose testimony the corporate credit union wishes to present and the general nature of each witness's expected testimony.

(d) *Order to hold informal hearing.* Upon timely receipt of a written response that includes a request for a hearing, the Board will issue an order commencing an informal hearing no later than 30 days after receipt of the request, unless the corporate credit union requests a later date. The hearing will be held in Alexandria, Virginia, or at such other place as may be designated by the Board, before a presiding officer designated by the Board to conduct the hearing and to recommend a decision.

(e) *Procedures for informal hearing.*—(1) The corporate credit union may appear at the hearing through a representative or through counsel. The corporate credit union will have the right to introduce relevant documents and to present oral argument at the hearing. The corporate credit union may introduce witness testimony only if expressly authorized by the Board or the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR part 747) will apply to an informal hearing under this section unless the Board orders otherwise.

(2) The informal hearing will be recorded, and a transcript will be furnished to the corporate credit union

upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or by the presiding officer. The presiding officer may ask questions of any witness.

(3) The presiding officer may order that the hearing be continued for a reasonable period following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(4) Within 20 calendar days following the closing of the hearing and the record, the presiding officer will make a recommendation to the Board on the proposed reclassification.

(f) *Time for final decision.* Not later than 60 calendar days after the date the record is closed, or the date of receipt of the corporate credit union's response in a case where no hearing was requested, the Board will decide whether to reclassify the corporate credit union, and will notify the corporate credit union of its decision. The decision of the Board will be final.

(g) *Request to rescind reclassification.* Any corporate credit union that has been reclassified under this section may file a written request to the Board to reconsider or rescind the reclassification, or to modify, rescind or remove any directives issued as a result of the reclassification. Unless otherwise ordered by the Board, the corporate credit union will remain reclassified, and subject to any directives issued as a result, while such request is pending.

§ 747.3004 Review of order to dismiss a director or senior executive officer.

(a) *Service of directive to dismiss and notice.* When the Board issues and serves a directive on a corporate credit union requiring it to dismiss from office any director or senior executive officer under §§ 704.4(g) and 704.4(k)(3) of this chapter, the Board will also serve upon the person the corporate credit union is directed to dismiss (Respondent) a copy of the directive (or the relevant portions, where appropriate) and notice of the Respondent's right to seek reinstatement.

(b) *Contents of notice of right to seek reinstatement.* A notice of a Respondent's right to seek reinstatement will state:

(1) That a request for reinstatement (including a request for a hearing) must be filed with the Board within 14 calendar days after the Respondent receives the directive and notice under paragraph (a) of this section, unless the Board grants the Respondent's request for further time;

(2) The reasons for dismissal of the Respondent; and

(3) That the Respondent's failure to—

(i) Request reinstatement will be deemed a waiver of any right to seek reinstatement;

(ii) Request a hearing will be deemed a waiver of any right to a hearing; and

(iii) Request the opportunity to present witness testimony will be deemed a waiver of the right to present such testimony.

(c) *Contents of request for reinstatement.* A request for reinstatement in response to a notice under paragraph (b) of this section must:

(1) Explain why the Respondent should be reinstated;

(2) Include any relevant information, mitigating circumstances, documentation, or other evidence in support of the Respondent's position;

(3) If desired, request an informal hearing before the Board under this section; and

(4) If a hearing is requested, identify any witness whose testimony the Respondent wishes to present and the general nature of each witness's expected testimony.

(d) *Order to hold informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a corporate credit union to dismiss from office any director or senior executive officer, the Board will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing will be held in Alexandria, Virginia, or at such other place as may be designated by the Board, before a presiding officer designated by the Board to conduct the hearing and recommend a decision.

(e) *Procedures for informal hearing.*—(1) A Respondent may appear at the hearing personally or through counsel. A Respondent will have the right to introduce relevant documents and to present oral argument at the hearing. A Respondent may introduce witness testimony only if expressly authorized by the Board or by the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR part 747) apply to an informal hearing under this section unless the Board orders otherwise.

(2) The informal hearing will be recorded, and a transcript will be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer. The presiding officer may ask questions of any witness.

(3) The presiding officer may order that the hearing be continued for a reasonable period following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(4) A Respondent will bear the burden of demonstrating that his or her continued employment by or service with the corporate credit union would materially strengthen the corporate credit union's ability to—

(i) Become "adequately capitalized," to the extent that the directive was issued as a result of the corporate credit union's capital classification category or its failure to submit or implement a capital restoration plan; and

(ii) Correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of reclassification of the corporate credit union pursuant to § 704.4(d)(3) of this chapter.

(5) Within 20 calendar days following the date of closing of the hearing and the record, the presiding officer will make a recommendation to the Board concerning the Respondent's request for reinstatement with the corporate credit union.

(f) *Time for final decision.* Not later than 60 calendar days after the date the record is closed, or the date of the response in a case where no hearing was requested, the Board will grant or deny the request for reinstatement and will notify the Respondent of its decision. If the Board denies the request for reinstatement, it will set forth in the notification the reasons for its decision. The decision of the Board will be final.

(g) *Effective date.* Unless otherwise ordered by the Board, the Respondent's dismissal will take and remain in effect pending a final decision on the request for reinstatement.

§ 747.3005 Enforcement of directives.

(a) *Judicial remedies.* Whenever a corporate credit union fails to comply with a directive imposing a discretionary supervisory action, or enforcing a mandatory supervisory action under section 704.4 of this chapter, the Board may seek enforcement of the directive in the appropriate United States District Court pursuant to 12 U.S.C. 1786(k)(1).

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the Board may assess a civil money penalty against any corporate credit union that violates or otherwise fails to comply with any final directive issued under section 704.4 of this chapter, or against

any institution-affiliated party of a corporate credit union (per 12 U.S.C. 1786(r)) who participates in such violation or noncompliance.

(2) *Failure to implement plan.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the Board may assess a civil money penalty against a corporate credit union which fails to implement a capital restoration plan under § 704.4(e) of this chapter, regardless whether the plan was published.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the Board may seek enforcement of the directives issued under section 704.4 of this chapter through any other judicial or administrative proceeding authorized by law.

§ 747.3006 Conservatorship or liquidation of critically undercapitalized corporate credit union.

Notwithstanding any other provision of this title, the NCUA may, without any administrative due process, immediately place into conservatorship or liquidation any corporate credit union that has been categorized as critically undercapitalized.

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Wednesday,
December 9, 2009

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 405

Medicare Program: Changes to the Medicare Claims Appeal Procedures; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 405

[CMS–4064–F]

RIN 0938–AM73

Medicare Program: Changes to the Medicare Claims Appeal Procedures

AGENCY: Centers for Medicare & Medicaid Services (CMS), DHHS.

ACTION: Final rule.

SUMMARY: Under the procedures in this final rule, Medicare beneficiaries and, under certain circumstances, providers and suppliers of health care services can appeal adverse determinations regarding claims for benefits under Medicare Part A and Part B pursuant to sections 1869 and 1879 of the Social Security Act (the Act). Section 521 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) amended section 1869 of the Act to provide for significant changes to the Medicare claims appeal procedures. After publication of a proposed rule implementing the section 521 changes, additional new statutory requirements for the appeals process were enacted in Title IX of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). In March 2005, we published an interim final rule with comment period to implement these statutory changes. This final rule responds to comments on the interim final rule regarding changes to these appeal procedures, makes revisions where warranted, establishes the final implementing regulations, and explains how the new procedures will be put into practice.

DATES: *Effective Date:* These regulations are effective on January 8, 2010.

FOR FURTHER INFORMATION CONTACT:

Arrah Tabe-Bedward, (410) 786–7129 (for issues relating to general appeal rights).

David Danek, (617) 565–2682 (for issues relating to redeterminations, reconsiderations, reopenings and expedited access to judicial review (EAJR) issues).

Katherine L. Hosna, (410) 786–4993 (for general appeal issues).

Peggy McFadden-Elmore, (703) 235–0126 (for issues relating to Administrative Law Judge (ALJ) hearings).

Theodore Kim, (202) 565–0200 (for issues relating to Medicare Appeals Council (MAC) review).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Overview of Existing Medicare Program

The original Medicare program consists of two parts: Part A and Part B. Part A, known as the hospital insurance program, covers certain care provided to inpatients in hospitals, critical access hospitals, and skilled nursing facilities, as well as hospice care and some home health care. Part B, the supplementary medical insurance program, covers certain physician's services, outpatient hospital care, and other medical services that are not covered under Part A.

In addition to the original Medicare program, beneficiaries may elect to receive health care coverage under Part C of Medicare, the Medicare Advantage (MA) program. Under the MA program, an individual is entitled to those items and services (other than hospice care) for which benefits are available under Part A and Part B. MA plans may provide additional health care items and services that are not covered under the original Medicare program. Beneficiaries can also elect to receive

prescription drug coverage under Part D of Medicare, which became effective January 1, 2006.

Under the original Medicare program, a beneficiary can generally obtain health services from any institution, agency, or person qualified to participate in the Medicare program. After providing an item or service, the provider or supplier (or, in some cases, a beneficiary) can submit a claim for benefits under the Medicare program to the appropriate government contractor: A fiscal intermediary (FI) (for all Part A claims and certain Part B claims); a carrier (for most claims under Part B); or a Medicare administrative contractor (under Medicare contracting reform, a contractor that processes all types of Part A and Part B claims). If the claim is for an item or service that falls within a Medicare benefit category, is not otherwise excluded by statute or rule, and is reasonable and necessary for the individual as set forth in § 1862(a) of the Social Security Act, then the item or service is covered and the contractor may make payment for the claim. However, the Medicare program does not cover all health care expenses. Therefore, if the Medicare contractor determines that the medical care is not covered under the Medicare program, then it denies the claim.

B. Appeals Procedures Under Previous Regulations

Generally, when a contractor denies a claim, it notifies the provider or supplier, and the beneficiary of the denial and offers the opportunity to appeal the denial. The pre-BIPA appeal procedures for original Medicare are set forth in regulations at 42 CFR part 405, subparts G and H. Separate procedures for appealing determinations made under the MA program are set forth at 42 CFR part 422, subpart M. There is a similar, separate appeals process for the prescription drug program set forth at subpart M of 42 CFR part 423. In addition, we published a proposed rule to describe the appeals procedures that would apply at the ALJ and MAC levels in deciding appeals brought by individuals who have enrolled in the Medicare Part D prescription drug benefit program (73 FR 14342, March 17, 2008). After an appellant has exhausted the administrative appeal procedures offered under the Medicare program, the Medicare statute provides the opportunity for an individual who is dissatisfied to seek review in Federal court.

The regulations in part 405 subpart G beginning at § 405.701 describe reconsiderations and appeals under Medicare Part A, prior to the statutory changes in BIPA and the MMA. As set forth in these regulations, when a Medicare contractor made a determination for a Part A claim, the beneficiary or, in some circumstances, the provider, could appeal the determination. Consistent with sections 1861(u) and 1866(e) of the Act and § 400.202, the term "provider" includes hospitals, skilled nursing facilities (SNFs), home health agencies (HHAs), comprehensive outpatient rehabilitation facilities (CORFs), and hospices, as well as certain clinics, rehabilitation agencies, and public health agencies. Under this process, if a determination was appealed, the contractor would reconsider the initial determination. If the contractor upheld the original determination, a party could request a hearing before an ALJ, provided that the amount in controversy (AIC) was at least $100. If a party was dissatisfied with the ALJ's decision, it could request review by the Departmental Appeals Board (DAB). Under these regulations, the component within the DAB responsible for Medicare claim appeals was the MAC. (Although the Medicare appeals regulations in part 405, subparts G and H, contain some limited provisions regarding ALJ and MAC proceedings, these proceedings were generally governed by the Social Security Administration (SSA) regulations at 20 CFR part 404, subpart J.) MAC decisions generally constituted the final decision of the Secretary and could be appealed to a Federal court. With few exceptions, parties had to complete the lower level of appeal before the appeal could go on to the next level. Pre-BIPA and pre-MMA appeal procedures for Medicare Part B are set forth in 42 CFR part 405 subpart H (§ 405.801, *et. seq.*). Under these regulations, beneficiaries, and suppliers that accepted assignment for Medicare claims could request review of the contractor's initial determination that a claim could not be paid, either in full or in part. (The term "supplier" is defined under section 1861(d) of the Act, as amended by section 901(b) of the MMA, and means a physician or other practitioner, a facility, or other entity (other than a provider of services that furnishes items or services) under Medicare.) Suppliers that did not take assignment and providers, in some circumstances, had limited appeal rights under these regulations.

As defined in the pre-BIPA and pre-MMA regulation at § 405.815, if a party to the contractor's review determination was dissatisfied and the amount in controversy was at least $100, the party was entitled to request a second level appeal known as a "carrier hearing". If the carrier's hearing officer upheld the denial, a party to the carrier hearing could request a hearing before an ALJ, provided that the action met the amount in controversy requirement. (We published a ruling, CMS Ruling No. 02–1, which implemented the $100 amount in controversy requirement for Part B ALJ hearings specified in section 521 of BIPA for initial determinations made on or after October 1, 2002. *See* 67 FR 62478, 62480 (Oct. 7, 2002). For initial determinations made prior to October 1, 2002, the amount in controversy threshold was $100 for home health services and $500 for all other services.) Subsequent aspects of the appeals process for Part B claims are identical to those described above for Part A claims.

C. Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA)

Section 521 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554) amended section 1869 of the Act to require revisions to the Medicare fee-for-service (Part A and Part B) appeals process. Among the major changes required by the BIPA amendments were—

- Establishing a uniform process for handling Medicare Part A and Part B appeals, including the introduction of a new level of appeal for Part A claims;
- Revising the timeframes for filing a request for Part A and Part B appeals;
- Imposing time limits for "redetermination" decisions made by the contractors;
- Establishing a new appeals entity, the qualified independent contractor (QIC), to conduct "reconsiderations" of contractors' initial determinations (including redeterminations) and allowing appellants to escalate cases to the next level of appeal (an ALJ hearing) if reconsiderations are not completed within established time limits;
- Establishing a uniform amount in controversy threshold for appeals at the ALJ level;
- Imposing 90-day time limits for issuing decisions at the ALJ and MAC levels of appeal and allowing appellants to escalate cases to the next level of appeal if an ALJ or the MAC does not meet the 90-day deadline; and
- Requiring "*de novo*" review when the MAC reviews an ALJ decision made after a hearing.

On November 15, 2002, we published in the **Federal Register** a comprehensive proposed rule (67 FR 69312) to set forth proposed changes needed to implement the provisions of section 521 of the BIPA, as well as other complementary

changes needed to improve the Medicare claims appeal procedures.

D. Related Provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

On December 8, 2003, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) was enacted. The MMA includes a number of provisions that made additional changes to the Medicare claim appeals process. To the extent the new statutory language necessitated revisions or additions to our proposed regulations to ensure conformance to the MMA, we have incorporated the needed changes into the interim final rule (70 FR 11420, March 8, 2005), the correcting amendments (70 FR 37700, June 30, 2005 and 70 FR 50214, August 26, 2005) and this final rule. Among the major changes required by MMA are—

- Transferring the ALJ function to the Department of Health and Human Services (Section 931 of the MMA).
- Establishing a process for expedited access to judicial review (Section 932 of the MMA).
- Requiring the full and early presentation of evidence (Section 933(a) of the MMA).
- Requiring the review of a patient's medical records in a QIC reconsideration (Section 933(b) of the MMA).
- Establishing content requirements for appeal determination notices (Section 933(c) of the MMA).
- Revising eligibility requirements for QICs (Section 933(d) of the MMA).
- Precluding administrative or judicial review of a determination by the Secretary of sustained or high levels of payment errors (Section 934(a) of the MMA).
- Creating a separate process for the correction of minor errors or omissions (Section 937 of the MMA).
- Permitting appeals by providers and suppliers when there is no other party available (Section 939 of the MMA).
- Revising appeals timeframes and amounts in controversy (Section 940 of the MMA).

E. Codification of Regulations

The BIPA provisions and the subsequent revisions made under MMA make possible a largely uniform set of appeals procedures that can be applied for both Part A and Part B of Medicare. In the interim final rule, we established a new subpart I of part 405 that sets forth in one location the requirements for fee-for-service claims appeals processed by Medicare carriers, FIs, Medicare administrative contractors, and QICs. Also included in subpart I are the provisions needed to govern Medicare claims appeals to ALJs and the MAC. Thus, subpart I will codify in one location key regulations governing all aspects of Medicare claim appeals, beginning with the statutory requirements that apply to initial determinations and proceeding through all four levels of the administrative appeals process.

II. Analysis of Appeals Procedures and Responses to Public Comments

A. Overview

Discussed below are the comments and clarifications to the March 2005 interim final rule with comment period implementing section 521 of BIPA and the relevant sections of the MMA. In general, we discuss those sections of the interim final rule on which we received comments from the public or which required editorial changes to improve the clarity and simplicity of the regulations. We include a brief explanation of each regulatory provision, provide a summary of, and responses to, the comments received, and describe the changes, if any, to be made in finalizing the provision in this rulemaking. The changes made in this final regulation are summarized in the section of this preamble entitled "Provisions of the Final Regulations."

We received 26 timely comments on the 2005 interim final rule with comment period from individuals, organizations representing providers and suppliers, beneficiary advocacy groups, law offices, health plans, and others. The issues most frequently raised by commenters include: Beneficiary protections; deadlines for filing appeals and timeframes for decision-making; entities entitled to receive notices; differences between an assignee and the beneficiary's appointed representative; the role of the QICs that will perform reconsiderations; evidentiary requirements; the perceived formality of the ALJ procedures, especially proceedings where CMS or one of its contractors enters the process, and the impact on beneficiaries; and whether the nature of an ALJ hearing has changed, how much deference the ALJ gives to CMS' policies and, in general, the manner in which the ALJs conduct hearings. These comments and our responses are discussed below.

B. Appeals

1. Statutory Basis and Scope, Definitions and General Procedures (§ 405.900 Through § 405.904)

In § 405.900, we set forth the general statutory authority for the ensuing provisions and explain that this subpart establishes the requirements for appeals of initial determinations for benefits under Part A and Part B of Medicare. Section 405.902 sets forth the definitions for terms used in subpart I. Section 405.904 provides a general description of the appeals process for entitlement and claims appeals. Additional detailed discussion of these provisions is found in the interim final rule at 70 FR 11427, 11431 through 11432, and 11434 through 11435.

In this final regulation, we are making a technical revision to § 405.902 to define the term contractor, as applicable to the provisions in subpart I. We believe the meaning of the term contractor may have been unclear because, in some instances, we specified the entities that are included in the term contractor whereas, in other instances, we did not provide such detail. Thus, we believe a technical revision to clearly define the term contractor and to ensure that the term is used consistently throughout Subpart I is appropriate. Contractor means an entity that contracts with the Federal government to review and/or adjudicate claims, determinations and/or decisions. This includes, but is not limited to, fiscal intermediaries, carriers, Medicare administrative contractors, qualified independent contractors, and quality improvement organizations (QIOs). Although, based on this definition, the term contractor includes many entities, the meaning of the term contractor for a particular provision is derived from the context. For example, under § 405.920(a), after a claim is filed with the appropriate contractor in the manner and form described in part 424 subpart C, the contractor must determine if the items and services furnished are covered or otherwise reimbursable under title XVIII of the Act. Only fiscal intermediaries, carriers and Medicare administrative contractors make such determinations, so the term contractor means only these three entities in this context. We are also making technical revisions to several sections noted below, in order to remove references to specific contractors (such as QICs and QIOs) when describing the general actions, responsibilities, or authority of contractors. However, there are instances where we continue to use the term contractor and also separately include a reference to QICs in the same provision (for example, § 405.910(i)(2) and § 405.980(a)(4)). In those situations, we are maintaining the separate reference to the QIC in order to highlight the specific responsibilities of

the QIC with respect to reconsiderations.

We received no comments on these sections. Therefore, we are finalizing § 405.900 and § 405.904 without modification. We are finalizing § 405.902, § 405.1000, § 405.1010 and § 405.1012 with modifications, as noted.

2. Parties to an Appeal, Medicaid State Agencies, and Appointment of Representatives (§ 405.906 Through § 405.910)

Section 405.906 discusses parties to the appeals process. More detail is provided on the role of Medicaid State agencies in the appeals process in section 405.908. Section 405.910 describes appointed representatives and the process for becoming an appointed representative. We received several comments with respect to the rights of Medicaid State agencies to file appeals, and the rights and responsibilities of representatives. A summary of the comments and our responses is included below. Additional detailed discussion of these provisions is found in the interim final rule at 70 FR 11423, 11427 through 11431, 11432, 11434 through 11435, 11441, 11444 through 11445, and 11468.

Comment: Several commenters asked CMS to broaden the definition of "party" at the initial determination level to include Medicaid State agencies.

Response: As set forth in § 405.906(b)(2), a Medicaid State agency can be a party to a redetermination, reconsideration, hearing or MAC review. Section 405.908 explains the process for a Medicaid State agency to join the appeal as a party. Specifically, in § 405.908, we allow the State agency to file an appeal with respect to "a claim for items or services furnished to a dually eligible beneficiary only for services for which the Medicaid State agency has made payment, or for which it may be liable." Only after Medicare has issued its initial determination on a claim for items or services provided to a dually eligible beneficiary can a determination be made about a State agency's potential liability for all or part of the associated charges, and thus, the Medicaid State agency should not be a party to the initial determination. If the Medicaid program is not financially responsible for the items or services on a particular claim, it follows that the State agency would have no interest in the claim and thus, should not be a party to any appeal of the initial determination. Accordingly, we believe it is appropriate to offer party status to a Medicaid State agency only after there has been a determination on the claim by Medicare, and then only if the State agency makes payment or may be liable to make payment for the items or services on that claim. If these requirements are met, the State agency may file a request for a redetermination and will retain party status through the course of any subsequent appeals for the particular claim.

Comment: One commenter stated that although the interim final rule calls for an adjudicator to contact the party and provide a description of information missing from the appointment of representative form (§ 405.910(d)(1)), there are no provisions explaining how the need to cure a defective appointment affects the time deadline for filing an appeal. The commenter recommended amending the rule to indicate that an appeal filed within time limits remains timely when the only technical flaw is a defective appointment of representative that can be, and is, cured.

Response: Under § 405.910(d)(1), if an appeal request is filed by an individual attempting to represent a party, but the submission contains a defective appointment of representative (AOR) form, the adjudicator will give the party notice of the defect. The adjudicator provides the party and the putative representative with a reasonable timeframe within which to cure the defect. The adjudicator will not dismiss an appeal request filed with a defective AOR provided the defect is cured within the timeframe established by the adjudicator. Thus, in response to the situation described by the commenter, an appeal request filed timely will be considered timely if the party submits a corrected and valid appointment instrument within the timeframe specified by the adjudicator, even if that period extends beyond the time limit for filing the appeal.

However, if the adjudicator does not receive a valid appointment instrument within the timeframe specified by the adjudicator, it may dismiss the appeal request because the individual requesting the appeal is not a proper party to the appeal or does not otherwise have a right to appeal. *See* § 405.952(b)(1), § 405.972(b)(1), § 405.1052(a)(3) and § 405.1114(b). If the appeal request is dismissed, the party or the representative may re-file the request. If the resubmission is untimely, consistent with § 405.942(b), the representative must include an explanation of the circumstances leading to the late filing and request that the contractor consider whether good cause exists to extend the time for filing the appeal.

Comment: One commenter asked that § 405.910(e)(1) be amended to note that an appointment is valid for one year, except as noted in § 405.910(e)(3). We were also asked to clarify whether a representative may be appointed before the issuance of an initial determination. Finally, a commenter asked when an updated appointment of representative form (Form CMS–1696) would be available.

Response: Section 405.910(e)(1) states that once the AOR form is executed, it is valid for one year from the effective date. Section 405.910(e)(2) states that the representative must submit, with each appeal request, a copy of the valid, effective AOR or other conforming written instrument in order to request a redetermination or other appeal on behalf of the party. Thus, a valid, executed AOR will be honored for the duration of the initial appeal request for which it is filed, and for any subsequent appeal request with which it is submitted, provided the initial appeal request is filed within one year of the effective date of the AOR.

In § 405.910(e)(3), we made an exception for appointments signed in connection with Medicare Secondary Payer recovery claims, because liability, no-fault, and worker's compensation claims often take more than one year to resolve. Where an appointment of representative is related to these recovery claims, the appointment is valid from the date that it is signed through the duration of any subsequent appeal. We believe § 405.910(e) is clear on its face and, thus, we are not revising this subsection.

In the interim final rule, we stated that, under § 405.910(a), the appointment of representative provisions apply at the initial determination level and throughout the appeals process. *See* 70 FR 11431. Section 405.910(a) states that "[a]n appointed representative may act on behalf of an individual or entity in exercising his or her right to an initial determination or appeal." In addition, § 405.910(c)(7) states that the AOR form may "[b]e filed with the entity processing the party's initial determination or appeal." Finally, § 405.910(e)(1) states that the effective date of the appointment is the date that the AOR form or other conforming written instrument contains the signatures of both the party and appointed representative. The AOR may be completed prior to the submission of a claim or appeal request, and a representative may assist with the preparation or submission of a claim. (However, consistent with § 405.910(i)(1), notices and other information regarding the initial determination are only sent to the party

to the initial determination, except for Medicare secondary payer claims appeals as discussed in § 405.910(i)(4)). We believe these provisions convey that a representative may be appointed prior to the issuance of an initial determination.

Finally, the revised appointment of representative form, Form CMS–1696, is available online, in both English and Spanish, at *http://www.cms.hhs.gov/CMSForms/CMSForms/list.asp#TopOfPage* Representatives at 1–800–MEDICARE can also provide information on how to obtain the appointment of representative form.

Comment: One commenter questioned the authority of CMS to impose a fee review process when an appointed representative for a beneficiary wished to charge a fee for services rendered in connection with an appeal before the Secretary. The commenter contended that beneficiary representatives should be treated like provider representatives who have no fee limitations. The commenter stated that the regulations, specifically, the fee review provisions, decrease the likelihood that a beneficiary will find an advocate to assist in the appeal. The commenter also stated that our regulations increase a beneficiary's need to be represented.

Response: Section 1869(b)(1)(B)(iv) of the Act (captioned, "Requirements for Representatives of a Beneficiary") establishes that the provisions of sections 205(j) and 206 (other than subsection (a)(4)) of the Act apply to representation of an individual for Medicare claim appeals in the same manner as they apply to representation of an individual for Social Security claims. By incorporating these sections in § 1869(b)(1)(B)(iv) of the Act, the Congress mandated that, for appeals before the Secretary, appointed representatives, including attorneys, must obtain approval of fees before charging a beneficiary. Consistent with these statutory provisions and the longstanding practice of fee petitions before ALJs, § 405.910(f)(1) requires that an appointed representative for a beneficiary, who wishes to charge a fee for services rendered in connection with an appeal before the Secretary, must obtain approval of the fee from the Secretary.

As noted in the preamble to the interim final rule (70 FR 11429 through 11430) and at § 405.910(f)(1), we do not consider proceedings before the ALJ hearing level (that is, initial determination, redetermination, and reconsideration levels) to be proceedings "before the Secretary". Section 206(a) of the Act authorizes the Commissioner of Social Security to prescribe rules and regulations to govern the representation of claimants in proceedings before the Commissioner. This provision has long been interpreted to include only proceedings at the ALJ level and beyond. Thus, we have interpreted appeals before the Secretary of the Department of Health and Human Services (DHHS or the Department) to include only the ALJ level and above. Therefore, the fee petition provisions in § 405.910(f) do not apply to administrative proceedings below the ALJ hearing level. Furthermore, because the clear intent of the fee petition provision of the statute is to protect the interests of individual Medicare beneficiaries, we do not interpret them as applying to non-beneficiary appellants.

The fee petition process described in § 405.910(f) specifically is designed to protect the interests of Medicare beneficiaries by ensuring that the fees charged by a representative are reasonable. This process is not new to these regulations. Rather, it has been a longstanding requirement in both the Medicare and Social Security programs for appeals at the ALJ level. *See* 42 CFR § 405.701(c) and 42 CFR § 405.801(c), incorporating by reference the provisions of 20 CFR part 404, subpart R regarding representation of parties. Thus, we do not believe this regulation will affect a beneficiary's ability to obtain assistance with an appeal.

Further, we do not believe the new appeals process increases the need for a beneficiary to obtain assistance with an appeal. The new appeals process primarily changes certain procedures with respect to appeals filed by providers and suppliers, the entities and individuals who file the vast majority of appeals (for example, the full and early presentation of evidence requirement, and CMS participation as a party or participant at the ALJ level). However, most of these changes do not affect beneficiary initiated appeals. Throughout the process, we have attempted to minimize the impact of the new appeals procedures on beneficiaries. Therefore, we do not believe that the new appeals process increases the need for a beneficiary to obtain assistance with an appeal. Further, where we have made changes to operational procedures, we have developed notices and model language for contractors to provide to parties that explain the new process in clear, plain language. We believe our newly developed notices and forms provide clear instructions to parties at each level of the administrative appeals process. We have also revised Your Medicare Rights and Protections (CMS Publication No. 10112, available to order from 1–800–MEDICARE, or available to view on-line at *http://www.medicare.gov/Publications/Pubs/pdf/10112.pdf),* which explains, in detail, the various steps in the appeals process. These notices, forms and instructions will provide beneficiaries and their representatives, as well as other parties and advocates, with additional information about the procedures to be followed in the administrative appeals process.

Comment: Two commenters expressed concern regarding the requirement that an appointed representative has an affirmative duty to "[c]omply with all laws and CMS regulations, CMS Rulings, and instructions" (§ 405.910(g)(1)(v)). One commenter requested the words "and instructions" be struck from the regulation, because an appointed representative should not be bound to comply with CMS instructions any more than a beneficiary, a contractor or an administrative law judge should be. Another commenter stated that it is not uncommon for an attorney or other representative to challenge the validity of CMS rulings, policy instructions and other interpretations, and, as such, it is unreasonable to require a representative to defer to all such policies to the potential detriment of the provider/appellant.

Response: Section 405.910(g)(1)(v) states that an appointed representative has an affirmative duty to comply with all laws and CMS regulations, CMS rulings and instructions. While we appreciate the commenters' concerns, we disagree with the commenters' interpretation of this provision. Providers and suppliers submitting claims on behalf of beneficiaries, and contractors processing claims are, in fact, bound to follow all laws, regulations, rulings and CMS operating instructions. QICs, ALJs and the MAC are bound to follow laws, regulations, rulings, and NCDs, and to afford substantial deference to CMS operating instructions and other program guidance. *See* § 405.968(b) and § 405.1062. As arbiters of fact in the administrative appeals process, QICs, ALJs and the MAC may determine that an instruction should not apply to the facts of a particular case. However, QICs, ALJs and the MAC cannot rule on the validity of the instruction. Similarly, an appointed representative has a duty to comply with such laws, regulations, rulings and instructions. However, an appointed representative is not precluded from challenging the application of that policy or instruction

during the course of an appeal. Thus, we do not believe a representative is unfairly burdened by this requirement, and we believe it is unnecessary to revise § 405.910(g)(1)(v).

Comment: Several commenters asked CMS to reconsider the policy prohibiting the issuance of MSNs to a beneficiary's appointed representative. One commenter stated that sending the notice of initial determination to the appointed representative is necessary to assure that beneficiaries can be effectively represented in the new appeals process. Another commenter indicated that quicker access to initial determination information was needed due to the shorter timeframes for requesting redeterminations and reconsiderations.

Response: Under § 405.910(i)(1), contractors issue initial determination notices (that is, Medicare Summary Notices (MSNs) and Remittance Advice (RAs)) only to the parties to the initial determination, and not to appointed representatives. As we stated in the preamble to the interim final rule (70 FR 11434) and in § 405.910, appointed representatives have the same right as parties to receive information on claims being appealed only after an appeal has been filed. The information included on MSNs covers the entire range of health care services and items billed to Medicare within a 90-day period; similarly, an RA contains comprehensive claims information for all claims processed for a provider or supplier during a specific period. Because the scope of an appointment of representation may vary, an appointed representative may not have authority to receive information on all such services or items. Accordingly, for privacy and confidentiality reasons, contractors must provide MSNs and RAs only to the parties to the initial determination. We believe that a beneficiary can be effectively represented without contractors directly providing the MSNs and RAs to appointed representatives because parties can share their respective notices with their representatives.

We note that our policy with respect to sending the notice of initial determination to the party and not the party's representative is consistent with the decision in *Connecticut Department of Social Services* v. *Leavitt,* 428 F.3d 138 (2d Cir. 2005). The court held that the due process interests of parties are adequately protected by their own receipt of the initial determination notice, and declined to require that contractors send these notices to the appointed representative of a party.

After the initial determination, the contractor, QIC, ALJ and the MAC will send notice of their action and requests for information or evidence to the appointed representative because, unlike the MSN and RA, this information is specific to the claim at issue. We also note that under § 405.910(i)(4), initial determinations and appeal notices that involve Medicare Secondary Payer recovery claims are sent to both the party and the appointed representative. Unlike other initial determinations, Medicare Secondary Payer recovery claims notices of initial determinations are limited to include only information related to the claim at issue.

We believe the current filing timeframes and the quarterly issuance of MSNs provide adequate time for representatives to obtain claims information from beneficiaries, providers and suppliers. Currently, parties have 120 calendar days from the date of an initial determination to file for a redetermination and 180 calendar days from the date the party receives the notice of the redetermination to file a reconsideration. In addition, contractors may extend redetermination and reconsideration filing timeframes (consistent with § 405.942(b) and § 405.962(b)) if a party shows good cause for not meeting the filing timeframe. Coupled with the quarterly issuance of MSNs, we believe individuals representing beneficiaries have ample time to obtain relevant information in order to submit an appeal of an initial determination or redetermination.

Accordingly, we are finalizing sections 405.906 through 405.910 without modification.

3. Assignment of Appeal Rights (§ 405.912)

The procedures for assigning appeal rights from a beneficiary to a provider or supplier are included in § 405.912. We received several comments on the assignment of appeal rights. A summary of the comments and our responses is included below. Additional detailed discussion of this provision is found in the interim final rule at 70 FR 11427 through 11428 and 11430 through 11432.

Comment: We received several comments that requested clarification of when an appointment of a representative or assignment of appeal rights was appropriate, given that participating providers and participating suppliers generally have appeal rights equal to those of the beneficiary.

Response: A number of the comments reflected continued confusion between the appointed representative provisions at § 405.910 and the assignment of appeal rights provisions at § 405.912. Appointing a representative and assigning appeal rights are two different and unrelated actions under the new appeals process. Beneficiaries have the option of either (1) assigning (transferring) their appeal rights to the provider or supplier that provided the item or service at issue, if such person or entity is not a party to the initial determination, or (2) appointing a representative to act on their behalf during the appeal.

As set forth in § 405.912, an assignment of appeal rights constitutes a complete transfer of party status and all appeal rights from a beneficiary to the provider or supplier that (1) provided the item or service at issue to the beneficiary and (2) does not already have party status at the initial determination. Thus, with an assignment of appeal rights, the provider or supplier becomes a party to the appeal in place of the beneficiary.

In contrast, a party may choose to appoint an individual as its representative to assist with an appeal. *See* § 405.902, defining appointed representative, and § 405.910. For example, a beneficiary may appoint his provider or supplier as an appointed representative. Appointing a representative does not transfer a party's appeal rights, nor does it make the appointed representative a party to the appeal. Rather, an appointed representative is simply an individual chosen by a party to act on behalf of the party in exercising his or her appeal rights.

In an overwhelming majority of appeals, there is no need for a beneficiary to assign appeal rights to his provider or supplier. For example, under § 405.906(a)(2) and (a)(3), a supplier who accepts assignment for items or services furnished to a beneficiary, and a provider who files a claim for items or services furnished to a beneficiary, are parties to the initial determination, and thus, may appeal that initial determination to the same extent as the beneficiary.

In limited situations, a provider or supplier will not have party status. For example, if a claim is filed by a non-participating physician who does not accept assignment on the claim, and the claim is denied as a statutory exclusion (such as certain cosmetic surgeries under section 1862(a)(10) of the Act), the physician submitting the claim would not have a direct right to appeal the initial determination made by the

carrier. However, the physician could get party status to file an appeal by obtaining an assignment of appeal rights from the beneficiary for this service. The assignment of appeal rights must be completed in accordance with the procedures set forth in § 405.912.

Comment: A commenter suggested that certain providers, such as clinical laboratories, be exempt from the provision requiring beneficiaries to sign an assignment of appeal rights form (§ 405.912(c)(2)).

Response: In situations where an assignment of appeal rights is appropriate, we believe the signature requirement is necessary for the protection of both the party and the representative, as well as to assist adjudicators in determining the proper parties to the appeal. While we acknowledge it may be difficult in some instances for a provider or supplier to obtain the signature of the beneficiary, the binding nature of the assignment and the effect of the assignment (transferring a beneficiary's appeal rights to an assignee and waiving the right of the provider or supplier to collect payment) make it essential that both parties sign the agreement. This situation, however, may not arise frequently because a supplier that is required to accept assignment on a claim, such as a clinical laboratory, is a party to the initial determination and, therefore, has direct standing to file an appeal. Accordingly, it would be inappropriate for a supplier, who otherwise has party status, to seek assignment of appeal rights from the beneficiary.

Comment: One commenter stated that the regulations indicate that when beneficiaries assign their rights to appeal an individual item or service to a provider or supplier, the provider or supplier must list all items or services provided on the date of service on the assignment form. The commenter recommended that a provider or supplier seeking assignment of appeal rights should have to list only those items or services for which appeal rights are to be assigned.

Response: Section 405.912(c)(3) requires that an assignment of appeal rights "indicate the item or service for which the assignment of appeal rights is authorized." A provider or supplier is not required to list all items or services provided on the date of service on the assignment agreement—just those for which appeal rights are to be assigned. An assignment of appeal rights will only be effective for the items or services listed on the assignment form.

Accordingly, we are finalizing § 405.912 without modification.

4. Initial Determinations (§ 405.920 Through § 405.928)

Sections 405.920 through 405.928 discuss the initial determination process, including how contractors make initial determinations on claims and what types of determinations are considered or not considered initial determinations.

We received several comments with respect to claims submissions and the processing of initial determinations as set forth in the interim final rule. A summary of the comments and our responses are included below. Additional discussion regarding these provisions is found in the interim final rule at 70 FR 11423 through 11424, 11428, and 11432 through 11436.

a. Initial Determinations, Notice of Initial Determinations, and Timeframe for Processing Initial Determinations (§ 405.920 Through § 405.922)

Section 405.920 explains the process a contractor must follow in making an initial determination. Section 405.921 describes the notice of initial determination, including the content of the notice, and § 405.922 discusses the timeframe for processing initial determinations.

Comment: Two commenters recommended that the term "non-clean claim" be defined. Commenters also suggested that if a claim is paid at the QIC level or higher, such claims should be considered clean, and that interest should accrue from the date of the original denial in order to provide incentive to expedite claim determinations and assure fairness. Two commenters noted that although contractors must issue an initial determination within 45 days of receipt of a "non-clean" claim, the regulations do not provide for any interest payments if the determination is issued after the 45 day time period.

Response: The term "clean claim" is clearly defined in statute at sections 1816(c)(2)(B)(i) and 1842(c)(2)(B)(i) of the Act as "a claim that has no defect or impropriety (including any lack of any required substantiating documentation) or particular circumstance requiring special treatment that prevents timely payment from being made on the claim." This definition also is set forth in § 405.902. Claims that do not meet this definition are considered "non-clean claims." Therefore, we do not believe that we need to define non-clean claim because the meaning of non-clean claim is sufficiently clear given the meaning of clean claim set forth in § 405.902.

Claims for services that cannot be adjudicated timely at the initial determination level because they lack sufficient documentation and/or require special handling do not come within the definition of clean claims. Claims initially denied and subsequently paid following a favorable appeal decision, or revised following a reopening action, are, by their nature, claims that require special treatment. Often, during an appeal or reopening action, additional substantiating documentation is needed to support the coverage and payment decision. Thus, claims that are adjusted as a result of the effectuation of an appeal decision, and claims that are revised following a reopening action do not fall under the definition of "clean claim" set forth in the statute.

Section 1869(a)(2)(A) of the Act, in conjunction with sections 1816(c)(2) and 1842(c)(2) of the Act, establishes that, on all claims other than clean claims, the initial determination shall be concluded and a notice of such determination must be mailed to the individual filing the claim by no later than 45 days after the contractor receives the claim. Additionally, section 1869(a)(2)(A) of the Act, in conjunction with sections 1816(c)(2) and 1842(c)(2) of the Act, requires that interest accrue if clean claims are not processed within 30 calendar days. Thus, reading these provisions together, no interest accrues on non-clean claims, including claims that are adjusted as the result of the effectuation of an appeal decision, and claims that are revised following a reopening action.

Finally, neither the statute nor our regulations provide for escalation, payment of interest or other remedies when the 45-day deadline is missed for non-clean claims. Through various tools used to monitor the performance of our contractors, we attempt to ensure that claim determinations are both timely and accurate. As we noted in the interim final rule, providers and suppliers play a vital role in the contractors' ability to meet their decision-making timeframes. If providers and suppliers submit clean claims, they can avoid the delays that are associated with processing non-clean claims. The more accurate the claim is at initial submission, the greater the ability of the Medicare contractor to process the claim quickly.

Accordingly, we are finalizing §§ 405.920 and 405.921 without modification. We are finalizing § 405.922 with modification as discussed in section II.B.5.a. of this preamble.

b. What Constitutes an Initial Determination and Decisions That Are Not Considered Initial Determinations (§ 405.924 Through § 405.926)

In § 405.924, we describe actions that are initial determinations and are subject to the administrative appeals procedures in subpart I. In § 405.926, we list examples of determinations that are not considered initial determinations and are not subject to the administrative appeals procedures contained in this subpart.

Comment: One commenter questioned the need to maintain the number of home health visits as a determination that constitutes an initial determination (§ 405.924(b)(7)). The commenter stated that this particular item is no longer a relevant factor in determining whether the charges were covered under Medicare Part A or Part B, and suggested that this item be removed from the list of determinations considered initial determinations.

Response: We agree with the commenter and have revised § 405.924 to eliminate paragraph (b)(7), which specifically included the number of home health visits used as an initial determination.

Comment: One commenter stated that under § 405.926(c), issues regarding the computation of the payment amount of program reimbursement of general applicability are not considered initial determinations and, therefore, are not subject to appeal under subpart I. The commenter questioned whether the payment amount of a specific, individual claim is considered an initial determination. The commenter suggested amending § 405.924 and § 405.926 to clarify that individual determinations with respect to payment amounts are initial determinations. In addition, the commenter suggested that we revise § 405.924(c) to state that a provider's notice of non-coverage to the Medicare beneficiary is not an initial determination. The commenter noted that while the provider of service may be the first decision maker regarding Medicare coverage of an item or service, its notice of non-coverage has not been considered an initial determination subject to appeal.

Response: Section 405.920 provides that, after a claim is filed, a contractor must perform certain actions, including determining any amounts payable. Such a determination constitutes an initial determination subject to the subpart I appeals process. Similarly, under § 405.924(b), a payment amount determination with respect to a particular item or service on a claim is an initial determination that is appealable under subpart I. In contrast, § 405.926(c) specifies that "[a]ny issue regarding the computation of the payment amount of program reimbursement of general applicability for which CMS or a carrier has sole responsibility under Part B such as the establishment of a fee schedule * * *" is not an initial determination, and is not subject to administrative appeal under subpart I. For example, section 1848(i)(1) of the Act expressly prohibits administrative and judicial review of the components that comprise the Medicare physician fee schedule. Thus, in situations where payment amounts are determined in accordance with statutorily mandated methodologies (such as the physician fee schedule), adjudicators are required to follow such methodologies when making a finding regarding a payment amount. Therefore, we believe that the regulations at §§ 405.920, 405.924, and 405.926 clearly provide that the payment amount of a specific, individual claim is considered an initial determination and also appropriately convey the distinction between a direct challenge to the Medicare payment methodology and an appeal that raises questions regarding a determination of a payment amount for a particular claim. Therefore, we do not believe it is necessary to revise § 405.924 or § 405.926 to provide any further clarification.

We agree with the commenter's statement that a provider's notice of non-coverage does not constitute an initial determination, because it is not a determination made by the Medicare program. Instead, it is an opinion of the provider, and the notices clearly state that they are conveying the provider's opinion with respect to non-coverage. The notices also clearly explain the steps required to obtain a determination by Medicare and how to appeal that determination. Thus, we do not believe it is necessary to revise § 405.924 or § 405.926 to include a provision explicitly excluding such notices from the definition of initial determination.

Comment: One commenter requested that we define the phrase "sustained or high levels of payment errors" (§ 405.926(p)) and requested that we specify how such determinations will be made. The commenter also requested that CMS review dismissals on the grounds that the claim involves a sustained or high error rate. The commenter suggested that CMS provide clarification of the implications of such a finding. Finally, the commenter recommended that CMS provide a mechanism for providers to be removed from this "sanction".

Response: In section 1893(f)(3) of the Act, added by section 935 of the MMA, Congress placed restrictions on the use of extrapolation to determine overpayment amounts to be recovered from Medicare providers, suppliers or beneficiaries. In order to calculate an overpayment by extrapolation, there must be a determination of either: (1) A sustained or high level of payment error, or (2) a documented educational intervention that has failed to correct the payment error. In addition, in section 1874A(h)(2) of the Act, as added by section 934 of the MMA, Congress required contractors to identify a likelihood of sustained or high level of payment error under section 1893(f)(3)(A) of the Act before initiating non-random pre-payment reviews of a provider or supplier, and in section 1893(f)(3) of the Act, expressly precluded administrative or judicial review of contractor determinations of sustained or high levels of payment errors. Accordingly, we included a conforming provision at § 405.926(p) of the interim final rule providing that determinations of sustained or high levels of payment error are not initial determinations that may be appealed under this subpart. We note, however, that while the determination of whether a provider or supplier has a sustained or high level of payment error is not subject to appeal, the initial or revised determinations made on the underlying claims for items or services would be subject to appeal.

CMS issued operating instructions for determining when a provider or supplier has a sustained or high level of payment error in June 2005: (*http://www.cms.hhs.gov/transmittals/downloads/R114PI.pdf*). Furthermore, we issued a final rule on September 26, 2008 (73 FR 55753) to address when contractors may terminate the non-random pre-payment review of claims submitted by a provider or supplier. The commenter's concerns regarding the practical considerations of determinations of a provider's or supplier's sustained or high error rates are beyond the scope of this regulation. With respect to the suggestion that CMS review dismissals on the grounds that the claim involved a sustained or high error rate, as noted above, while that determination does not constitute an initial determination and is not subject to appeal, any claim denials resulting from the review would constitute initial determinations that may be appealed. Therefore, we do not anticipate any denials of claims solely based on this determination. Rather, the determination of a sustained or high

error rate will be used as the basis for a contractor undertaking further review of claims submitted by the provider or supplier. Finally, we strongly disagree with the commenter's characterization of the determination of a sustained or high error rate as a sanction. This determination does not result in an assessment of civil money penalties, or any other administrative action. Rather, it serves as the basis for a contractor's review of a provider's or supplier's subsequent claim submissions.

Comment: Section 405.926(s) states that claim submissions on forms or formats that are incomplete, invalid, or do not otherwise meet the requirements for a Medicare claim and, as a result, are rejected or returned to the provider or supplier, do not constitute initial determinations. A commenter asked whether this section would preclude review where a claim is suspended for medical review.

Response: A claim suspended for development by a contractor's medical review staff is not considered a claim that is invalid or incomplete as described in § 405.926(s). Thus, § 405.926(s) would not preclude review where a claim is suspended for medical review because it does not apply to this situation. Rather, a claim that is suspended for development is one that appears technically sufficient on its face, but requires additional information in order to make a coverage and payment decision. At the time the claim is suspended for development, an initial determination has not been made, and thus, appeal rights have not attached to the claim. In addition, the medical review staff's decision to suspend a claim for development does not constitute an initial determination that would be subject to appeal. Generally, once the contractor makes a decision regarding coverage and payment and issues an initial determination in the form of a MSN or RA, parties to the initial determination have 120 calendar days to request a redetermination. However, if a contractor denies coverage and payment of a claim because the documentation requested during the medical review of the claim was not submitted within the specified timeframe, any subsequent submission of the requested documentation to the contractor, or any timely request for a redetermination of that claim will be processed under our reopenings policy at § 405.980(a)(2). If a revised determination is issued following the reopening of the claim, the revised initial determination carries with it appeal rights in accordance with § 405.984(a).

Accordingly, we are finalizing § 405.924 with modification as noted above. We are finalizing § 405.926 without modification.

c. Initial Determinations Subject to the Reopenings Process (§ 405.927) and the Effects of Initial Determinations (§ 405.928)

Section 405.927 states that minor errors or omissions in an initial determination must be corrected through the contractor's reopening process under § 405.980(a)(3). Section 405.928 describes the effects of an initial determination. We received no comments on these sections. Accordingly, we are finalizing § 405.927 and § 405.928 without modification.

5. Redeterminations (§ 405.940 Through § 405.958)

Sections 405.940 through 405.958 discuss the redetermination process. We received comments with respect to redetermination decision-making timeframes and other aspects of the redetermination process. A brief overview of the relevant regulatory provisions, a summary of the comments and our responses follow. Additional detailed discussion of the redetermination process is included in the interim final rule at 70 FR 11423, 11428, 11436 through 11443, and 11458.

a. Redetermination Requests (§ 405.940 Through § 405.946)

Section 405.940 establishes the general rule that a person or entity that may be a party to a redetermination under § 405.906(b) and that is dissatisfied with an initial determination may request a redetermination under subpart I. Sections 405.942 and 405.944 then set forth the requirements concerning the timeframes and procedures for filing a redetermination request. Section 405.946 describes the evidence that should be submitted with a redetermination request.

Comment: One commenter asked that we specify when a standardized redetermination request form will be available.

Response: A standardized Form 20027, revised May 1, 2005, is available to beneficiaries and other interested parties and can be used to request a redetermination. Customer service representatives at 1–800–MEDICARE can provide beneficiaries with information on how they may obtain standardized appeal forms. In addition, updated appeal forms will continue to be available on the Internet at *http://www.cms.hhs.gov/CMSForms/CMSForms/list.asp#TopOfPage* and *http://www.medicare.gov/Basics/forms/default.asp*. In addition, representatives at 1–800–MEDICARE can also provide information on how to obtain appeals forms.

Further, as noted previously, beneficiaries receive information on the appeals process and instructions for requesting a redetermination (first level appeal) as part of the MSN. Beneficiaries can use the MSN to request an appeal by circling the item or service with which they disagree, explaining why they disagree, signing the MSN, and returning it, or a copy, to the contractor address specified on the notice.

Comment: One commenter suggested that contractors and QICs send an acknowledgment letter to all affected parties to an appeal indicating receipt of the appeal request. Thus, a provider would know if a beneficiary has already appealed a claim denial. The commenter also requested that adjudicators assign a reference number to all appeals. The commenter suggested that the appeal case number not utilize a beneficiary's HIC number, in order to minimize confusion for provider appeals involving multiple beneficiaries.

Response: Due to the volume of redetermination and reconsideration requests, it is not feasible to require contractors or the QICs to send an acknowledgment letter to all parties for each appeal (although we note that QICs send acknowledgment letters to appellants indicating receipt of the request for reconsideration). While having more than one party file an appeal on a claim may appear to be duplicative, we believe it may be in the best interest of a party dissatisfied with the outcome of an initial determination or appeal decision to file an appeal request and submit relevant evidence with respect to the issues in the case because of the full and early presentation of evidence rule. Under this rule, as set forth in § 405.966(a)(2), a provider, supplier, or beneficiary represented by a provider or supplier that is a party to the reconsideration must submit all evidence prior to the issuance of the reconsideration. New evidence submitted at the ALJ hearing by a provider, supplier, or beneficiary represented by a provider or supplier will be excluded from consideration unless the ALJ finds good cause to explain why the evidence was not submitted prior to the issuance of the reconsideration. *See* § 405.1018(c) and § 405.1028. Thus, by filing an appeal, a party can make sure that the evidence it wants considered will not be excluded from consideration. The

contractor or QIC will then consolidate timely appeal requests from multiple parties into one proceeding, as required under § 405.944(c) and § 405.964(c), which will prevent possible disparate appeal decisions.

Every appeal request at each level of the appeals process receives a unique control number. This number is included on notices sent to parties. We acknowledge the commenter's concerns regarding the use of a beneficiary's HIC number as the appeal control number for ALJ hearings. In the past, certain ALJ hearings processed by the Social Security Administration used a beneficiary's HIC number. With the implementation of the new Medicare Appeals System (MAS) to control and track appeals at the QIC and ALJ levels, beneficiary HIC numbers are no longer used for assigning case numbers to an appeal. However, before a new case number has been assigned to an appeal request, beneficiary HIC numbers are helpful when making status inquiries with the QIC or an ALJ because these numbers can be used internally to identify the unique record for the appeal.

In this final regulation, we are making technical revisions to several sections that set forth the deadlines and timeframes that apply to various actions taken by parties, appellants and adjudicators. Throughout subpart I, we use the words "day", "days" and "calendar days" when referring to these timeframes and deadlines. Although we believe parties and potential participants to the appeals process and adjudicators understand these terms are used interchangeably, and that "days" means "calendar days" unless otherwise stated, we believe technical revisions are necessary to ensure that these terms are used consistently throughout subpart I and to clarify the timeframes and deadlines set forth in the rule. Further, we believe these revisions will reduce potential confusion about the specific date by which an action must be taken by a party or adjudicator.

Therefore, we are revising the following sections to insert the word "calendar" before the word "day" or "days": § 405.922, § 405.942(a)(1), § 405.942(b), § 405.946(b), § 405.950(b)(1), § 405.950(b)(2), § 405.950(b)(3), § 405.962(a)(1), § 405.962(a)(2), § 405.962(b), § 405.966(b), § 405.966(c), § 405.970(a)(2), § 405.970(b)(1), § 405.970(b)(2), § 405.970(b)(3), § 405.970(c), § 405.970(e)(2), § 405.974(b)(1), § 405.974(b)(1)(i), § 405.974(b)(1)(ii), § 405.980(d)(1), § 405.980(d)(2), § 405.980(d)(3), § 405.980(e)(1), § 405.980(e)(2), § 405.980(e)(3), § 405.990(f)(2), § 405.990(f)(4), § 405.990(h)(2), § 405.990(i)(2), § 405.990(j)(1), § 405.1002(a)(1), § 405.1002(a)(3), § 405.1002(a)(4), § 405.1002(b)(2), § 405.1004(a)(1), § 405.1004(a)(3), § 405.1004(a)(4), § 405.1006(e)(1)(ii), § 405.1010(b), § 405.1012(b), § 405.1014(b)(1), § 405.1014(b)(2), § 405.1016(a), § 405.1016(c), § 405.1018(a), § 405.1018(b), § 405.1020(g)(3)(ii), § 405.1022(a), § 405.1024(a), § 405.1028(a), § 405.1036(f)(5)(iv), § 405.1037(c)(5), § 405.1037(e)(2)(iii), § 405.1042(b)(2), § 405.1044(d), § 405.1046(d), § 405.1052(a)(2)(ii), § 405.1052(a)(2)(iii), § 405.1100(c), § 405.1100(d), § 405.1102(a)(1), § 405.1102(a)(2), § 405.1104(a)(2), § 405.1106(b), § 405.1110(a), § 405.1110(b)(2), § 405.1110(d), § 405.1118, § 405.1122(e)(4), § 405.1124(b), § 405.1126(d)(1), § 405.1130, § 405.1132(b), § 405.1136(c)(3), § 405.1136(d)(2), § 405.1140(b)(1), § 405.1140(c)(1), § 405.1140(c)(4), § 405.1140(d).

Finally, to further ensure that beneficiaries and others affected by the rule understand the various time frames and deadlines set forth in the rule, we note that where the regulations provide for a time frame and that time frame ends on a Saturday, Sunday, legal holiday, or any other Federal nonwork day, we apply a rollover period that extends the time frame within which an act must be done to the first day after the Saturday, Sunday, legal holiday, or other Federal nonwork day.

Accordingly, we are finalizing sections 405.940 and 405.944 without modification. We are finalizing sections 405.942 and 405.946 with modification as discussed in this section.

Per the discussion in this section, we also are finalizing the following sections to add the word "calendar" in front of the word "day" or "days": § 405.922, § 405.942(a)(1), § 405.942(b), § 405.946(b), § 405.950(b)(1), § 405.950(b)(2), § 405.950(b)(3), § 405.962(a)(1), § 405.962(a)(2), § 405.962(b), § 405.966(b), § 405.966(c), § 405.970(a)(2), § 405.970(b)(1), § 405.970(b)(2), § 405.970(b)(3), § 405.970(c), § 405.970(e)(2), § 405.974(b)(1), § 405.974(b)(1)(i), § 405.974(b)(1)(ii), § 405.980(d)(1), § 405.980(d)(2), § 405.980(d)(3), § 405.980(e)(1), § 405.980(e)(2), § 405.980(e)(3), § 405.990(f)(2), § 405.990(f)(4), § 405.990(h)(2), § 405.990(i)(2), § 405.990(j)(1), § 405.1002(a)(1), § 405.1002(a)(3), § 405.1002(a)(4), § 405.1002(b)(2), § 405.1004(a)(1), § 405.1004(a)(3), § 405.1004(a)(4), § 405.1006(e)(1)(ii), § 405.1010(b), § 405.1012(b), § 405.1014(b)(1), § 405.1014(b)(2), § 405.1016(a), § 405.1016(c), § 405.1018(a), § 405.1018(b), § 405.1020(g)(3)(ii), § 405.1022(a), § 405.1024(a), § 405.1028(a), § 405.1036(f)(5)(iv), § 405.1037(c)(5), § 405.1037(e)(2)(iii), § 405.1042(b)(2), § 405.1044(d), § 405.1046(d), § 405.1052(a)(2)(ii), § 405.1052(a)(2)(iii), § 405.1100(c), § 405.1100(d), § 405.1102(a)(1), § 405.1102(a)(2), § 405.1104(a)(2), § 405.1106(b), § 405.1110(a), § 405.1110(b)(2), § 405.1110(d), § 405.1118, § 405.1122(e)(4), § 405.1124(b), § 405.1126(d)(1), § 405.1130, § 405.1132(b), § 405.1136(c)(3), § 405.1136(d)(2), § 405.1140(b)(1), § 405.1140(c)(1), § 405.1140(c)(4), and § 405.1140(d).

b. Conduct and Effect of Redeterminations (§ 405.948 Through § 405.958)

Sections 405.948 and 405.950 describe basic procedures contractors follow in conducting redeterminations, including the adjudication timeframes for issuing redetermination notices and exceptions to the timeframes. Section 405.952 contains provisions relating to the withdrawal or dismissal of a request for a redetermination. Sections 405.954 and 405.956 address redetermination decisions and notification rules. Section 405.958 discusses the effect of a redetermination decision.

Comment: One commenter expressed concern that the rule does not provide a process for notifying an appellant of new issues being considered by a contractor during the redetermination. The commenter recommended that § 405.948 be amended to require contractor notification of the appellant about new issues, and to provide an opportunity for the appellant to respond to those issues.

Response: We understand the commenter's concern about ensuring appellants have an opportunity to respond to new issues raised by contractors during the redetermination process. Thus, appellants are strongly encouraged to submit all relevant evidence at the earliest point possible to support their assertion that the initial determination is incorrect. This works to enhance the efficiency and accuracy of the appeals process and enables adjudicators to make more informed decisions at the first level of the appeals process. Given the short timeframes for processing redeterminations and the high volume of requests, it is not feasible to require contractors to send formal notice of new issues raised during the redetermination process.

However, during the course of the redetermination, if a contractor determines that a new issue, distinct from the issues considered at the initial determination, warrants consideration, and the pertinent documentation necessary to make a decision on that issue is missing from the record, it is expected that the contractor will contact the appropriate entity to obtain the missing information prior to rendering its decision. In addition, the contractor's redetermination notice will contain a decision with respect to any new issues, and parties dissatisfied with the outcome may file a request for reconsideration.

Comment: One commenter objected to the provision that where two or more parties requested an appeal on the same initial determination, the contractor's deadline for processing the appeal would be based on the latest filed request (§ 405.950(b)(2)). The commenter argued that the first appellant was placed at a disadvantage in the decision-making timeframe. The commenter suggested that we stipulate in this final regulation that the decision-making timeframe starts with the first appeal request, extending the decision-making time by no more than 14 days from the original deadline, applicable only if a later party's appeal request contained new, relevant evidence.

Response: In sections 405.944(c), 405.950(b)(2), 405.964(c) and 405.970(b)(2) of the interim final rule, we require carriers, FIs, and QICs to consolidate multiple requests for a redetermination, or multiple requests for a reconsideration, into a single proceeding in order to avoid duplication and to issue one appeal decision within 60 days of the latest appeal request. This policy allows time for the adjudicator to carefully review and consider each of the appeal requests, including any additional evidence submitted with the requests. Instances when more than one party files a request for an appeal of the same claim have always been rare, and we do not expect any change in this regard. Therefore, we do not believe that consolidating the decision-making timeframe for appeals requested by multiple parties, such that the decision-making timeframe begins with the latest filed request, creates an impediment to the efficient resolution of appeals or places the first appellant at a disadvantage. To the contrary, we believe that when another party subsequently requests an appeal before a decision has been made on the original request, fairness and efficiency is enhanced by combining the two requests into one case and beginning the decision-making timeframe with the latest filed request to allow adequate time to review each request and the evidence submitted before a decision is made. Finally, we do not believe that extending the decision-making timeframe by no more than 14 days from the original deadline of the first appeal request received only if the later party's appeal request contained new, relevant evidence would allow for careful review and consideration of the appeals request.

Comment: We received several comments objecting to the extension of the decision-making timeframes at the redetermination and reconsideration levels to allow for the submission of new evidence (§ 405.950(b)(3), which incorporates § 405.946(b), for redeterminations, and § 405.970(b)(3), which incorporates § 405.966(b), for reconsiderations). Although most commenters recognized the need to ensure contractors have adequate time to review new evidence, those who objected to this provision believe that the unlimited and automatic extensions of the statutory decision-making timeframes by up to 14 days upon submission of new evidence are contrary to section 1869(a)(3)(C)(ii) of the Act for redeterminations and section 1869(c)(3)(C)(iv) of the Act for reconsiderations. One commenter added that the automatic extensions of the decision-making timeframes contradict the congressional intent behind the establishment of timeframes for lower-level reviews: To expedite the appeals process and avoid the huge backlogs that have plagued the system. Another commenter suggested that only those submissions of evidence initiated by a party should extend the decision-making timeframe, and that additional evidence submitted by a party in response to a request from the Medicare contractor should not result in an extension of the decision-making timeframe.

Response: As stated in the interim final rule, we continue to believe allowing extensions of decision-making timeframes under some circumstances is consistent with the statute. *See* 70 FR 11439, 11445 through 11446. Since the statute imposes decision-making timeframes with the assumption that at the time the appeal is filed, all relevant evidence will be submitted to the adjudicator, we believe extensions that result from late-submitted evidence are consistent with the statute. When an appellant submits new information after the appeal is filed, the adjudicator should not be penalized for an appellant's late submission of evidence. We also believe that appellants should be afforded some flexibility to supplement the administrative record if needed. Thus, the extensions of the decision-making timeframe in § 405.950(b)(3) and § 405.970(b)(3) balance the needs of the party with the needs of the adjudicator by allowing an appropriate timeframe within which the adjudicator can carefully consider additional evidence.

Further, we believe that contractors should be afforded up to an additional 14 calendar days to issue a redetermination decision when the contractor requests missing documentation from a party that is essential to resolving the issues on appeal. We believe the efficiency and cost-effectiveness of the appeals process is greatly enhanced by allowing this additional time to ensure an accurate decision is made at the lowest possible level. The only way to avoid the need for extended decision-making timeframes would be to preclude the submission of additional evidence by appellants after they file their redetermination requests. Although the contractor may extend the deadline when it receives additional evidence, this policy does not mean that in all cases we expect a contractor to take the maximum time to issue the decision.

Similarly, at the reconsideration level, the QIC's adjudication deadline is extended up to 14 days when a party submits additional evidence not included with the request for reconsideration. However, the extension does not apply to a party's timely submission of evidence in response to a request by a QIC (unless the contractor, in its redetermination notice, informed the party that (1) the documentation was missing from the administrative record, and (2) the documentation must be submitted with the request for reconsideration, and then the party failed to submit such documentation). *See* § 405.956(b)(6), § 405.966(b); 70 FR 11446. As noted above, we believe the adjudication timeframes presuppose a complete record for the adjudicator. Where evidence is missing from the record, and the party is on notice that the evidence must be submitted with the reconsideration request, we believe the extension of the adjudication timeframe is both necessary and consistent with the statute.

Finally, we do not expect an extension of up to 14 days will cause backlogs or significant delays in the appeals process. Rather, we believe this policy will encourage parties to submit evidence as soon as practicable. As stated previously, we urge appellants to submit all necessary documentation with their requests in order to avoid delays.

Comment: One commenter inquired about the process for handling redetermination requests from family members when a beneficiary is deceased. The commenter expressed concern about the ability of a surviving spouse or relative to provide proof of their status as the legally authorized representative of the decedent. The commenter related instances where the surviving family member attempting to pursue an appeal is unable to produce appropriate documentation to prove such status because there is no will or there are no assets to distribute by probate. The commenter stated that appeals should not be dismissed if requisite documents are not provided by surviving family members.

Response: We appreciate the concerns of the commenter regarding the difficulty surviving family members of a deceased beneficiary may have in securing proof of their authority to file an appeal on behalf of the decedent. We routinely require documentation of an individual's authority to file an appeal request on behalf of a party. In part, this is because the individually identifiable health care information that may be shared during the appeals process, including information with respect to a deceased person, cannot be disclosed unless the disclosure is authorized by law or authorized by the individual. In order to protect against an unauthorized disclosure, contractors must obtain documentation of the status of any person attempting to act on behalf of a deceased beneficiary by filing an appeal. For example, if the person attempting to file an appeal on behalf of a deceased beneficiary is authorized under State law to administer the estate, then the contractor must obtain documentation of the individual's authority (that is, as the executor or administrator of the estate) or information regarding the intestate provisions of the relevant State's probate law. Similarly, contractors determine whether an individual meets the requirements set forth in 42 CFR part 424, subpart E if the individual asserts they have assumed a legal obligation to pay for the services. Contractors are not prohibited from assisting individuals to obtain any necessary information. However, whether the beneficiary is living or deceased, absent timely filed evidence that the individual attempting to file an appeal has authority to do so, contractors must dismiss the redetermination request. *See* § 405.952(b)(1).

Comment: We received two comments concerning contractor notices to beneficiaries on appeal issues. One commenter agreed with our policy in § 405.956(a)(2) that contractors should issue written notice to only the appellants when an appeal concerns an overpayment involving multiple beneficiaries who have no financial liability. However, another commenter thought our policies with respect to beneficiary notification could deprive a beneficiary of his or her appeal rights. The commenter stated that when a fully favorable decision is issued to a non-beneficiary appellant, the beneficiary does not receive a copy of the redetermination notice. As a result, the 120 day period to request a redetermination may expire without the beneficiary knowing of the existing appeal. The commenter further noted that a decision that is fully favorable to a provider or supplier may not be fully favorable to the beneficiary. The commenter questioned whether a beneficiary still has appeal rights if the redetermination is not favorable for the beneficiary and what process follows if the evidence submitted by the beneficiary and provider conflict.

Response: We do not believe a beneficiary would be deprived of any appeal rights in the scenario described by the commenter. In the case of a redetermination that is fully favorable (that is, fully reverses a denial of coverage or payment on the initial determination), parties will receive a redetermination notice, MSN, or RA, as applicable. *See* § 405.956(a)(1); Internet Only Manual (IOM) Pub. 100–4, Ch. 29, section 310.5. The MSN and RA will reflect any adjustment made to the claim, including a shift in the financial liability from a provider to a beneficiary, and will contain information regarding further appeal rights.

With respect to the commenter's concern about the subsequent appeal rights of a beneficiary when another party has requested a redetermination, a beneficiary's right to appeal does not depend on his or her status as an appellant at previous levels in the appeals process. Beneficiaries may request a subsequent appeal even if they did not initiate prior appeals (unless they have formally assigned their appeal rights to a provider or supplier and have not revoked the assignment). In the scenario presented by the commenter, if a redetermination request is timely filed by a second party before the redetermination decision is issued, the contractor will consolidate the multiple redetermination requests consistent with § 405.944(c). If a redetermination request from another party is received by the contractor after the redetermination decision is issued, the contractor would treat the redetermination request as misfiled, and would forward the request to the QIC. *See* CMS IOM, Publication 100–4, Chapter 29, Section 320.1.B at (*http://www.cms.hhs.gov/manuals/downloads/clm104c29.pdf*). Finally, in situations where evidence submitted during an appeal conflicts with other evidence in the administrative record, the adjudicator, as an arbiter of fact, is responsible for examining all of the evidence submitted, and making appropriate findings of fact with respect to such evidence.

In this final regulation, we are making technical revisions to several sections that describe the nature and effect of the determinations, decisions, and other actions issued by adjudicators. In subpart I, we refer to these actions as "final", "final and binding" and "binding". Although we believe parties to the appeals process understand the meaning of these terms, we believe technical revisions are necessary so that these terms are used consistently throughout subpart I. These revisions will reduce potential confusion regarding the effect of a determination or decision issued by an adjudicator.

We believe referring to certain decisions or actions as "final" or "final and binding" may create confusion as to whether the adjudicator's action or decision constitutes a final decision of the Secretary for which judicial review may be sought under section 205(g) of the Act. As described in § 405.1132 and § 405.1136(a), to the extent authorized by sections 1869, 1876(c)(5)(B), and 1879(d) of the Act, judicial review is available to a party to a MAC decision, or to an appellant who requests escalation to Federal district court if the MAC does not complete its review of the ALJ's decision (other than MAC review of an ALJ dismissal) within the applicable adjudication period. In addition, judicial review is available when a review entity certifies that a party has met the expedited access to judicial review (EAJR) requirements, or, under § 405.990(f)(4), when the review entity fails to make such certification within the applicable timeframe specified in § 405.990(f)(2). *See* section 1869(b)(2) of the Act; § 405.990. Judicial review is also available under § 405.1140(a) when a Federal district court remands a case for further consideration, the MAC subsequently remands the case to an ALJ, and the ALJ issues a decision that becomes the final decision of the Secretary. We are reserving the term "final" to describe those actions or decisions for which judicial review may be immediately sought. Thus, we believe these technical revisions will ensure that parties will be

able to understand when judicial review is available.

When we state that an action or decision is "binding" on parties, we mean that the parties are obligated to abide by the adjudicator's action or decision, unless further recourse to challenge the action or decision is available, and a party exercises that right (for example, obtaining a decision at the next level of appeal, or having the adjudicator reopen and vacate the decision or action). When a party may take further action on an adjudicator's action or decision, we specify those actions that may be taken. If a party chooses not to take further action, or further recourse is unavailable to parties, then the adjudicator's decision is binding on the parties, and is final in the sense that no further review of the decision is available.

In summary, when we use the term "final" in the regulation text, we mean those actions or decisions for which judicial review may be immediately sought. When we use the term "binding" in the regulation text, we mean that the parties are obligated to abide by the adjudicator's action or decision, unless further recourse to challenge the action or decision is available, and a party exercises that right. As such, a final decision of the Secretary is always a binding decision. However, a binding decision may not be a final decision of the Secretary for the purposes of exhausting administrative remedies when seeking judicial review.

We also are making related technical revisions to several sections that describe the decisions or actions issued by adjudicators. In several instances we use the term "final action" or "final decision" to describe the actions taken or the decisions issued by a QIC, an ALJ, and the MAC. We believe that the meaning of these terms may, at times, be confusing since some of these "final actions" or "final decisions" may not be final as discussed above. We also believe describing the specific actions that an adjudicator may take, rather than using a generic phrase, such as final action, adds clarity and assists parties in understanding both the effect of a specific action issued by an adjudicator, and when judicial review may be available. Therefore, where we use the terms "final action" or "final decision", we are making technical revisions to replace those terms, as appropriate, with the specific determinations, decisions or actions that the adjudicator may take. For example, we are revising § 405.1136(a)(2) to remove the phrase "final action" and replace it with the phrase "final decision, dismissal order, or remand order".

Furthermore, we are making similar technical revisions to § 405.990(b)(1)(i)(A) to replace the term "final decision" with the specific actions that, if taken by an ALJ, will preclude a party from seeking EAJR in place of an ALJ hearing, and to § 405.990(b)(1)(i)(B) by adding dismissal orders and remand orders to the description of the actions that, if taken by the MAC, will preclude a party from seeking EAJR in place of MAC review. We believe that the use of the word "decision" alone in these subsections does not clearly convey the specific actions of the ALJ or MAC that will preclude a party from seeking EAJR, and thus we believe it is necessary to clearly articulate which actions could preclude such a request. Therefore, we are making the following technical revisions, consistent with the discussion above:

We are revising the following sections to remove the terms "final" and "final and binding" and replace them with the term "binding": § 405.952(e), § 405.958, § 405.972(e), § 405.974(b)(3), § 405.978, § 405.980(a)(1), § 405.980(a)(5), § 405.1004(c) and § 405.1052(a)(6).

We are revising § 405.990(b)(1)(i)(A) to remove the phrase "final decision" and replace it with the phrase "decision, dismissal order, or remand order".

We are revising § 405.990(b)(1)(i)(B) to add the phrase "dismissal order, or remand order" after "final decision".

We are revising § 405.990(b)(1)(ii) to remove the term "final action" and replace it with the phrase "decision or dismissal order".

We are revising § 405.990(f)(3) to remove the words "final and".

We are revising § 405.1002(b)(2) and § 405.1112(a) to remove the phrase "final action" with replace it with the phrase "decision or dismissal order".

We are revising § 405.1046(c) to remove the word "final" and replace it with the phrase "binding on the contractor".

We are revising § 405.1048(a) to remove the phrase "either issues a final action" and replace it with the phrase "issues a final decision or remand order".

We are revising § 405.1100(c) and (d) to remove the phrase "final action" and replace it with the phrase "final decision or dismissal order".

We are revising § 405.1104(a)(2) to remove the phrase "final action or remand the case to the QIC", § 405.1104(b)(1) to remove the phrase "final action or remand", § 405.1104(b)(2) to remove the phrase "final action or remand order", and § 405.1104(c) to remove the phrase "final action" and replace them with the phrase "decision, dismissal order, or remand order".

We are revising § 405.1104(b)(3) to remove the phrase "a final administrative decision for purposes of MAC review" and replace it with the phrase "the decision that is subject to MAC review consistent with 405.1102(a)".

We are revising § 405.1106(b) to remove the phrase "final action or remand the case to the ALJ", § 405.1132(b) to remove the phrase "final action or remand", and § 405.1136(a)(2) to remove the phrase "final action" and replace them with the phrase "final decision, dismissal order, or remand order".

We are revising § 405.1110(d) to remove the phrase "remains the final action in the case" and replace it with the phrase "is binding on the parties to the ALJ decision."

We are revising § 405.1126(a) to remove the word "final".

We are revising § 405.1130 to add the words "final and" before the word "binding".

Accordingly, we are finalizing § 405.948, § 405.954, and § 405.956 without modification. We are finalizing § 405.950 with modification as discussed in section II.B.5.a. of this preamble. We are finalizing § 405.952, § 405.958, § 405.972, § 405.974, § 405.978, § 405.980, § 405.984, § 405.990, § 405.1002, § 405.1004, § 405.1046, § 405.1048, § 405.1052, § 405.1100, § 405.1104, § 405.1106, § 405.1110, § 405.1112, § 405.1126, § 405.1130, § 405.1132, and § 405.1136 with modifications, as noted.

6. Reconsiderations (§ 405.960 Through § 405.978)

Sections 405.960 through 405.978 address the reconsideration process. We discuss specific sections and summarize and respond to comments on the reconsideration process below. Additional detailed discussion of the reconsideration process is included in the interim final rule at 70 FR 11423, 11428, 11440, 11441, and 11443 through 11450.

Comment: One commenter suggested that we establish for chain providers an exception to the standard rule requiring reconsiderations to be performed by the QIC for the State in which the service was rendered. In appeals involving providers that have elected a single FI, the commenter recommended that providers have the option of having appeals processed by the QIC for the State in which the provider's home office is located or the State in which the service was rendered.

Response: In determining the workload distribution for appeals among the Part A QICs, CMS issued instructions requiring that, for chain providers that have elected to have their claims processed by a single FI, any related reconsiderations will be processed by the QIC with jurisdiction over the State where the FI is located. Since there are no in-person reconsiderations, we believe it is unnecessary to adjust the jurisdictions to accommodate home office locations. The one exception to this general rule applies to claims currently processed by one of our contractors. Because this contractor processes claims in all 50 States, it would be too burdensome to require one QIC to process all the reconsiderations for those claims. Thus, we determined it was necessary to split that workload among the Part A QICs based on the State in which the service is rendered.

a. Processing Reconsideration Requests (§ 405.960 Through § 405.964)

Section 405.960 states that any person or entity that is a party to a redetermination and is dissatisfied with that determination, may request a reconsideration of the redetermination by a QIC. Section 405.962 specifies that appellants who wish to file a request for reconsideration must do so within 180 calendar days of the date on which the party receives the notice of the redetermination, or within such additional time as CMS may allow. In § 405.964, we set forth the place and method for filing requests for reconsideration.

We received no comments on these sections; however, in this regulation, we are making a technical revision to § 405.962(a). Section 405.962(a) states that requests for reconsideration of a contractor's redetermination must be filed within 180 calendar days from the date the party receives notice of the redetermination, unless the QIC extends the timeframe upon a showing of good cause for the late filing consistent with § 405.962(b). We inadvertently omitted a reference to the different filing timeframe applicable to requests for QIC reconsideration of a contractor's dismissal of a request for redetermination under § 405.974(b). In § 405.974(b)(1), we specify that a party must file the written request for reconsideration of a contractor's dismissal action with the QIC within 60 days after receipt of the contractor's notice of dismissal. While the reconsideration of a dismissal action under § 405.974(b) differs from the reconsideration of a redetermination under § 405.974(a) (for example, a QIC's reconsideration of a dismissal action is not subject to further review under § 405.974(b)(3)), for clarity, we are amending § 405.962(a) to include the reference to the timeframe applicable to requests for QIC reconsideration of contractor dismissals.

Accordingly, we are finalizing § 405.960 and § 405.964 without modification. We are finalizing § 405.962 with modification as noted above, and as discussed in section II.B.5.a. of this preamble.

b. Evidence Submitted With the Reconsideration Request—Full and Early Presentation of Evidence (§ 405.966)

Section 405.966(a) specifies that a party should present evidence and allegations of fact or law related to the issue in dispute and explain why it disagrees with the initial determination when filing a request for reconsideration. Absent good cause, failure to submit all evidence, including documentation requested in the notice of redetermination, prior to the issuance of the notice of reconsideration precludes subsequent consideration of that evidence. Section 405.966(b) explains that submissions of evidence that do not accompany the request for reconsideration extend the QIC's 60-day decision-making timeframe up to 14 calendar days for each submission. Section 405.966(c) establishes an exception to the full and early presentation of evidence requirement, and permits Medicaid State agencies and beneficiaries, other than those represented by providers or suppliers, to submit additional new evidence after the reconsideration level without establishing good cause for the delayed submission.

Comment: We received many comments concerning the provision that requires a provider or supplier to submit all evidence prior to the QIC reconsideration decision being rendered, unless there is good cause for submitting the evidence later. In general, most commenters were in favor of expediting the appeals process and recognized the value of early evidence submission. However, some commenters argued that this provision was too burdensome for providers, suppliers, and beneficiaries, particularly when they do not have easy access to supporting documentation that may be required, or may not know until after the QIC decision that additional evidence may be necessary or useful. Several commenters requested that CMS include in the regulations a specific list of items, documents or circumstances that constitute good cause for late submission of evidence. Some commenters objected to the limitations completely. One commenter stated that evidence submission should be allowed at any stage of the appeals process, as long as the evidence proved relevant and there was no prejudice to permitting its submission.

Response: The requirement in § 405.966 for the early presentation of evidence by providers and suppliers is based on the statutory requirement contained in section 1869(b)(3) of the Act, as added by section 933(a) of the MMA, which states that a provider or supplier may not, in any subsequent level of appeal, introduce evidence that was not presented at the reconsideration conducted by the QIC, unless there is good cause that precluded the introduction of that evidence at or before the reconsideration. Section 405.966(c)(2) extends the full and early presentation of evidence requirement to beneficiaries represented by providers or suppliers. We recognize that absent advance notice of what documents are needed to support a claim, appellants may have difficulty determining what constitutes relevant evidence for their claim appeals. Thus, § 405.956(b)(6) requires contractor redetermination notices to identify "specific missing documentation." We believe this provision helps appellants, since it should enable appellants to better understand the basis for the unfavorable redetermination and understand the information missing from the record. Ultimately, we believe this can result in a better developed record at the reconsideration level, and will allow the QIC to make more fully informed reconsideration decisions. We do not believe that it is either practical or consistent with the statute to limit the requirement for full and early presentation of evidence by attempting to distinguish categorically between evidence that is readily available to the provider, supplier, or beneficiary and that which is obtained from entities not directly involved in the claim dispute. Limiting the requirement for full and early presentation of evidence to objective medical information would be equally problematic. Given the vast amount of medical services and items that could be involved in a claim dispute, it would be extremely difficult to draw clear distinctions among the numerous types of documentation that might be needed. Nevertheless, where it is not feasible to obtain this documentation prior to issuance of the reconsideration, as indicated in § 405.1028, an ALJ will make a determination on whether good cause

for failure to submit the evidence to the QIC exists. This applies to all documentation, including any items listed in the notice of redetermination.

Finally, § 405.966(c) states that the limitation on the presentation of new evidence does not apply to beneficiary appellants unless they are represented by a provider or supplier or to Medicaid State agencies. Therefore, although contractor redetermination notices will uniformly identify any necessary missing documentation, beneficiaries, except those represented by providers or suppliers, and Medicaid State agencies will still be permitted to introduce evidence after the QIC reconsideration level (although for efficiency reasons, they would be better served by doing so as soon as possible).

We are finalizing § 405.966 with modification as discussed in section II.B.5.a. of this preamble.

c. Conduct and Processing of Reconsiderations (§ 405.968 Through § 405.978)

In § 405.968, we describe the manner in which QICs conduct reconsiderations. In § 405.970, we set forth the timeframes for issuing reconsideration notices. In § 405.972, we explain the process by which a QIC may dismiss, or a party may withdraw, a request for reconsideration. Section 405.974 describes the reconsideration by a QIC of a contractor's determination and a contractor's dismissal of a redetermination request. Section 405.976 discusses the notice requirements for QIC reconsiderations. Finally, § 405.978 explains the effect of a reconsideration.

Comment: Several commenters opposed the elimination of the Part B fair hearing. These commenters believe that appellants will be deprived of an important opportunity to provide adjudicators with clarifications and additional information not contained in the record, and that adjudicators will not have an opportunity to personally assess a beneficiary's physical or mental condition. The commenters suggested that having an in-person hearing at the second level of appeal would reduce the number of cases appealed to the ALJ level, thus speeding up reimbursement to providers and reducing administrative costs. One commenter requested that QICs be encouraged to contact beneficiaries, providers and suppliers with questions or to request input to obtain all relevant evidence.

Response: We continue to believe that providing for an on-the-record review at the QIC level of appeal, rather than an in-person hearing, is consistent with both BIPA and the MMA. Although it certainly could have, the Congress did not provide for hearings by the QICs. Instead, under section 1869(c)(3)(B)(i) of the Act, Congress required QICs to "review" initial determinations. In contrast, under section 1869(d)(1) of the Act, the statute specifically provides for a "hearing" at the ALJ level. Furthermore, Congress also significantly reduced the decision-making timeframes at all levels of the appeals process. As discussed in the interim final rule, the significantly shortened decision-making timeframes result in appellants receiving a hearing before an ALJ generally within the same timeframe they would have received a "fair hearing" under the previous Part B appeals process. *See* 70 FR 11448. Finally, the regulatory provisions at § 405.968(a)(1) regarding QIC reconsiderations continue to allow QICs to contact appellants and obtain any necessary information by phone, or other means.

Comment: One commenter expressed concern that the regulation does not define "medical record", nor does it address specific items and services that require physician completion of a Certificate of Medical Necessity (CMN). The commenter suggested that we clarify that the CMN is a medical record and that Congress established the CMN to enable physicians to demonstrate medical necessity.

Response: We do not agree with the commenter's suggestion that it is necessary to define the term "medical record" in this regulation. The purpose of this regulation is to implement the changes made to the Medicare claims appeals process as required by BIPA and the MMA. The term "medical record" is not a term of art that requires a definition in this regulation, and neither BIPA nor the MMA attach special significance to the term with respect to the claims appeals process. Further, we do not believe it is appropriate to include information related to the completion of the CMN in this regulation. Policies that relate to the completion of the CMN are outside of the scope of this regulation.

Nevertheless, we disagree with the commenter's assertion that completion of the CMN demonstrates definitively that an item or service is medically reasonable and necessary for diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member under section 1862(a)(1)(A) of the Act. CMS' longstanding policy has been that even where a CMN has been provided, contractors may request supporting medical documentation to demonstrate the "medical necessity" of items or services. This policy was affirmed in *Gulfcoast Medical Supply, Inc.* v. *Sec'y, Health and Human Servs.*, 468 F.3d 1347 (11th Cir. 2006) and *MacKenzie Medical Supply, Inc* v. *Leavitt* 506 F.3d 341 (4th Cir. 2007). In *Gulfcoast*, the Circuit Court stated that the Medicare statute "unambiguously permits carriers and the Secretary to require suppliers to submit evidence of medical necessity beyond a CMN." In *MacKenzie*, the Circuit Court found that Congress did not unambiguously mandate that the CMN is the only document that can be required of a supplier to show medical necessity.

Comment: We received many comments on § 405.968(b)(2), which requires QICs to give substantial deference to a local coverage determination (LCD), local medical review policy (LMRP), and CMS program guidance, unless the QIC determines, either at a party's request or at its own discretion that the policy does not apply to the facts of the particular case in which case the QIC may decline to follow the policy. Commenters raised many of the same concerns voiced by commenters to the proposed rule. They believe that CMS exceeded its statutory authority by specifying that QICs are bound by LCDs and LMRPs and questioned the propriety of requiring QICs to give deference to policies that they allege sometimes contradict statutes and regulations, are against the intent of BIPA, and are not promulgated through notice and comment rulemaking. These commenters suggested that deference to these coverage policies should be eliminated to preserve fairness and due process. They also noted that QICs are required to have extensive medical, legal, and Medicare program knowledge and so would be well equipped to make decisions without deferring to these policies.

Response: We continue to believe that it is both appropriate and consistent with the statutory intent of BIPA, which added section 1869(c)(3)(B)(ii)(II) of the Act to require QICs to consider LCDs in making their decisions, to require QICs to give substantial deference to LCDs and LMRPs and other CMS program guidance in the appeals they adjudicate if these policies are applicable to a specific case. *See* § 405.968(b)(2). As noted in the proposed rule, the use of consistent review criteria will serve several important purposes, including the identification of recurrent problems with CMS policies, fostering consistency in appeal decisions, and potentially reducing both ALJ appeals volume and the ALJ reversal rate. *See* 67 FR 69312, 69325 and 69328. In addition,

as explained in the interim final rule, Federal courts have considered and applied deference standards in considering the validity of various Medicare policies and have also recognized that ALJs and the MAC properly consider issues relating to deference as well. *See Abiona* v. *Thompson,* 237 F.Supp.2d 258 (E.D.N.Y. 2002), and 70 FR 11458.

We note that section 522 of BIPA provides an explicit process for contesting LCDs. However, we agree with the commenters' assertion that QICs should be able to evaluate whether a particular coverage policy applies in a specific appeal. In response to similar comments on the proposed rule, in the interim final rule, we revised § 405.968(b)(2) to allow QICs to decline to follow an LMRP, LCD or other CMS program guidance either at the request of a party or at its own discretion if a QIC determines that the policy does not apply to the facts of the particular case. However, we also believe that it is necessary to ensure that the QICs, like other appeals adjudicators, give the contractors' coverage policies substantial deference if they are applicable to a particular case. Thus, we require QICs to give substantial deference to LMRPs, LCDs and other CMS program guidance, unless the QIC finds that the policy is not applicable in a particular case. This policy acknowledges the extensive medical expertise and program knowledge within each QIC, and strikes a balance between the need to preserve QIC independence and the need to apply consistent review criteria and to ensure that the established coverage policies are given appropriate consideration.

Comment: One commenter inquired about the QIC's ability to raise or develop new issues. The commenter did not understand how a new issue could develop if the contractor had rendered a redetermination with respect to the claim. The commenter requested that we modify the language of § 405.968(b)(5) to be consistent with other regulatory provisions that reference raising new issues.

Response: A reconsideration is a new and independent review of an initial determination, and we believe adjudicators at the reconsideration level should be permitted to raise and develop any issues that they believe are relevant to the claim(s) in the case at hand. For example, if a claim was denied initially as not medically reasonable and necessary because medical records were not submitted to the carrier as requested, and during the reconsideration, the review of the medical records accompanying the appeal request shows that the services would be excluded for a different reason or under a different statutory authority, the QIC should be permitted to explore the new issues. Furthermore, we note that the policy with regard to raising new issues at § 405.968(b)(5) is consistent with the policy with regard to raising new issues as part of the redetermination in § 405.948. Accordingly, we are not modifying the language in § 405.968(b)(5).

Comment: A number of commenters asked that the final rule include more explicit information about the QICs. In particular, commenters wanted the final rule to identify the minimum qualifications for the QIC panel members and reviewers, clearly define the role of the QIC panel in the reconsideration process, and describe the on-going training that would be made available to the panel members and reviewers. Several commenters recommended that the regulations list specific physician or healthcare specialties that would be included on the QIC panel. Commenters also asked that the final rule spell out the provisions that would be put in place to ensure the QICs' independence. One commenter supported some type of sanction for QICs that failed to issue timely decisions under § 405.970. Finally, a commenter stated that if the QIC's decision contradicts the treating physician's judgment, such as determining an item or service is not medically necessary, despite a physician's certification on a CMN, then the appeals decision should outline circumstances that would justify this finding.

Response: As noted in the interim final rule (70 FR 11449), the requirements for QIC reviewers and the physicians who serve as panel members are contained in section 933 of the MMA and section 521 of BIPA. Specifically, section 1869(c), (e)(3), and (g) of the Act contain provisions regarding the independence of the QICs, qualification requirements for QICs, the role of the QIC panel, and continuing education for QICs with respect to Medicare coverage of items and services. Thus, we do not believe it is appropriate or necessary to address these issues, or the specific physician or health care specialties that would be included on the QIC panel, in any further detail in these regulations. Instead, through the QIC contracting and evaluation processes, we ensure that the QICs are fully compliant with these statutory requirements, including the appropriateness of the members of QIC panels. In fact, we have already taken action to replace a QIC that was having difficulty meeting the performance standards imposed by the statute.

In addition, although we are committed to ensuring that QICs are meeting the statutory decision-making timeframes, we note that Congress has already provided a remedy for those cases in which a QIC fails to issue a timely decision. In section 1869(c)(3)(C)(iii) of the Act and in § 405.970(c), appellants who do not receive a reconsideration within the applicable decision-making timeframe have the right to escalate the appeal to an ALJ. Therefore, we do not believe that the regulations should contain provisions sanctioning QICs for not meeting the applicable decision-making timeframes.

Finally, in the event a QIC's decision contradicts the treating physician's medical judgment, such as determining that an item or service is not medically necessary, we note that § 405.976(b) requires that the notice of reconsideration include a rationale for the decision.

In this final regulation, we are also making a technical revision to § 405.972(b)(3) (discussed below), and further technical revisions to § 405.972(e) and § 405.1004(c) (*see* section II.B.5.b. of this preamble for a discussion of our prior revision). In § 405.972, we explain the process by which a QIC may dismiss, or a party may withdraw, a request for reconsideration. We are revising § 405.972(e) to clarify that when a QIC dismisses a request for review of a contractor's dismissal action, the dismissal is binding and not subject to further review. Similarly, we are revising § 405.1004(c) to clarify that an ALJ's dismissal of a request for review of a QIC's dismissal action is binding and not subject to further review.

In § 405.974(b)(1) and § 405.1004(a), we offer parties an opportunity to appeal a dismissal action to the next adjudicative level and, under § 405.974(b)(3) and § 405.1004(c), the decision of the adjudicator at that subsequent level with respect to the dismissal action is binding and not subject to further review. *See* 70 FR 11444. We did not, however, intend to permit additional opportunities for review of dismissals where the request for review of a dismissal is invalid and thus, subject to dismissal. For example, a contractor dismisses a request for a redetermination. The party then requests that the QIC review the dismissal but the party, without having good cause, does not file this request with the QIC in a timely fashion. In this scenario, the QIC would dismiss the

request for reconsideration of the contractor's dismissal and the party would not be entitled to ALJ review of the QIC's decision.

In allowing review of dismissals at the next adjudicative level, we balance a party's need for review and the need for administrative finality. If a party does not file a valid request for review for a second time, we believe the need for finality in the administrative process outweighs the need for further review. Thus, a QIC's dismissal of a request for review of a contractor's dismissal action, and an ALJ's dismissal of a request for review of a QIC's dismissal are not subject to further review. However, while a party may not request further review in the administrative appeals process when an adjudicator dismisses a request for review of a dismissal, we note that a party may still request the dismissal be vacated consistent with the provisions of § 405.952(d), § 405.972(d), § 405.1054, and § 405.1108(b).

In addition, we are making a technical revision to § 405.972(b)(3). In § 405.972(b)(3), when describing the authority of the QIC to dismiss an untimely filed request for reconsideration, we inadvertently omitted the cross-reference to requests for QIC review of a contractor's dismissal of a redetermination request. The timeframes for filing such requests, which differ from the timeframes for filing a request for reconsideration of a contractor's redetermination decision, are found in § 405.974(b)(1). For clarity, we are amending § 405.972(b)(3) to reference the separate timeframes applicable to appeals of contractor dismissal actions at the redetermination level.

In summary, we are amending § 405.972(b)(3) to include a reference to the timeframe for filing a request for QIC review of a contractor dismissal action, and we are amending § 405.972(e) and § 405.1004(c) to clarify that a QIC's dismissal of a request for a reconsideration of a contractor's dismissal of a request for redetermination, and an ALJ's dismissal of a request for review of a QIC's dismissal of a request for reconsideration is binding and not subject to further review.

Accordingly, we are finalizing §§ 405.968 and 405.976 without modification. We are finalizing §§ 405.970 and 405.974 with modification as discussed in section II.B.5.a. of this preamble. We are finalizing §§ 405.972 and 405.1004 with modifications as noted above, and §§ 405.972, 405.974 and 405.978 with modification as discussed in section II.B.5.b. of this preamble.

7. Reopenings of Initial Determinations, Redeterminations, Reconsiderations, Hearings and Reviews (§ 405.980 Through § 405.986)

Sections 405.980 through 405.986 set forth the requirements regarding the reopenings process, including how parties may request reopenings of determinations and decisions, and how contractors, QICs, ALJs, and the MAC will conduct reopenings.

We received several comments with respect to the reopening provisions as set forth in the interim final rule. A summary of the comments and our responses are included below. Additional detailed discussion of the reopening process is included in the interim final rule at 70 FR 11423, 11435, 11447, 11450 through 11453, and 11458.

a. Reopening Actions (§ 405.980)

Section 405.980 describes the general rules for reopening initial determinations, redeterminations, reconsiderations, hearing decisions and MAC review decisions.

Comment: One commenter recommended that CMS create enforcement provisions for the "good cause" standard when contractors reopen claims. The commenter believed that contractors often ignore the guidelines set out in regulations and manuals, and recommended that the good cause standard be enforced to ensure fairness and finality for Medicare providers and suppliers.

Response: Contractors are required to follow Federal laws, regulations and manual instructions in their business operations. As noted in the interim final rule in response to a similar comment on the proposed rule (70 FR 11453), our regulations require that contractors abide by the good cause standard for reopening actions as set forth in § 405.980(b) and § 405.986. CMS conducts audits and evaluations of contractor performance in order to assess compliance with Medicare policies. Thus, the necessary monitoring and enforcement mechanisms are already in place and we do not believe it is necessary to add enforcement provisions to these regulations.

Comment: One commenter believed that CMS Change Request 3622 does not comport with § 405.927 and § 405.980(a)(3) with respect to the distinction between claim reopenings and appeals of initial determinations. The commenter stated that the reopening provisions indicate that adjustments resulting from clerical errors are to be processed as reopenings. However, CMS instructions in Change Request 3622, implemented July 5, 2005, state that the Medicare Carrier System (MCS) will deny claims resubmitted with new information (such as diagnosis codes), requiring the provider or supplier to submit an appeal.

Response: Since the publication of the interim final rule, we have issued instructions to carriers to suspend implementation of Change Request 3622. *See http://www.cms.hhs.gov/transmittals/downloads/R104PI.pdf* modified by JSM–05385, dated 06–20–2005. CMS is re-evaluating the duplicate edit policies to determine how best to address the subsequent re-submission of claims in light of the reopening policies and will take into consideration the concerns raised by the commenter.

As noted by the commenter and as discussed in the preamble to the interim final rule, in accordance with § 405.980(a)(3)(iii), contractors will process disputes involving resubmitted claims denied as duplicates through the reopening process. *See* 70 FR 11451. Generally, providers and suppliers should avoid resubmitting claims for previously denied items or services (this does not apply to providers who submit claim adjustments for returned claims). Unless a claim is denied as the result of a clerical error, when a denied claim carries with it appeal rights, providers and suppliers should file appeal requests to dispute the determination that denies items or services on the claim. However, if a provider or supplier decides to resubmit a claim for items or services previously submitted to Medicare, the appeals rights for those items or services flow from the original claim submission and not the subsequent claim submission. Resubmissions of claims for the same items or services do not extend the appeal rights available to a party. Thus, we have instructed contractors to process appeal requests for claims denied as duplicates as reopenings, and the sole issue to be resolved is whether the claim is in fact a duplicate of a previous submission. All other issues not considered clerical errors (that is, coverage and payment issues) must be resolved through an appeal of the first claim. If an appeal is pending on the original submission of the item or service, then the contractor will not process the reopening on the resubmitted claim. To do otherwise could result in duplicate payment for the items or services.

Comment: One commenter expressed concern that a party cannot seek review of a determination not to grant a request for reopening. *See* § 405.926(l),

§ 405.980(a)(5). The commenter argued that not allowing an appeal in this situation places too much authority in the hands of the persons making decisions regarding reopenings.

Response: As noted in our response to a similar comment in the interim final rule, it has been a longstanding principle that failure to grant a request for reopening is not reviewable. *See* 70 FR 11453. The Supreme Court has upheld this concept. *See Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999); *Califano* v. *Sanders*, 430 U.S. 99 (1977). This policy does not violate a party's due process rights, because the administrative appeals process for Medicare claims already affords ample opportunities for a party to challenge claim determinations. The reopenings process simply offers, but does not guarantee, an additional process if a party believes an error on a claim should be corrected, but the party has exhausted his or her appeal rights, or the error is one that should not be resolved through the appeals process. *See* § 405.927.

In § 405.980(a)(3), we indicate that a contractor must refuse to process a reopening request when it disagrees that the dispute involves a clerical error and must "dismiss" the reopening request and advise the party of any appeal rights, provided the timeframe to request an appeal has not expired. The use of the term "dismiss" in connection with a reopening request does not confer any right to obtain further review of a decision on a reopening request. *See* § 405.926(l) and § 405.980(a)(5).

Comment: Several commenters stated that the definition of "similar fault" in § 405.902 is too broad and allows contractors to reopen almost any claim, for any reason and that it requires providers and suppliers to maintain supporting billing records for an indefinite time period, at considerable expense. One commenter cited a difference between the definition of "similar fault" in the interim final rule compared to the Medicare Claims Processing Manual, Chapter 29, Appeals of Claims Decisions, section 90.9 Unrestricted Reopenings, and urged CMS to follow the policy as stated in the claims processing manual.

Response: The definition of "similar fault" contained in § 405.902 covers situations in which a contractor identifies an inappropriate billing that does not rise to the level of fraud. The definition covers situations where Medicare payment is obtained by an individual or entity with no legal right to the funds, the contractor determines that the individual or entity knows or could reasonably be expected to know that the claims for items or services should not have been paid, and there is no determination by law enforcement that the payment was obtained through an act of fraud. The similar fault provision is appropriately used where fraudulent behavior is suspected, but law enforcement is not proceeding with recovery on the basis of fraud.

With respect to the commenter's concern about indefinite storage of records, we do not believe this regulation will significantly impact providers and suppliers for several reasons. First, it is a longstanding policy in the Medicare program that a claim may be reopened at any time if it was procured by fraud or similar fault. Thus, this regulation does not impose a new burden on providers or suppliers. *See* § 405.750(b)(3)(ii) and § 405.841(c)(1). In addition, State law and Federal conditions of participation have longstanding requirements for the retention of records. Finally, providers and suppliers who submit claims that are in compliance with Medicare program requirements, and do not accept payment for claims which they know, or should reasonably be expected to know, they are not otherwise entitled, will not have claims reopened for fraud or similar fault. Thus, we believe the fraud or similar fault provisions in this regulation will not have a significant impact on providers and suppliers.

In § 405.902 of the interim final rule, we codified the definition of "similar fault" for the purposes of reopening initial determinations and appeal decisions. This definition supersedes the definition previously found in our claims processing manual. Based on our experience with the reopenings process, we determined that the previous definition of similar fault did not provide adequate guidance to adjudicators. We believe the new definition more accurately conveys the meaning of similar fault, and makes clear that the fault must be "similar" to fraud.

Comment: One commenter asked for clarification on the types of errors that could be corrected through reopenings.

Response: It is not possible to delineate in a regulation all of the types of minor clerical and technical errors that can be addressed through the reopening process. However, we have issued operating instructions to contractors that offer examples of issues that are appropriate to handle as reopenings, and those that should be processed as appeals. *See* IOM 100–4 Chapter 34, Reopening and Revision of Claim Determinations and Decisions (*http://www.cms.hhs.gov/manuals/downloads/clm104c34.pdf*).

Under § 405.980(a)(3), we state that a clerical error includes human and mechanical mistakes on the part of the party or the contractor (that is, mathematical or computational mistakes, inaccurate data entry, or denials of claims as duplicates). Nevertheless, we appreciate the difficulty some providers and suppliers may have in determining whether a claim should be corrected through the reopenings process or the initial determination should be contested through the appeals process. We note that consistent with § 405.980(a)(3), if the contractor determines that an appeal request involves either the correction of a clerical error, or another matter that should be handled through the reopenings process, the appeal request will be treated as a request for a reopening, and the contractor will transfer the appeal request to the reopenings unit for processing. Similarly, if the contractor determines that a request for reopening involves an issue that must be resolved through the appeals process, the reopening request will be denied, and the contractor will advise the party accordingly. Although a contractor's refusal to reopen an initial determination is not subject to appeal, a party may file an appeal request with the contractor, subject to the filing requirements in § 405.942 through § 405.946, if they continue to dispute the initial determination on the items or services at issue. Thus, if it is unclear whether a particular dispute should be resolved as a reopening or as an appeal, a party's best recourse may be to file an appeal request.

In this final regulation, we are making two technical corrections to the introductory clause of § 405.980(b). First, we are replacing the word "its" with the word "an". This correction ensures that § 405.980(b) is consistent with (1) our longstanding policy as set forth in the interim final rule which allows certain contractors, other than the contractor that issued the initial determination, to reopen an initial determination (*see* 70 FR 11450), and (2) the definition of contractor included as a technical revision in this rule. In the interim final rule, we explained that for the purposes of reopening, the term "contractors" includes "carriers, intermediaries, and program safeguard contractors." Program safeguard contractors (PSCs) do not have authority to issue initial determinations (*see* section 1893 of the Act). Thus, PSCs have not issued, and do not issue, initial determinations; however, in order to carry out their functions as authorized under section 1893(b)(1) of the Act (for

example, to conduct medical, utilization and fraud review of claims), PSCs must be able to reopen initial determinations made by other contractors. Including them in this list of "contractors" in the interim final rule that can conduct reopenings was meant to be consistent with 1893(b)(1) of the Act. Furthermore, the technical correction discussed above is consistent with our clarification of the term "contractor" set forth in this rule. As clarified in this rule, the term "contractor" would include, among other entities, PSCs.

We note that certain entities that did not exist when the interim final rule was published (and thus, were not included in the list of entities considered contractors for the purpose of conducting reopenings), would be included in the definition of "contractor" as clarified in this rule and may be authorized to reopen initial determinations made by other contractors. For example, recovery audit contractors (RACs) (considered contractors as that term is clarified in this rule) do not issue initial determinations. However, in order to carry out their functions as authorized by section 1893(h)(1) of the Act, they must be able to reopen initial determinations made by other contractors. Under section 1893(h)(1) of the Act, RACs identify underpayments and overpayments and recoup overpayments. In order to identify underpayments and overpayments, and prior to initiating recoupment of an overpayment, RACs must reopen the initial determinations issued by other contractors. Thus, consistent with their authority under section 1893 of the Act, RACs would be permitted to reopen initial determinations under § 405.980. Accordingly, consistent with our policy as set forth in the interim final rule, we are replacing the word "its" with "an" in the introductory clause of § 405.980(b) to more clearly convey our policy to permit certain contractors, other than those who issue initial determinations, to reopen initial determinations when appropriate.

Second, we are removing the words "and revise" from the introductory clause of § 405.980(b). Subsections (c), (d), and (e) of § 405.980, which are analogous to subsection (b), in that they discuss reopening timeframes and requirements for determinations and decisions requested by a party or initiated by a QIC, ALJ, or the MAC, do not include the words "and revise" and we inadvertently included these words in subsection (b). The provision, as revised, now reflects our longstanding policy that the timeframes for reopening a determination or decision are measured by the date of the reopening not the date of the revision of the determinations or decisions. *See* 42 CFR § 405.750(b), § 405.841, § 405.842(a); 67 FR 69327; The Carriers Manual, Pub. 14–3 (Claims Process Part 3), Chapter XII, section 12100.4, and The Intermediary Manual, Pub. 13–3 (Claims Process Part 3), Chapter VIII, section 3799.4. With the revisions described above, the introductory clause of § 405.980(b) will read as follows: "A contractor may reopen an initial determination or redetermination on its own motion —"

Accordingly, we are finalizing § 405.980 with modifications as noted above, with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble.

b. Conduct of Reopenings (§ 405.982 Through § 405.986)

Section 405.982 discusses the provision of notice of a revised determination or decision. Section 405.984 explains the effect of a revised determination or decision and § 405.986 sets forth the good cause standard for reopening a determination or a decision.

Comment: We received several comments concerning the reopening timeframes. Some commenters requested that CMS establish a response and decision-making timeframe for contractors to complete or deny reopening requests from a party. One commenter expressed concern about uncertainty in the timing of the reopening process. The commenter explained that while awaiting a contractor's decision on whether to reopen, the deadline for filing for a redetermination could pass. The commenter suggested that we require adjudicators to find good cause and extend the time limit for filing an appeal if a decision regarding a reopening is not made until after the relevant appeal filing time limit has passed. One commenter requested that the rule allow for 60 days to file an appeal after a contractor denies a reopening request.

Response: We appreciate the many suggestions regarding the processing of reopening requests. With respect to the commenter's concern about uncertainty in the timing of the reopening process, we acknowledge that there are no regulatory timeframes that apply to the processing of the reopening request when a party requests that an adjudicator reopen a determination. Since reopenings are a discretionary activity, we believe it is more appropriate to establish applicable response and decision-making timeframes in our operating instructions to ensure the agency has adequate flexibility to make necessary changes in order to respond to shifts in contractor workload. Current operating instructions to contractors generally require the resolution of party initiated reopening requests within 60 days of receipt of the reopening request. *See* IOM 100–4 Chapter 34 Section 10.7 *http://www.cms.hhs.gov/manuals/downloads/clm104c34.pdf.* If a party misses the filing deadline for an appeal while awaiting a decision on a reopening request, the party may request the adjudicator consider granting an extension to the filing time limit for good cause consistent with § 405.942(b). Thus, we are not amending § 405.980 or § 405.982 to include a timeframe for resolving requests for reopening.

Furthermore, we do not believe it is appropriate to require adjudicators to find good cause to extend filing time limits if an adjudicator's decision with respect to a request for reopening is made after the party's deadline for filing an appeal request has expired. Rather, we believe a decision as to whether good cause exists for extending appeals filing time limits should be made on a case by case basis. Alternatively, a party may consider filing an appeal request (if appeal rights are available) if there is concern that the timeframe for filing a subsequent appeal may expire should the reopening request be denied. If the issue involves a clerical error, consistent with § 405.980(a)(3), the contractor will process the request as a reopening.

We also considered the commenter's suggestion that we allow an additional 60 days following a denial of a reopening request, to file an appeal on the item or service at issue. While we understand the concerns of the commenter regarding the potential effect a denied reopening request may have on appeal rights, we believe that allowing additional time to file an appeal as suggested would provide an inappropriate extension to appeals filing timeframes. Moreover, as we noted in the interim final rule, when a party is unsure whether a dispute regarding an item or service is to be handled as a reopening or an appeal, to ensure that the item or service at issue is reviewed in some manner by the adjudicator, it may be in the party's best interest to request an appeal, provided appeal rights are available. *See* 70 FR 11452. Thus, we are not adopting the commenters' suggestions to extend appeals filing time limits or require a finding of good cause for late filing when decisions on reopenings occur after the filing deadline has passed.

Comment: One commenter objected to the new regulatory definition of new and material evidence in § 405.986(a)(1), stating that it is far more restrictive than prior regulations at 20 CFR § 404.988(b) and § 404.989.

Response: Prior to the issuance of the interim final rule, the reopening process for Medicare claims relied on the regulatory provisions found in 20 CFR § 404.988(b) and § 404.989 that govern the reopening of Social Security disability claims. *See* 42 CFR § 405.750(b) and § 405.841. 20 CFR § 404.988(b) states that a determination or decision may be reopened within four years of the date of the notice of initial determination upon a finding of good cause as defined in 20 CFR § 404.989. In 20 CFR § 404.989, good cause to reopen a determination or decision may be established if (1) new and material evidence is furnished; (2) a clerical error in the computation or recomputation of benefits was made; or (3) the evidence that was considered in making the determination or decision clearly shows on its face that an error was made. The term "new and material evidence" was not defined in the regulations used by Social Security, nor was it defined in the Medicare's regulations. However, operating instructions used by Medicare carriers and fiscal intermediaries in processing reopenings have included a definition of new and material evidence for more that 15 years, and this definition served as the basis for the definition of new and material evidence included in § 405.986(a)(1). *See* The Carriers Manual, Pub. 14–3 (Claims Process Part 3), Chapter XII, section 12100.9 and The Intermediary Manual, Pub. 13–3 (Claims Process Part 3), Chapter VIII, section 3799.9. Thus, since we codified existing operating instructions, we disagree with the commenter's assertion that our standard for new and material evidence under § 405.986(a)(1) is far more restrictive than it had been prior to the interim final rule.

Comment: One commenter asked for clarification of § 405.986(b) regarding changes in substantive law or interpretative policy not serving as the basis for reopening a determination. The commenter believed the current wording could be construed as giving the contractor the ability to reopen a case based on local coverage determinations taking effect within one year of the initial determination or redetermination and lead to contractors reopening decisions when coverage is no longer extended to a certain treatment. The commenter stated this could then force providers to repay contractors for payments made while the treatment was covered under a local or national coverage decision. The commenter recommended that the regulation explicitly prohibit the retroactive application of local and national coverage determinations.

Response: While we appreciate the commenter's concern, we note that for purposes of making claim payment determinations, contractors apply the NCD or LCD in place on the day the item or service was provided by the provider or supplier. Furthermore, NCDs and LCDs include effective dates that necessarily make their application prospective. The only exception relates to effectuation of coverage appeals. As explained in § 405.986(b), in order to effectuate a favorable coverage appeal, contractors may reopen the specific claim(s) associated with a challenge to a local or national coverage determination under section 1869(f) of the Act and apply the revised coverage policy, but only to the specific claims at issue. The revised coverage policy would not apply retroactively to any other claims.

Accordingly, we are finalizing § 405.982 and § 405.986 without modification. We are finalizing § 405.984 with modification as discussed in section II.B.5.b. of this preamble.

8. Expedited Access to Judicial Review (§ 405.990)

Section 405.990 sets forth a process under which a party may obtain expedited access to judicial review when a review entity determines that the MAC does not have the authority to decide a question of law or regulation relevant to the matters in dispute, and that there is no material issue of fact in dispute. We received no comments on this section. However, as discussed in this preamble at section II.B.5.b. above, we are making technical revisions to § 405.990 in regards to describing specific determinations, decisions or actions that the adjudicator may take. We are also making revisions to § 405.990, per our discussion in section II.B.5.a.

Accordingly, we are finalizing § 405.990 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble.

9. ALJ Hearings (§ 405.1000 Through § 405.1064)

Our regulations under § 405.1000 through § 405.1064 describe the procedures for conducting hearings before ALJs. We received several comments regarding these procedures. A brief overview of the relevant regulatory provisions, a summary of the comments, and our responses to those comments are included below. Further discussion regarding the procedures for appeals at the ALJ level is found in the interim final rule at 70 FR 11420, 11422, 11445 through 11446, and 11454 through 11466.

a. Transfer of the ALJ Function

Section 931 of the MMA required transfer of the ALJ function for hearing appeals under title XVIII of the Act (and related provisions of title XI of the Act) from the Commissioner of SSA to the Secretary of the Department of Health and Human Services (DHHS or the Department). The DHHS ALJs are required to be organizationally and functionally independent from CMS and must report to, and be under the general supervision of, the Secretary of DHHS. The DHHS and SSA jointly developed a plan to facilitate the transfer, which was started on July 1, 2005 and completed on October 1, 2005 as required by section 931(b)(1) of the MMA.

Comment: At least one commenter expressed concern about possible delays in processing appeals resulting from the transfer of the ALJ function from SSA to DHHS. The commenter asked DHHS to ensure that during the transition all appeal rights and remedies are available to parties in a timely fashion.

Response: We appreciate the commenter's concern, and note that the transfer of the responsibility for the ALJ function from the Commissioner of SSA to the Secretary of the DHHS was completed October 1, 2005. Staff in the DHHS Office of Medicare Hearings and Appeals (OMHA), the office responsible for administering ALJ hearings, worked closely with staff in the SSA Office of Hearings and Appeals to ensure a smooth transition and worked collaboratively to correct problems, to protect the rights of parties, and to issue timely decisions.

Comment: One commenter complained about the loss of Medicare-experienced SSA ALJs who have not relocated to the new DHHS ALJ offices. The commenter felt strongly that the loss of these ALJs would adversely impact the parties involved in appeals.

Response: The Administrative Procedure Act (APA) (5 U.S.C. 1104, and 3105) provides that ALJs be selected using a merit system of selection administered by the Office of Personnel Management (OPM). OMHA's ALJs are recruited from OPM's pool of qualified candidates and are provided with significant training in the relevant Medicare statutes and regulations. Furthermore, unlike SSA's ALJs, whose

main responsibility was to adjudicate disability and Medicare cases, OMHA's ALJs focus exclusively on Medicare appeals. Therefore, we do not think that parties involved in appeals have been or will be adversely impacted by this transition.

Comment: We received several comments concerning the training provided to the ALJs. One commenter expressed concern about the prospect of having to educate new ALJs about the Medicare regulations and questioned whether these judges would be able to address the highly complex and technical issues associated with Medicare claims appeals. Another commenter asked for more information about how ALJs will be trained and requested that all training material be made available to the public. The same commenter wanted DHHS to allow beneficiary and provider input into ALJ training sessions. Finally, a commenter noted that his inquiries to DHHS regarding ALJ training had been referred to the Public Affairs Office of CMS, which concerned the commenter because DHHS ALJs are required to be independent of CMS.

Response: As stated in the previous response, OMHA's ALJs are provided with significant and comprehensive training. OMHA Headquarters, with cooperation and input from its field office Managing ALJs, conducts a continuous evaluation of the ALJs' training needs. The training provided to the ALJs includes, but is not limited to, a comprehensive review of the following: The Medicare FFS, MA, and Part D programs and appeals processes; the applicable Medicare substantive authorities, such as CMS regulations, rulings, and program guidance; and the processes and procedures associated with conducting an administrative hearing. This comprehensive training provides ALJs with the knowledge and expertise necessary to address the highly complex and technical issues associated with Medicare claims appeals.

It is important for the ALJs to remain independent from the parties that may appear before them, including providers, suppliers and beneficiaries, and CMS and its contractors. Accordingly, with consideration of the statutory requirement at section 931 of the MMA that ALJs be functionally and organizationally independent from CMS, OMHA evaluates each potential trainer to determine whether the trainer, or the training itself, would adversely affect the independence or impartiality of the ALJs, or even present the appearance of a lack of independence or impartiality. OMHA also would apply this impartiality standard in determining whether to permit other individuals or entities, such as beneficiaries and providers, to provide input into an ALJ training session. Requests for copies of materials provided to ALJs during training sessions will be handled in accordance with the DHHS rules regarding requests for information under the Freedom of Information Act (FOIA). Such requests should be filed with the DHHS Freedom of Information Officer following the procedures outlined in 45 CFR Part 5.

Finally, we note that at the time of the publication of the interim final rule on March 8, 2005, OMHA was not in existence. Therefore, inquiries, such as those noted by the commenter concerning ALJ level function and received prior to the establishment of OMHA, were temporarily directed to the CMS Office of External Affairs. Since the establishment of OMHA, such inquiries have been directed to OMHA.

b. ALJ Hearings—General Rules (§ 405.1000 Through § 405.1014)

Section 405.1000 provides an overview of the ALJ hearing process. Section 405.1002 describes the requirements for obtaining an ALJ hearing and § 405.1004 describes the process for obtaining ALJ review of a QIC notice of dismissal. Section 405.1006 sets forth the amount in controversy requirements for ALJ hearings and judicial review. Section 405.1008 describes who may request an ALJ hearing and describes the parties to an ALJ hearing. Section 405.1010 explains the process by which CMS or its contractors may participate in an ALJ hearing, and § 405.1012 explains the process by which CMS or its contractors may choose to become a party to a hearing. Section 405.1014 sets forth the content and filing requirements for ALJ hearing requests.

Comment: One commenter expressed concern that ALJ hearings were no longer considered *de novo* hearings. The commenter stated that the removal of *de novo* status for ALJ hearings will hamper efforts to obtain the optimum amounts of information about each case, and lead to unfair and unjustified denials of legitimate Medicare claims for reimbursement.

Response: As stated in the Office of Medicare Hearings and Appeals; Statement of Organization, Functions, and Delegations of Authority, 70 FR 36386 through 36387, ALJs conduct impartial *de novo* hearings and this standard of review has not changed. Although the statute and implementing regulations place limitations on the submission of evidence, which impacts the scope of review, this limitation does not impact the standard of review for ALJ hearings. Rather, consistent with § 405.1032(a), the ALJ reviews anew all issues brought out in the initial determination, redetermination, or reconsideration that were not decided entirely in a party's favor. In addition, if evidence presented before the hearing causes an ALJ to question a favorable portion of a determination, the ALJ may consider that issue at the hearing after providing notice to the parties. *See* § 405.1032(a). However, to further clarify that the ALJ conducts a *de novo* review and to eliminate any potential confusion, we are making a technical revision to § 405.1000(d) to state that the ALJ conducts a *de novo* review and issues a decision based on the hearing record.

Comment: We received many comments regarding CMS' and its contractors' participation as a party or as a participant in the appeals process as set forth in § 405.1010 and § 405.1012. Several commenters generally objected to CMS or its contractors participating in ALJ hearings, or becoming a party at the ALJ level of appeal. One commenter contended that submission of evidence by CMS or its contractor acting as a party or participant should be prohibited if CMS or its contractor had the opportunity to submit the evidence at the time of the redetermination request. Another commenter objected to submission of position papers and clarifying testimony, stating that CMS should only be permitted to submit materials which ALJs must adhere to, or defer to, pursuant to § 405.1060 through § 405.1063 (that is, NCDs, LCDs, program guidance or CMS Rulings). Some of these commenters felt that CMS participation should be limited only to instances where the ALJ required information from CMS or its contractors.

Response: As discussed in detail in the preamble to the interim final rule in response to similar comments, we continue to believe that limited expansion of CMS' role in the ALJ hearing process is appropriate, necessary and consistent with the statute. *See* 70 FR 11459 through 11460. As previously noted, section 1869(c)(3)(J) of the Act provides that the QIC will not only prepare the record of the reconsideration when a hearing before an ALJ is requested, but also will "participate in such hearings as required by the Secretary." We continue to believe that this provision indicates a recognition of the benefit of agency participation in the appeals process.

Based on our experience and the experience of our contractors, there

have been many instances in which an ALJ has determined that input from CMS or a contractor would help resolve a policy issue or clarify factual issues in a case. Prior to the interim final rule, the regulations did not provide specific procedures for ALJs to obtain input from the agency. When ALJs requested position papers, testimony, or other evidence from CMS or a contractor, the process was cumbersome because the regulations did not provide specific procedures for obtaining this input. Thus, consistent with section 1869(c)(3)(J) of the Act, we afford CMS and its contractors the discretion to appear as a party in appeals other than appeals involving unrepresented beneficiaries under § 405.1012. In addition, in § 405.1010, we provide CMS and its contractors the discretion to participate in a more limited role at the hearing by providing assistance in resolving factual or policy issues in a case as a participant in the hearing. Moreover, the Office of Inspector General (OIG) report, as we noted in the preamble to the IFC (OEI–04–97–00160 issued in September 1999), further supports participation by CMS and its contractors in ALJ hearings. *See* 70 FR 11459.

We disagree with the comment that submission of evidence by CMS or its contractors when participating in an ALJ hearing should be prohibited if CMS or its contractors had the opportunity to submit the evidence at the time of the redetermination request. CMS and its contractors are not permitted to participate in the appeals process as a party or participant prior to the ALJ level, and thus, are unable to submit new evidence into the administrative record at the redetermination and reconsideration levels. Therefore, if CMS or its contractors elect to join an appeal as a participant or a party, they should be afforded an opportunity to present evidence, and the ALJ level is the earliest opportunity for this to take place.

We also disagree with the commenter's suggestions that participation by CMS or its contractor should not include the submission of position papers or clarifying testimony, and CMS or its contractor should be restricted to submitting materials to which ALJs must adhere or defer. We continue to believe that CMS or contractor participation at a hearing may assist beneficiaries, as well as adjudicators, in understanding the complex issues raised during claims appeals, and that such participation will assist ALJs and the MAC in creating a fully developed record that resolves issues of fact and law. Participation, as suggested by one commenter, that is limited to the submission of evidence an adjudicator is already required to follow or defer to will have limited usefulness because it will not necessarily take into account the unique factual situations involved in each case before an ALJ. We expect that additional case development resulting from the submission of position papers or clarifying testimony from CMS or its contractors may result in a reduction in the number of cases remanded from the MAC to the ALJ level for additional development, yielding faster decisions for parties and administrative cost savings. Therefore, we believe it is necessary and appropriate for CMS and its contractors to have an opportunity to participate at the ALJ level, and that participation should not be restricted to materials to which the ALJ must adhere or defer.

In addition, we disagree with the comment that CMS or contractor participation should be limited to instances where the ALJ requires information from CMS or its contractor. As noted above, we believe that CMS or contractor participation at a hearing may assist beneficiaries as well as adjudicators in understanding and resolving complex issues raised during appeals. Some appeals may raise factual or policy issues of which the ALJ is not aware, and thus, we believe it is necessary and appropriate to permit CMS and its contractors to participate in ALJ hearings (either as participants or as parties) even if the ALJ does not specifically request information from them.

Thus, for the reasons discussed above, we believe that CMS or contractor participation in ALJ hearings under § 405.1010 and § 405.1012 is necessary and appropriate and should not be limited only to instances where the ALJ requires information from CMS or its contractors. Furthermore, as discussed above, when participating in a hearing as participants or as parties, CMS and its contractors should not be restricted to submitting materials to which the ALJ is required to adhere or defer, and should not be prohibited from submitting position papers and clarifying testimony.

Comment: One commenter viewed the participation provisions as a mechanism for CMS to insert itself as an adversary of the Medicare beneficiary, and objected to the use of Program dollars to fund adversarial actions against beneficiaries trying to obtain Medicare covered benefits. Some commenters objected to the provision prohibiting CMS or its contractors from being called as witnesses if they are participating in an ALJ hearing. Several commenters felt that this provision should be eliminated altogether. Several commenters suggested that if CMS' objective in participating in hearings was to allow for a more thorough examination of all the issues, that goal was not feasible if CMS immunized itself from being called as witness. Finally, one commenter suggested that if the provision regarding participation by CMS or its contractors is retained, an ALJ should be permitted to draw an adverse inference if CMS or its contractors refuse cross examination or withdraw evidence.

Response: We do not believe that participation in a hearing by CMS or its contractor causes the hearing to become an adversarial proceeding against a beneficiary. When an unrepresented beneficiary files a request for hearing, CMS or its contractor may not be a party to the hearing and may only choose to act as a participant. *See* § 405.1010, § 405.1012(a). In general, the role of a participant under § 405.1010 is to provide information that assists the ALJ by clarifying factual or policy issues in a case. When compared to the rights CMS and its contractors are afforded as a party under § 405.1012, the scope of a participant's rights under § 405.1010 is limited. For example, as a participant, CMS and its contractors do not have the right to call witnesses or cross-examine the witnesses of parties. *See* § 405.1010(c). Nor does a participant have a right to object to the issues described in the ALJ's notice of hearing. *See* § 405.1024(a), which applies only to parties. These are cornerstone elements in an adversarial proceeding. Thus, we believe the non-adversarial nature of an ALJ hearing is preserved when CMS or its contractor acts as a participant under § 405.1010.

We also disagree with the commenter's assertion that participation by CMS or its contractor constitutes an inappropriate use of program dollars. As noted above, by conferring authority on the Secretary to determine when the QIC's participation in hearings is appropriate, Congress recognized the benefit of such participation. *See* section 1869(c)(3)(J) of the Act. In addition, as discussed above, we believe that CMS or contractor participation may assist ALJs and the MAC in creating a fully developed record that resolves issues of fact and law, which could result in a reduction in the number of cases remanded from the MAC to the ALJ, thereby yielding faster decisions for parties and administrative cost savings. Furthermore, participating in a hearing reflects one of our agency's top mandates as stewards of the Medicare Trust Fund: ensuring accurate

payments. Thus, we do not believe participation in an ALJ hearing as a participant or as a party constitutes an inappropriate use of program resources.

We also do not agree with the commenters who suggested that we eliminate the provision in § 405.1010(d) that prohibits calling CMS or its contractor as a witness when participating in a hearing under § 405.1010. We believe this prohibition is important in maintaining the non-adversarial manner for such hearings. As previously noted, a participant's role under § 405.1010 is significantly limited when compared to the role of a party under § 405.1012. For example, as a participant, CMS or its contractor can file position papers or provide testimony to help further clarify certain factual or policy issues in the appeal. However, as a participant, CMS or its contractor may not call witnesses or cross-examine the witnesses of a party, nor may it be called as a witness during the hearing. *See* § 405.1010(c) and § 405.1010(d). In contrast, as a party under § 405.1012, CMS or its contractor may exercise all of the rights available to a party (such as, calling witnesses, cross-examining witnesses of other parties, requesting the issuance of subpoenas, objecting to the issues to be decided at the hearing). The election of party status by CMS or its contractor also makes the discovery process available to parties under § 405.1037.

The differences between the role of CMS or its contractor as a participant under § 405.1010 and as a party under § 405.1012 reflect the distinction under our regulations between a less formal, non-adversarial style of hearing (when CMS or its contractor participates as a non-party) and a more formal, adversarial style of hearing (when CMS or its contractor elects party status). (As further discussed below, CMS and its contractors have discretion to determine whether to participate in a hearing and to determine the manner and extent of participation.) Requiring CMS or its contractor to be called as a witness when it is a participant in a hearing under § 405.1010 would blur this distinction and would require CMS or its contractor to take on an adversarial role in the hearing when it has chosen the non-adversarial role of participant under § 405.1010. Thus, in order to maintain the non-adversarial nature of the hearing when CMS or its contractor is a participant under § 405.1010, we believe it is necessary to preclude calling CMS or its contractor as a witness during the hearing. We note that the policy prohibiting CMS or its contractor from being called as a witness when it has chosen to participate as a non-party in the proceeding under § 405.1010 is consistent with the Department's Touhy regulations at 45 CFR Part 2, which leaves to agency discretion the decision of whether to permit agency officials or certain contractors to testify or produce evidence in proceedings in which the agency is not a party.

Furthermore, even though CMS and its contractors cannot be called as witnesses when they participate in a proceeding under § 405.1010, we believe that participation by CMS or its contractors under § 405.1010 still allows for a more thorough examination of the issues. As discussed above, when CMS or its contractors participate under § 405.1010, they may file position papers or provide testimony to clarify factual or policy issues in a case, thereby assisting ALJs and the MAC in creating a fully developed record that resolves issues of fact and law.

Finally, we disagree with commenters who suggested that we permit ALJs to draw an adverse inference if CMS or its contractors refuse cross-examination or withdraw evidence when they participate in the proceeding under § 405.1010. The limited resources and broad programmatic responsibilities facing CMS and its contractors may not allow for participation in all hearings. Thus, while an ALJ may request that CMS or its contractors participate in a hearing or other proceeding, under § 405.1010(a), an ALJ cannot require CMS or its contractors to participate in a case. In addition, an ALJ may not require CMS or its contractor to appear as a witness under § 405.1010(d). Thus, CMS and its contractors have discretion to determine whether to participate in a hearing and to determine the manner and extent of participation. If CMS or its contractor, in exercising this discretion, chooses to participate in the proceeding in the limited, non-adversarial manner provided in § 405.1010, we do not believe that it would be reasonable for the ALJ to draw an adverse inference if CMS or its contractor declines to extend this participation beyond the limits set forth in § 405.1010 (for example, by refusing cross-examination). Furthermore, given the discretion provided to CMS and its contractors to determine whether and how to participate in a proceeding, we do not think it would be reasonable for the ALJ to draw an adverse inference if CMS or its contractor chooses to withdraw evidence. Therefore, we do not believe it is appropriate to amend § 405.1010(f) to permit an ALJ to draw an adverse inference if CMS or its contractor refuses cross-examination or withdraws evidence.

Comment: We received several comments concerning the submission of evidence by CMS or its contractors when participating at the ALJ or MAC levels of the appeals process. These commenters stated that in cases where CMS or its contractors submit new evidence, there should be an opportunity for the parties to respond, without having to show good cause and without delaying the adjudication timeframes.

Response: We disagree with the recommendation that providers and suppliers should not have to show good cause to submit new evidence at the ALJ and MAC levels in response to the submission of evidence by CMS or its contractors, if the agency elects to join the appeal as a party or participant. As noted earlier in this rule, the MMA amended several of the appeals provisions contained in BIPA. Section 1869(b)(3) of the Act, as added by section 933(a) of the MMA, requires that a provider of services or supplier not introduce evidence in any appeal that was not presented at the reconsideration conducted by the QIC, unless there is good cause that precluded the introduction of such evidence at or before the reconsideration. In our regulations at § 405.1018, we extended this requirement to beneficiaries represented by providers and suppliers. However, section 1869(b)(3) of the Act, and the corresponding regulatory provisions, do not apply to CMS or its contractors. To the extent participation by CMS or its contractors raises new issues in the appeal that were not considered during the earlier levels of appeal, this may provide good cause for the introduction of new evidence by parties at the ALJ level.

Finally, in light of the statutory requirement for full and early presentation of evidence, our provision requiring parties to submit evidence with the request for hearing or within 10 days of receipt of the notice of hearing (§ 405.1018), and the need for the ALJ to evaluate the good cause justification for submission of new evidence after the reconsideration as set forth in § 405.1018 and § 405.1028, it is necessary to allow an ALJ additional time to consider whether the new evidence submitted by the appellant or party may be considered at the hearing. We believe that § 405.1018(b), which tolls the ALJ adjudication timeframe when a party submits evidence after the deadline established in § 405.1018(a), is consistent with the statute and with Congressional intent. Congress has clearly indicated that adjudicators must devise procedures compatible with meeting the statutory deadlines.

Moreover, we do not believe it appropriate for appellants to avail themselves of the escalation provisions if the appellant has delayed the administrative process by submitting evidence after the deadline. In addition, we believe that by tolling the 90-day adjudication period as provided in § 405.1018(b) in those instances in which the appellant is responsible for the delay, we provide an incentive for appellants to submit all relevant evidence as soon as possible (preferably with the hearing request), to appear at scheduled hearings, and otherwise comply with hearing procedures. We believe that tolling the ALJ adjudication timeframe when a party submits evidence after the deadline established in § 405.1018(a), balances the party's need to submit new evidence in certain circumstances, with the need to provide the ALJ with sufficient time to evaluate the good cause justification for submitting the new evidence, and to review any such additional evidence that is to be admitted into the administrative record. Furthermore, we believe it is reasonable to toll the decision-making timeframe to allow full and careful consideration of all issues, even if the evidence being considered is in response to evidence submitted by CMS or its contractors.

Comment: We received two comments regarding the availability of attorney's fees when CMS or its contractors participate in an ALJ hearing. Both commenters argued that if CMS or its contractors participate as a party it would turn the hearing into an adversarial proceeding and, under the Equal Access to Justice Act (EAJA), CMS could be obligated to pay attorney's fees and other costs to prevailing appellants.

Response: In our response to an identical question raised on the proposed rule, we indicated that the Department would review its EAJA provisions to determine what, if any, amendments might be necessary to reflect the changes implemented in the interim final rule. *See* 70 FR 11429 through 11430. To date, DHHS has not amended its EAJA regulations to expressly include administrative appeals under this subpart in the list of proceedings in 45 CFR part 13, Appendix A that are considered adversary adjudications, and to which the EAJA rules apply.

In light of the commenter's concern, however, we believe it is appropriate to clarify when a hearing involving claim determinations becomes an adversary adjudication for the purposes of making an application for attorney fees under the Department's EAJA regulations. Only those ALJ hearings in which CMS elects party status under § 405.1012(a) meet the definition of an adversary adjudication as set forth in 45 CFR 13.3(a). The Department's EAJA regulations at 45 CFR 13.3(a) state that the EAJA rules apply only to adversary adjudications. An adversary adjudication is defined as "an adjudication required to be under 5 U.S.C. 554, in which the position of the Department or one of its components is represented by an attorney or other representative ('the agency's litigating party') who enters an appearance and participates in the proceeding. * * *" We believe appeals where CMS elects party status fall within this definition.

However, if a non-governmental entity, such as a QIC or other CMS contractor, decides to become a party to an appeal at either an ALJ hearing or MAC review, it does not constitute an adversary adjudication for the purposes of the EAJA, because the Department's position would not be represented by an attorney employed by DHHS. DHHS has previously indicated its position with respect to a contractor-party in 45 CFR part 13, Appendix A, which lists proceedings covered by the Department's EAJA regulations. In that appendix, a Provider Reimbursement Review Board proceeding is considered an adversary adjudication only when DHHS employees appear as counsel for the intermediary. In the context of a hearing or MAC review, if a QIC or other CMS contractor decides to become a party, DHHS would not be represented by its own attorney, and therefore, EAJA would not apply.

Further, we do not believe the Department's EAJA rules cover ALJ hearings or MAC review in which CMS or one of its contractors chooses to participate, but does not enter as a party. Our regulations provide for two completely separate options for CMS or its contractors to participate in an ALJ hearing or MAC review: as a party or as a participant. In electing party status, CMS or its contractor enters an ALJ hearing with all of the rights and responsibilities of other parties as described in § 405.1012, including the right to call witnesses, cross-examine witnesses of the appellant or other party, be subject to cross-examination, and to submit evidence. In contrast, by simply participating in the appeal as a non-party, the agency or its contractors have significantly more limited rights as described in § 405.1010 (that is, the right to submit position papers or to provide testimony to clarify factual or policy issues in the case). More importantly, however, a non-party participant does not have the right to call witnesses or cross-examine the appellant's or other parties' witnesses, and a non-party participant may not be called as a witness at the hearing. Thus, as we have stated in the proposed and interim final rules, the role of CMS or its contractors as a non-party participant is non-adversarial. *See* 67 FR 69332; 70 FR 11459 through 11460. Accordingly, we believe an ALJ hearing or MAC review in which CMS or its contractor is a participant, but not a party, does not fall within the definition of an adversary adjudication for the purposes of applying the provisions of the EAJA.

Finally, we note that the Department's EAJA rules state: "The Department may reimburse parties for expenses incurred in adversary adjudications if the party prevails in the proceeding and if the Department's position in the proceeding was not substantially justified. * * *" *See* 45 CFR 13.1. The mere fact that a party prevails in the proceeding does not create a presumption that the Department's position was not substantially justified. Rather, the agency's litigating party is afforded an opportunity to show that the Department's position was reasonable in fact and law, thus avoiding an award of fees and expenses in connection with the proceeding. *See* 45 CFR 13.5(b).

Accordingly, we are finalizing § 405.1008 without modification. We are finalizing § 405.1000 with modification as discussed above, and with modification as discussed in section II.B.1. of this preamble. We are finalizing §§ 405.1002 and 405.1004 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble. We are finalizing §§ 405.1006 and 405.1014 with modification as discussed in section II.B.5.a. of this preamble. We are finalizing §§ 405.1010 and 405.1012 with modification as discussed in section II.B.1. of this preamble and with modification as discussed in section II.B.5.a. of this preamble.

c. Adjudication Deadlines—ALJ Level (§ 405.1016)

Section 405.1016 sets forth the timeframes for an ALJ to issue hearing decisions, states that timeframes may be extended as provided in subpart I, and also includes provisions to toll timeframes under limited circumstances.

Comment: One commenter objected to the provision that a request for an ALJ hearing is considered timely filed when it is received by the entity specified on the QIC's notice of reconsideration. The commenter noted that the Medicare statute specifies the decisionmaking timeframe beginning on the date the

request for a hearing was timely filed. The commenter felt that many beneficiaries, who had typically filed appeals with the SSA, and may continue to do so, would not get the benefit of the revised statutory timeframes.

Response: We agree with the commenter that the decision-making timeframe begins when a request for hearing is timely filed. However, in order to be timely filed, a hearing request must contain all the required information and be filed with the entity specified in the reconsideration decision within 60 days of receipt of the reconsideration decision. *See* § 405.1014(a) and § 405.1014(b). We believe that directing appellants to only one filing location reduces confusion and eliminates any potential delay in transmitting the request. Thus, all reconsideration decision letters issued by QICs contain the specific OMHA field office address where a request for ALJ hearing must be filed. Although some beneficiaries may continue to file hearing requests with the SSA, we do not believe it is appropriate to recognize SSA field offices as filing locations for ALJ hearing requests pertaining to claims for benefits under Medicare Part A and Part B, because the SSA no longer has a role in the processing of these Medicare appeals. (However, we note that parties may file requests for ALJ hearings pertaining to Part A and Part B entitlement (*see* § 405.924(a)) and Part B Income Related Monthly Adjustment Amounts (IRMAA) directly with OMHA or with SSA offices.) To ensure appeals that are misfiled with the SSA are promptly forwarded to the correct entity, CMS and SSA developed Emergency Message EM–05028 (originally issued on June 23, 2005). This instruction directs SSA staff to immediately forward misfiled Part A and Part B claims appeals to the appropriate OMHA field office and to direct any beneficiaries who attempt to file appeals in-person to send the request to the entity specified in their reconsideration decision letter. Thus, we believe it is reasonable to begin the adjudication timeframe on the date an appeal request is timely filed with the entity specified in the QIC's notice of reconsideration.

Pursuant to § 405.1014(b)(2), if a request for hearing is timely filed with an entity other than the entity specified in the notice of reconsideration, the request is not treated as untimely or otherwise rejected. Rather, the deadline for deciding the appeal under § 405.1016 begins on the date the entity specified in the QIC's reconsideration notice receives the request for hearing. In situations such as this, where an appellant's actions do not meet regulatory requirements and cause a delay in the adjudication process, we think it is both necessary and fair to allow an ALJ the full 90 days afforded by statute, beginning the date the correct ALJ office receives the request, to issue a decision. Section 405.1014(b)(2) states that if the request for hearing is filed with an entity, other than the entity specified in the QIC's reconsideration, the ALJ hearing office must notify the appellant of the date of receipt of the request and the commencement of the 90 day adjudication timeframe.

Comment: We received two comments regarding the decision-making timeframes when cases are escalated. One commenter agreed with the provisions in § 405.970(c)(2) and § 405.970(e)(2)(i) which provide an adjudicator five additional days to complete a decision when an appellant has requested the case to be escalated to the next level. Another commenter disagreed with any extension of the decision-making timeframe in cases involving escalation, and opined that such an extension was not authorized under the statute.

Response: Section 1869(d)(1)(A) of the Act requires an ALJ to hold a hearing on the decision of the QIC, and to render a decision on such hearing within 90 days of the adjudicator's receipt of a request for a hearing (that is timely filed). Section 1869(c)(3)(C)(ii) of the Act provides that a party may escalate an appeal to the ALJ if the QIC fails to mail or provide notice (as applicable) of the decision by the end of the applicable decision-making timeframe. OMHA's adjudication timeframe in case of escalation from a QIC is not explicitly stated in statute. The statute provides only a qualified right for an appellant to escalate an appeal to the ALJ level if the QIC does not timely issue a reconsideration determination. As discussed in the interim final rule, we interpret the 90 day adjudication provision as requiring an ALJ to decide a case within 90 days only when the QIC has issued a final action in a case. *See* 70 FR 11454 through 11456, and 11463. Therefore, we state that, when an appellant escalates an appeal from the QIC to the ALJ level, the proceedings before the ALJ will not be subject to the 90-day limit. Rather, as specified in § 405.1016(c), the ALJ will have up to 180 days to issue a decision, dismissal order, or remand order (unless the time period is otherwise extended as provided in part 405 subpart I). The absence of an actual reconsideration determination and its attendant administrative processes imposes a substantial additional burden on OMHA, including locating and acquiring relevant information from the QIC, performing additional procedural and jurisdictional reviews, and organizing evidence in the case file. Setting the adjudication timeframe by regulation at 180 days for escalated appeals balances the interests of the appellant in timely resolving the disputed appeal and an ALJ's duty to collect the evidence and perform the administrative tasks necessary to fully and fairly adjudicate an appeal that has not been addressed in a reconsideration determination. We note that the 180 day timeframe does not preclude OMHA from adjudicating the appeal more expeditiously if possible.

We are finalizing § 405.1016 with modification as discussed in section II.B.5.a. of this preamble.

d. Submission of Evidence Before the ALJ Hearing (§ 405.1018)

Section 405.1018 states that a provider, supplier or beneficiary represented by a provider or supplier must submit all written evidence they wish to have considered at the hearing with the request for hearing or within 10 days of receiving notice of the hearing. Any evidence that is not submitted prior to the issuance of the QIC reconsideration determination must be accompanied by a written statement explaining why the evidence was not previously submitted to the QIC or a prior decision-maker. We explain in § 405.1018 and § 405.1028 the process an ALJ follows in determining whether good cause exists to allow the new evidence into the administrative record.

Comment: One commenter objected to the provision limiting the submission of evidence after the QIC level of appeal. The commenter stated the appellant should not be penalized by having to draft statements showing good cause for the submission of new evidence at the ALJ level when many times the later submission is due to circumstances that are beyond a party's control.

Response: Section 933(a) of the MMA amended section 1869(b) of the Act to require full and early presentation of evidence by providers and suppliers. Absent good cause for not presenting the evidence prior to the issuance of a reconsideration by the QIC, a provider or supplier is precluded, by statute, from introducing new evidence at the ALJ or MAC levels. Sections 405.1018(c) and 405.1028 implement the good cause requirement. These provisions help to ensure expeditious adjudication, while recognizing that early presentation of evidence is not always possible. We also note that this requirement does not

apply to evidence submitted by beneficiaries, unless they are represented by a provider or supplier. *See* § 405.966(c) and § 405.1018(d); 70 FR 11446.

We are finalizing § 405.1018 with modification as discussed in section II.B.5.a. of this preamble.

e. Time and Place for a Hearing Before an ALJ; Notice of Hearing; Objections to the Issues (§ 405.1020 Through § 405.1024)

In § 405.1020, we set forth the requirements for determining how appearances will be made before the ALJ, for providing notice of a hearing, for waiving a hearing, for changing the time and place of a hearing, and for requesting an in-person hearing. In § 405.1022, we describe the content and processing requirements with respect to the notice of ALJ hearing sent to the parties and other potential participants. In § 405.1024, we explain the procedures parties must follow if they object to the issues described in the ALJ's notice of hearing.

Comment: We received many comments concerning the types of hearings available at the ALJ level. Several of the commenters stated that an appellant should have the right to an in-person hearing before an ALJ. One commenter opined that the reliance on videoteleconferencing (VTC) hearings may be premature. Another commenter questioned the adequacy of hearings by VTC, opining that where credibility and veracity are at issue, in-person hearings will provide the decision maker with the chance to observe all parties, and allow the appellant to observe the reaction of the ALJ to the evidence and tailor presentations accordingly. The commenter also noted that many Medicare beneficiaries have visual, hearing, or even cognitive impairments which create difficulties in viewing VTC screens, hearing telephone conversations or participating in other than face-to-face hearings. Many of these commenters also objected to the requirement that an appellant show good cause before an ALJ will grant an in-person hearing and characterized the good cause standard as vague.

Response: Section 1869(b)(1)(A) of the Social Security Act as amended by BIPA provides that any individual dissatisfied with any initial determination shall be entitled to a reconsideration and to a hearing to the same extent as is provided in section 205(b) of the Act. Section 1869(b)(1)(A) of the Act does not specify the manner in which hearings must be held. Congress, however, instructed the DHHS to explore the possibility of providing hearings using formats other than in-person hearings. Specifically, the MMA instructed the DHHS to consider the feasibility of conducting Medicare hearings "using tele- or video-conference technologies." *See* section 931(a)(2)(G) of the MMA.

At approximately the same time that MMA was enacted, the SSA finalized regulations that provided for VTC hearings in Medicare and disability appeals. *See* 68 FR 5210 (February 3, 2003). Taking into account SSA's regulations, the Secretary concluded that the expanded use of VTC and telephone hearings for Medicare appeals is appropriate for various reasons. First, contrary to the commenters' assertions, and unlike Social Security disability hearings, where in-person hearings may be needed in order to evaluate an individual's physical ability and/or credibility, Medicare hearings are generally less dependent on the physical presence of the appellant or other witnesses and are, therefore, better suited to VTC hearings. Second, VTC allows ALJs to conduct hearings more quickly, which is particularly important in light of the timeframes mandated by the statute. For parties who might otherwise waive their right to a hearing and request an on-the-record decision because of traveling or scheduling difficulties, VTC hearings can be scheduled locally in a convenient setting where the party has an opportunity to present his/her case orally. Given these benefits, we believe VTC is an efficient and effective method of conducting ALJ hearings. Despite the advantages of VTC, parties have the opportunity to request an in-person hearing, or an ALJ may determine that an in-person hearing is more appropriate than a hearing by VTC or telephone in a particular case. Thus, as explained in the interim final rule, we determined it is appropriate to permit ALJ hearings to be conducted by VTC. *See* 70 FR 11456 through 11457.

Specifically, § 405.1020(b) provides that an ALJ, with the concurrence of the Managing Field Office ALJ, may determine that an in-person hearing should be conducted if either (1) VTC technology is not available, or (2) special or extraordinary circumstances exist. The preamble to the interim final rule provides guidance for ALJs in determining whether special or extraordinary circumstances exist, thus warranting the scheduling of an in-person hearing under § 405.1020(b)(2). *See* 70 FR 11457. Section 405.1020(i) provides that a party may file a written objection to a scheduled VTC or telephone hearing, and request an in-person hearing. An ALJ may grant the request, with the concurrence of the Managing Field Office ALJ, upon a finding of good cause. In the preamble to the interim final rule, we provide guidance as to what may constitute good cause for an ALJ to grant a request for an in-person hearing. For example, an ALJ could find good cause to grant a request for an in-person hearing when a party demonstrates that the case presents complex, challenging or novel presentation issues that necessitate an in-person hearing. *See* 70 FR 11457. Similarly, an ALJ may find good cause to schedule an in-person hearing based on a party's proximity to and ability to go to the local hearing office. These provisions ensure that appellants or other parties who believe it is necessary to have an in-person hearing to effectively present and participate in their cases, including parties with physical and cognitive impairments, have the option to request an in-person hearing.

Furthermore, given the volume of hearing requests and short adjudicative timeframes imposed by BIPA, we believe it is reasonable to use a good cause standard in determining when it is appropriate for an ALJ to grant a request for an in-person hearing and reschedule the hearing for a time and place when the party can appear in person before the ALJ, as provided in § 405.1020(i)(5). As explained above, and to avoid the backlogs and delays that historically plagued the hearing process, we believe it is necessary and appropriate to generally conduct hearings by VTC or telephone. However, in § 405.1020(i), we acknowledge that, in some circumstances, it may be appropriate to grant a request to change the type of hearing scheduled and permit an in-person hearing. Thus, ALJs will evaluate in-person hearing requests made under § 405.1020(i) using the good cause standard established in § 405.1020(i)(5), and when appropriate grant a request for an in-person hearing.

Finally, we believe our decision not to provide an exhaustive description of the good cause standard in this regulation benefits parties by affording an ALJ the flexibility to grant an in-person hearing based on factors or circumstances that may be relevant, yet unforeseen at this time.

Comment: Several commenters were concerned about the number of ALJ offices available for in-person hearings as well as the ALJ office locations. Some commenters were concerned that the number of office locations was insufficient, and would impede appellant access to VTC and/or in-person hearings and cause delays in holding hearings. One commenter stated

that a system that relies on VTC and phone hearings and places ALJs in 4 locations around the country does not satisfy the requirements of MMA section 931(b)(3), which requires appropriate geographic distribution of offices to ensure timely access to judges. One commenter stated that since the current ALJ office locations weren't accessible to New York residents, DHHS should establish an ALJ office in New York City, as well as an ALJ office in upstate New York. A few commenters recognized the need to streamline ALJ locations and the ALJ hearing process for efficiency, but asked that DHHS monitor the process to ensure appellant access is not hindered. Several of the commenters opined that with only four ALJ offices, appellants would be forced to use VTC or telephones to conduct hearings rather than incur the expense, loss of income, and inconvenience of traveling to distant offices. Another commenter asked if any provisions would be made to allow travel allowances for appellants.

Response: In determining the number and location of OMHA's field offices, the DHHS thoroughly researched and considered, among other things, the then-current and projected geographic distribution of Medicare claims appeals heard by SSA and Medicare contractor jurisdictions. As a result, Arlington, Virginia, Cleveland, Ohio, Irvine, California, and Miami, Florida were chosen as the four sites for the OMHA field offices. The ALJs in these field offices hold hearings by videoteleconference and telephone, and in-person. Furthermore, VTC hearings are also held at sites other than the ALJ offices. OMHA makes extensive use of VTC to provide appellants with a vast nationwide network of access points for hearings close to their homes. Based on this research and our experience, we believe that the number and distribution of ALJ offices is sufficient and would not delay or impede access to in-person or VTC hearings. Thus, we believe that the number and locations of ALJs throughout the country satisfy the requirements section 931(b)(3) of the MMA, and we do not believe that it is necessary at this time to establish ALJ offices in New York City or in upstate New York.

While many appellants prefer the convenience of a telephone hearing or videoteleconference hearing, there are instances when an in-person hearing is appropriate. OMHA closely monitors appellants' access to the process via internal case tracking systems, appellant feedback during the scheduling of hearings, and appellant feedback during hearings. OMHA's tracking numbers and feedback from appellants reflect an overwhelming preference for telephone hearings. Based on the feedback and raw data received, OMHA adjusts its internal resources and processes accordingly.

Furthermore, when, in accordance with the regulations, the ALJ determines that a hearing will be held in-person, the ALJ will also consider whether it is most appropriate to travel to a location close to the party or to have the party travel to one of the OMHA field offices. In making this determination, the ALJ consults with the party requesting the hearing. OMHA has developed a travel reimbursement policy that it mails with every notice of hearing. Pursuant to this policy, eligible participants are reimbursed for certain expenses incurred in traveling to and from a field office or a VTC site. Thus, we do not believe that appellants are forced to use VTC or telephones to conduct hearings to avoid the expense of in-person hearings. We believe that this policy satisfies the mandate of section 931(b)(3) of the MMA to ensure timely access to judges.

Comment: A commenter noted that § 405.1020(c) requires the ALJ to send a notice of hearing to the contractor that issued the initial determination. The commenter expressed concern that receiving ALJ notices of hearing for every case may be cumbersome, and suggests it may be more efficient to send a notice of hearing to the contractor that processed the initial determination only when the ALJ requests that the contractor be a party or participant.

Response: We agree with the concerns raised by the commenter. We believe sending the notice of hearing to the QIC that processed the reconsideration provides adequate notice to CMS and its contractors of the pending ALJ hearing, and thus it is not necessary to also send notice of the hearing to the contractor that issued the initial determination. However, we note that, the ALJ would send a notice of the hearing to the contractor if an ALJ were to request that the contractor that issued the initial determination participate in, or be a party to, a hearing. Accordingly, we have revised § 405.1020(c) to remove the reference to the "contractor that issued the initial determination" from the list of entities that receive notice of the ALJ hearing.

Comment: We received several comments concerning § 405.1020(i)(4), which stipulates that when a request for in-person hearing is granted, the party is deemed to have waived the 90 day timeframe for ALJ decision-making. One commenter noted that § 1869(d)(1)(B) of the Act only provides for a waiver of the time period upon motion or stipulation of the party, and a request for an in-person hearing is not a motion or stipulation to waive the 90 day time period. The same commenter also observed that the regulations do not include a specific timeframe for making a decision in this situation even though Congress legislated set timeframes at every level of appeal. Although all of the commenters agreed that there should be a timeframe attached to these in-person hearings, they were split when it came to recommending a particular timeframe. Some commenters believed strongly that the 90 day timeframe that ordinarily applies to ALJ hearings should apply to in-person hearings. These commenters opined that the intent of BIPA, as amended by the MMA, was to give everyone access to an ALJ hearing within the 90 day timeframe. As such, ALJs should be held to rendering their decision within the 90 day timeframe for all hearing formats. One of these commenters suggested that the reduced number of in-person hearings should enable ALJs to meet the 90 day decision-making timeframe. In contrast, another commenter recommended setting a longer, but still defined, timeframe, such as 120 days, as a reasonable time limit for an in-person hearing. Similarly, another commenter suggested that in the event of an in-person hearing, the ALJ should have 90 days from the date of the hearing (as opposed to 90 days from the date the request for hearing is received) within which to render the decision.

Response: As discussed previously, in making revisions to the administrative appeals process in both BIPA and MMA, Congress did not specify the manner in which ALJ hearings were to be conducted. Thus, while hearings may be conducted in-person, by VTC or by telephone, parties do not have the right to a specific type of hearing, and ALJs are not required to offer an in-person hearing to parties. The Congress instructed the DHHS to consider the use of teleconference and video-teleconference technologies for ALJ hearings. *See* section 931(a)(2)(G) of the MMA. After carefully considering the feasibility of utilizing these technologies, the logistical issues in conducting hearings, and the need to devise procedures compatible with meeting the statutory deadlines, it became clear that VTC and telephone were appropriate methods for holding most ALJ hearings. While a hearing may be conducted in-person, by VTC or by telephone (§ 405.1000(b)), under § 405.1020(b), an ALJ will conduct the hearing by VTC if the technology is

available, thereby establishing VTC as the default method for conducting hearings.

We are mindful, however, that some parties may prefer or require an in-person hearing. Thus, under § 405.1020(b), an ALJ may offer to conduct an in-person hearing when VTC is not available, or if special or extraordinary circumstances exist making an in-person hearing necessary. Additionally, in § 405.1020(i), we afford parties an opportunity to object to a hearing scheduled to be conducted by VTC or telephone, and request an in-person hearing. If the ALJ grants the request for an in-person hearing, in many cases, the ALJ may need additional time beyond the standard 90-day adjudication time period specified in § 405.1016 in order to schedule, prepare for, and conduct an in-person hearing, and issue a decision. Accordingly, § 405.1020(i)(4), as clarified in our correcting amendment to the interim final rule issued June 30, 2005, states that the 90 day adjudication timeframe is waived if a party objects to the ALJ's scheduling of a hearing by VTC or telephone, and the ALJ, with the concurrence of the Managing Field Office ALJ, grants the party's request for an in-person hearing. *See* 70 FR 37700, 37701, 37704.

We have carefully considered the commenter's assertion that section 1869(d)(1)(B) of the Act only provides for a waiver of the adjudication deadline upon motion or stipulation of the party, and that a request for an in-person hearing is not a motion or stipulation to waive the 90-day time period. While we continue to believe that the statutory language is consistent with a reading that a party can be deemed to have waived the adjudication deadline when the party requests and is granted an in-person hearing, after further consideration, we have decided to amend § 405.1020(i) to state that when a party's request for an in-person hearing under § 405.1020(i)(1) is granted, the ALJ must issue a decision within the adjudication timeframe specified in § 405.1016 (including any applicable extensions provided in subpart I), unless the party requesting the hearing waives the adjudication timeframe in writing. We believe that this revised regulation also is consistent with the statutory language.

Commenters also offered recommendations to impose a specific adjudication timeframe for issuing decisions when an ALJ grants a request for an in-person hearing in response to an objection to a scheduled VTC or telephone hearing under § 405.1020(i). Given the revisions to § 405.1020(i) described above, it is no longer necessary to consider adopting these alternative timeframes. Furthermore, under § 405.1036(d), an appellant who waives the 90 day adjudication timeframe may work with the ALJ to establish an alternative decision making timeframe to ensure they have some expectation of when the ALJ will render his or her decision.

Finally, we are making a technical revision to § 405.1022(a) to clarify that even where a party waives receipt of the notice of hearing, the ALJ must still send the notice of hearing to all other parties and potential participants who have not waived their right to receive the notice of hearing, consistent with § 405.1020(c). Section 405.1022(a) provides that the ALJ sets the time and place of the hearing and mails the notice of hearing to the parties and other potential participants as provided in § 405.1020(c) unless the parties have indicated in writing that they do not wish to receive this notice. In turn, under § 405.1020(c)(2), parties to the hearing (and any potential participant from CMS or its contractor who wishes to attend the hearing) are required to reply to the notice of hearing to acknowledge whether they plan to attend the hearing, or to object to the proposed time and/or place of the hearing. In addition, under § 405.1010 and § 405.1012, CMS or its contractor is required to notify the ALJ, appellant, and all other parties identified in the notice of hearing of their intent to participate in the hearing or join as a party within 10 days after receiving the notice of hearing. In order for parties and potential participants from CMS or its contractor (who wish to attend the hearing) to comply with § 405.1020(c)(2), and for CMS and its contractors to provide the ALJ and all parties timely notice of their intent to join as a party or participate in the hearing consistent with § 405.1010(b) and § 405.1012(b), the ALJ must send the notice of hearing to the appropriate parties and potential participants, consistent with § 405.1020(c)(1). Thus, we are revising § 405.1022(a) to clarify that even where a party waives receipt of the notice of hearing, the ALJ must still send the notice of hearing to all other parties and potential participants who have not waived their right to receive the notice of hearing, consistent with § 405.1020(c).

We are finalizing § 405.1020 and § 405.1022 with modifications as noted above and as discussed in section II.B.5.a. of this preamble. We are finalizing § 405.1024 with modification as discussed in section II.B.5.a. of this preamble.

f. Disqualification of the ALJ (§ 405.1026)

In § 405.1026, we state that an ALJ cannot conduct a hearing if he or she is prejudiced or partial to any party or has any interest in the matter pending for decision. We also explain the process that a party must follow if they object to the ALJ assigned to conduct the hearing.

Comment: A number of commenters raised concerns about the independence of the DHHS ALJs. One commenter stated that, under SSA regulations, an ALJ may grant an in-person hearing if the party requesting it states they do not wish to appear by VTC. By contrast, the commenter noted that under DHHS regulations for Medicare appeals, the ALJ must seek the concurrence of the Managing Field Office ALJ in order to grant requests for in-person hearings. Another commenter questioned how an ALJ can be independent and base a decision on the evidence before him or her, if such concurrence is needed in what may be the first motion in the case.

A few commenters also questioned CMS' influence over the ALJs. One commenter recommended that safeguards be put in place to avoid any undue influence on the ALJs' independence. Another commenter viewed the issuance of the new appeals regulation by CMS, and the content of the provisions, as a strong indicator of CMS' intent to influence and control the ALJs' decision-making process. Finally, a commenter stated that formalized procedures in the form of promulgated rules on how the new Office of Medicare Hearings and Appeals will function are necessary to ensure ALJ independence.

Response: The Managing Administrative Law Judge (MALJ) is responsible for the administration of the field office, and is charged with ensuring the just, timely, accurate, and professional adjudication of all Medicare claims appeals whether they are heard in-person, via VTC, or by telephone. MALJ oversight is not intended to impede the judicial independence of the ALJ assigned to the appeal, but rather, such oversight will aid in the coordination of resources needed to successfully carry out an in-person hearing and will also assist the ALJs in fulfilling their responsibility to ensure that appellants receive an appropriate hearing and that appeals are decided in a timely manner.

In terms of structural organization, the DHHS is divided into a series of operational divisions that are administratively and programmatically independent of one another. Each

operational division has its own personnel, administrative support, and programmatic mission. While each operational division is ultimately accountable to the Secretary, they are independent of one another. As described in the June 23, 2005 Office of Medicare Hearings and Appeals; Statement of Organization, Functions, and Delegations of Authority that formally established OMHA, OMHA is part of the Office of the Secretary and is completely separate from CMS. 70 FR 36386. OMHA is under the direction of the Chief Administrative Law Judge who reports directly to the Secretary. 70 FR 36386 through 36387. Thus, consistent with section 931(b)(2) of MMA, Medicare appellants receive hearings before ALJs from an office that is organizationally and functionally separate from CMS.

Section 521 of BIPA amended section 1869 of the Act to substantially revise the Medicare claim appeals process. The statute mandated a series of structural and procedural changes to the existing appeals process, which necessitated the publication of new regulations to implement the statutory changes. Since CMS administers the Medicare program, and is responsible for safeguarding the interests of Medicare beneficiaries, it was the agency's responsibility to issue regulations implementing the BIPA provisions that revised the Medicare claims appeals process. These regulations were first published by CMS in the **Federal Register** as a proposed rule on November 15, 2002. CMS subsequently published an interim final rule with comment period on March 8, 2005, which included responses to the comments submitted on the proposed rule. The MMA mandated that the transfer of ALJ appeals from SSA to DHHS was not to begin earlier than July 1, 2005. Consequently, the proposed and interim final regulations were drafted and issued at a time when OMHA was not in existence. We note that the Medicare Appeals Council has been involved in developing relevant provisions of the proposed rule, interim final rule and this final rule, and OMHA has been involved in developing responses to comments and revisions to relevant regulatory provisions included in this final rule.

Finally, as noted above, the June 23, 2005 Office of Medicare Hearings and Appeals; Statement of Organization, Functions, and Delegations of Authority established OMHA as a part of the Office of the Secretary completely separate from CMS. *See* 70 FR 36386 through 36387. Pursuant to this Statement, OMHA is under the direction of the Chief Administrative Law Judge who reports directly to the Secretary. The Statement further describes the mission, organization and functions of OMHA. We do not believe that additional formalized procedures in the form of promulgated rules on how OMHA functions are necessary to ensure ALJ independence.

Comment: One commenter inquired about the possibility of establishing a complaint mechanism for appellants who feel the ALJ has failed to maintain his/her impartiality.

Response: Section 405.1026(a) establishes that "[a]n ALJ cannot conduct a hearing if he or she is prejudiced or partial to any party or has any interest in the matter pending for decision." Under § 405.1026(b), "[i]f a party objects to the ALJ who will conduct the hearing, the party must notify the ALJ within 10 calendar days of the date of the notice of hearing. The ALJ considers the party's objections and decides whether to proceed with the hearing or withdraw." Section 405.1026(c) provides that "[i]f the ALJ does not withdraw, the party may, after the ALJ has issued an action in the case, present his or her objections to the MAC in accordance with § 405.1100 *et seq.*" Section 405.1026(c) further provides that "[i]f the case is escalated to the MAC after a hearing is held but before the ALJ issues a decision, the MAC considers the reasons the party objected to the ALJ during its review of the case and, if the MAC deems it necessary, may remand the case to another ALJ for a hearing and decision." We believe that the provisions set forth in § 405.1026 provide sufficient procedures by which a party can object to the presiding ALJ for their hearing. Given these safeguards, we believe that the regulation as written sufficiently addresses the commenter's concerns.

Accordingly, we are finalizing § 405.1026 without modification.

g. Review of Evidence Submitted to the ALJ, Hearing Procedures, and Issues Before an ALJ (§ 405.1028 Through § 405.1032)

In § 405.1028, we explain the process for prehearing review of evidence submitted to the ALJ, including the procedures an ALJ follows in determining whether good cause exists to allow the submission of new evidence at the ALJ hearing by a provider, supplier or beneficiary represented by a provider or supplier, and the effect of a finding that good cause does not exist. In § 405.1030, we establish general procedures for ALJ hearings, including the procedures that apply when an ALJ determines that there is material evidence missing at the hearing. In section 405.1032, we discuss the types of issues that an ALJ may consider at a hearing, the conditions under which an ALJ may consider new issues at the hearing, and the restrictions imposed on adding new claims to pending appeals.

Comment: One commenter stated that § 405.1032 appears to allow an ALJ to consider new issues at the hearing that result from the participation by CMS or its contractors. The commenter indicated that this should not be allowed to occur if the matter could not have been reopened under the reopening provisions of § 405.980. The commenter recommended that § 405.1032 be amended to specify that no new issue should be addressed by the ALJ unless the standards for reopening are met.

Response: As noted in § 405.1032(a), ALJs consider the issues raised during previous levels of appeal not decided entirely in a party's favor (although, if evidence presented before the hearing causes the ALJ to question a favorable portion of the determination, the ALJ notifies the parties before the hearing and may consider it an issue at the hearing). However, there may be instances where the evidence presented to the ALJ brings to light a new issue. Accordingly, under § 405.1032(b), we allow an ALJ to consider new issues at the hearing, subject to the limitations described in § 405.1032(b)(1)(i) and (ii).

In the interest of the efficient resolution of claims appeals, we have developed procedures that foster the early resolution of disputes over claim determinations. With the requirement for the full and early presentation of evidence described above, as well as other provisions, we are attempting to avoid a prolonged and costly appeals process. Thus, we expect under the framework established in subpart I, that parties will raise issues as soon as practicable. It is neither efficient nor effective for parties to wait until the ALJ hearing to raise issues if those issues could have been brought to light and potentially resolved at previous levels. Therefore, in § 405.1032, we placed restrictions on the ability of a party to raise a new issue at the ALJ level. We believe that the restrictions currently set forth in § 405.1032(b) strike a reasonable balance between the need for efficient resolution of claims appeals and the need to consider new issues in certain circumstances.

We agree with the commenter's general description of the provisions of § 405.1032(b). Under § 405.1032(b)(1), an ALJ may raise and consider a new issue at the hearing when the conditions set forth in § 405.1032(b) are met. Like

any other party, when CMS and its contractors elect to be a party to an ALJ hearing under § 405.1012, CMS and its contractors have the right to raise new issues, but the conditions established in § 405.1032(b) must be satisfied before the ALJ may consider a new issue at the hearing. Section 405.1032(b) requires an ALJ to notify all of the parties about the new issue prior to the start of the hearing, and states that an ALJ may only consider a new issue at the hearing if its resolution could have a material impact on the claim(s) that are the subject of the request for hearing, and its resolution is permissible under the rules governing reopening of determinations and decisions. When electing to be a participant under § 405.1010, CMS and its contractors do not have the right to raise new issues at the ALJ level under § 405.1032. Rather, as a participant under § 405.1010, CMS or its contractor may provide evidence to the ALJ, and an ALJ may, in response, raise and consider a new issue at the hearing based on such evidence, consistent with § 405.1032(b)(1).

We believe the regulation is sufficiently clear in explaining that when an ALJ or a party, including CMS or its contractor when it elects party status, raises a new issue, the conditions set forth in § 405.1032(b) must be satisfied in order to have that new issue considered at the hearing. As discussed above, § 405.1032(b) requires, in pertinent part, that if a new issue is to be considered at the hearing, its resolution must be permissible under the rules governing the reopening of determinations and decisions. Thus, we do not believe it is necessary to amend § 405.1032, since we believe the regulation is already consistent with the commenter's suggested amendment regarding the conditions under which an ALJ may consider new issues.

Accordingly, we are finalizing §§ 405.1030 and 405.1032 without modification. We are finalizing § 405.1028 with modification as discussed in section II.B.5.a. of this preamble.

h. Remand Authority (§ 405.1034)

Section 405.1034 discusses when the ALJ can remand a case to the QIC. Section 405.1034(a) of the interim final rule states that in cases where the ALJ believes that the written record is missing information essential to resolving the issues on appeal, and such information can be provided only by CMS or its contractors, ALJs may either remand the case to the QIC that issued the reconsideration, or retain jurisdiction and request that the contractor forward the missing information to the appropriate hearing office.

It has come to our attention that there has been much confusion regarding what we meant by the phrase set forth in § 405.1034(a), "can be provided only by CMS or its contractors." Thus, we are revising § 405.1034 to clarify that the phrase "can be provided only by CMS or its contractors" means the information is not publicly available, and is not in the possession of, and cannot be requested and obtained by any of the parties to the appeal. "Publicly available" means the information is available to the general public via the Internet, or in a printed publication. For example, information available on a CMS or contractor Web site or included in an official CMS or DHHS publication is publicly available information (for example, provisions of NCDs or LCDs, procedure code or modifier descriptions, fee schedule data, and contractor operating manual instructions). Similarly, medical records and certificates of medical necessity are examples of information that is in the possession of, or could be requested and obtained by, one or more parties to the appeal, even though CMS or its contractors may also possess or be able to request such information.

Furthermore, we are revising § 405.1034(a) to clarify that if the missing information is not information that can be provided only by CMS or its contractors, as clarified above, the ALJ must retain jurisdiction of the case and obtain the missing information on his or her own, or directly from one of the parties. We note that § 405.1028 allows an ALJ, for good cause, to admit new evidence submitted by a provider, supplier, or a beneficiary represented by a provider or supplier. If there is missing information related to this new evidence that is in the possession of, or could be requested and obtained by the provider, supplier or beneficiary represented by a provider or supplier, a remand pursuant to § 405.1034(a) to obtain this missing information would be inappropriate because such information is not information that can be provided only by CMS or its contractors.

Similarly, if information missing from the administrative record relates to a new issue raised for the first time at the ALJ level by the ALJ or a party under § 405.1032(b), the ALJ determines whether the missing information related to the new issue can be provided only by CMS or its contractors, consistent with § 405.1034(a), in determining whether remanding to the QIC or retaining jurisdiction of the case is appropriate.

Accordingly, we are finalizing § 405.1034 with modifications as noted.

i. Description of the ALJ Hearing Process and Discovery (§ 405.1036 and § 405.1037)

Section 405.1036 provides details regarding the ALJ hearing process, including the procedures for the issuance of subpoenas by ALJs. In § 405.1037, we describe the discovery process available at an ALJ hearing when CMS or its contractor elects to participate in the hearing as a party. We received several comments regarding the subpoena and discovery provisions. A summary of the comments and our responses are included below. Detailed discussion of these provisions is included in the interim final rule at 70 FR 11461 through 11462.

Comment: We received several comments concerning subpoena requests at the ALJ level of appeal. The commenters expressed concern that a party may only seek ALJ issuance of a subpoena after all of the steps outlined in § 405.1036(f)(4) regarding discovery have been taken, but the subpoena must be requested within 10 calendar days of the receipt of the notice of hearing. *See* § 405.1036(f)(3). The commenters recommended that the provision be amended to state that the request for subpoena may be filed at any time before the ALJ issues a decision. One commenter suggested that alternatively, a party making a subpoena request should be allowed a "reasonable" amount of time to file the request for a subpoena, after the party has exhausted all other required efforts to obtain the records.

Response: We acknowledge that the rule requiring parties to submit subpoena requests within 10 calendar days of receipt of the notice of hearing as set forth in § 405.1036(f)(3) may be difficult to comply with given the requirements for the issuance of subpoenas described in § 405.1036(f)(4). We considered the commenters' suggestions to allow for the submission of subpoena requests anytime prior to the issuance of the ALJ decision, or alternatively, within a reasonable time after exhausting required efforts to obtain the requested information. However, we believe allowing subpoena requests to be submitted at anytime prior to the decision may negatively impact the ability of ALJs to issue hearing decisions within the applicable adjudication timeframes once discovery is complete. Although we agree that it would be appropriate to allow parties a reasonable time to submit subpoena requests after exhausting all other efforts to obtain the necessary records, we must

also consider the need to avoid unnecessary delays in the hearing process and the need to define the timeframe during which discovery will be completed. During the discovery process, parties to the hearing will become aware of any failure to comply with an ALJ's order compelling disclosure. Since a party's request for a subpoena must follow non-compliance with an order to compel disclosure, we believe it is reasonable to require parties to submit a request for subpoena prior to the end of the discovery period established by the ALJ in accordance with § 405.1037(c). Thus, we are amending § 405.1036(f)(3) accordingly. Should an ALJ determine that additional time is necessary in order to issue the subpoena and obtain the information requested or secure an appearance and/or testimony, the ALJ may extend the discovery period in accordance with § 405.1037(c)(4).

Comment: We received two comments concerning the discovery provisions. Both commenters objected to the policy making discovery available only when CMS participates in the hearing as a party. *See* § 405.1037(a). One commenter suggested that any documents relied upon by the contractors in making previous decisions should be discoverable. Another commenter stated that the use of admissions and interrogatories should be allowable under § 405.1037 consistent with the standards applicable to the use of depositions.

Response: Neither BIPA nor the MMA explicitly provides for discovery during ALJ proceedings, and given the evidence requirements and timeframes imposed by BIPA and the MMA, we do not believe that a full discovery process is necessary or even feasible at the ALJ level. Nevertheless, we decided, in response to comments received on the proposed rule, to permit limited discovery in § 405.1037 when CMS or its contractors become a party at the ALJ hearing level. *See* 70 FR 11461 through 11462. We continue to believe it is appropriate to allow only limited discovery in this instance, and that such discovery enhances the fairness of proceedings and the accuracy of decisions. We also believe that, in general, most information relevant to the issues before an ALJ, including documents relied upon by contractors in making their decisions, is obtainable by direct request of a party or the ALJ, or is already included in the administrative record. With respect to our prohibition on the use of interrogatories and admissions, we believe such discovery practices are unnecessary because the factual information typically obtained through the use of admissions and interrogatories is often already included in the administrative record, can be established during a pre-hearing conference under § 405.1040, or can be developed at the hearing. In addition, if an ALJ determines evidence is missing from the record, the ALJ may follow the procedures set forth in § 405.1030(c) to obtain such evidence. Thus, we do not believe it is necessary to include more expansive discovery provisions in the final rule.

Finally, we have determined that it is necessary to make technical revisions to § 405.1036(f) in order to clarify our policies, as discussed below. Section 405.1036(f)(1) authorizes, when it is reasonably necessary for the full presentation of the case, an ALJ to issue subpoenas, on his or her own initiative or at the request of a party, for the appearance and testimony of witnesses, and for a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying.

It has come to our attention that there has been some confusion regarding the participation regulations at § 405.1010 and § 405.1012 and the use of subpoenas under § 405.1036(f). As discussed above, an ALJ may not require CMS or its contractors to participate in a hearing either as a participant or as a party, and may not draw an adverse inference if CMS or its contractors decide not to participate or be a party in a proceeding before the ALJ. *See* §§ 405.1010(a) and (f) and 405.1012(d). Under these regulations, CMS and its contractors have discretion to determine whether to participate in ALJ proceedings, and to determine the manner and extent of their participation. We are clarifying in this final rule that § 405.1036(f) is not intended to permit the use of subpoenas to circumvent or limit the discretion provided to CMS and its contractors regarding participation in ALJ hearings. Thus, we are amending § 405.1036(f)(1) to clarify that an ALJ may not, on his or her own initiative or at the request of a party, issue a subpoena to CMS or its contractors to compel an appearance, testimony or the production of evidence in the context of a Medicare claim appeal under this subpart.

For similar reasons, we are also amending § 405.1122(d)(1) to clarify that the MAC may not issue subpoenas to CMS or its contractors, on its own initiative or at the request of a party, to compel the production of evidence. Similar to the policies and procedures applicable to ALJ proceedings, CMS and its contractors have discretion to determine whether to participate, and to determine the manner and extent of their participation, in a MAC review. Specifically, in § 405.1124(d) regarding oral argument, the MAC may request, but not require, CMS or its contractor to appear before it if the MAC determines that it may be helpful in resolving issues in a case. In addition, § 405.1124(e) states that the MAC may not draw any inference if CMS or its contractor decides not to participate in an oral argument. Furthermore, under § 405.1110, CMS or its contractors may refer a case to the MAC for review under the MAC's own motion authority. Thus, we are clarifying that § 405.1122(d) is not intended to permit the use of subpoenas to circumvent or limit the discretion provided to CMS and its contractors regarding participation in a MAC review. Finally, we note that the policy prohibiting the issuance of subpoenas to CMS by ALJs and the MAC as described above, is also supported by the long-settled doctrine of sovereign immunity.

Accordingly, we are finalizing §§ 405.1036 and 405.1122 with modifications as noted above. We are finalizing §§ 405.1036 and 405.1037 with modification as noted in section II.B.5.a. of this preamble.

j. Deciding a Case Without an ALJ Hearing, Conferences, the Administrative Record, and Consolidated Hearings (§ 405.1038 Through § 405.1044)

In §§ 405.1038 through 405.1044, we describe various procedures established for the conduct of ALJ hearings. In § 405.1038, we outline the circumstances in which an ALJ may issue a decision without holding a hearing. In § 405.1040, we describe the process for holding prehearing and posthearing conferences. In § 405.1042, we explain the requirements applicable to the creation of the administrative record of the ALJ proceedings, and for requesting and receiving copies of the administrative record. In § 405.1044, we describe the requirements applicable to holding a consolidated hearing before the ALJ. Additional discussion is included in the interim final rule at 70 FR 11464 through 11465.

We received no comments on these sections. However, in § 405.1038(b)(1)(i) we made a technical correction, changing the term "videoconferencing" to "videoteleconferencing", consistent with the use of the term throughout this regulation.

Accordingly, we are finalizing § 405.1040 without modification. We are finalizing § 405.1038 with the

modification noted above. We are finalizing §§ 405.1042 and 405.1044 with modification as discussed in section II.B.5.a. of this preamble.

k. Notice and Effect of ALJ's Decision (§ 405.1046 Through § 405.1048)

Section 405.1046 sets forth general rules regarding the notice of an ALJ's decision and describes certain limitations on an ALJ's decision, and § 405.1048 explains the effect of an ALJ decision on all parties to the hearing. We received one comment on the effect of an ALJ decision. A summary of the comment and our response are included below. Additional detailed discussion is included in the interim final rule at 70 FR 11466 through 11467.

Comment: We received a comment concerning the effect of an ALJ decision. The commenter urged CMS to state in the regulations that ALJ decisions are entitled to substantial deference by other adjudicators in the appeals process. The commenter believed that cases that have made it to the ALJ level are more likely to be cases concerning issues most important to beneficiaries and providers and, since the ALJ has fully considered such issues, other levels of appeal should benefit from these prior decisions and accord them substantial deference, similar to that which a district court would accord to a decision by another district court within the same circuit.

Response: We disagree with the commenter's recommendation, and note that, in some instances, it would be inappropriate to require other adjudicators to afford substantial deference to ALJ decisions. For example, the MAC is responsible for reviewing certain ALJ decisions and issuing final decisions on those appeals for the DHHS. Section 521 of BIPA added 1869(d)(2)(B) of the Social Security Act to mandate that in reviewing an ALJ decision, the MAC shall review the case *de novo*. *See* § 405.1100(c), § 405.1108(a). This is an expansion of the scope of review the MAC previously exercised in pre-BIPA appeals. Granting ALJ decisions substantial deference would be inconsistent with the DAB's expanded review authority provided by Congress.

In addition, the coverage and liability determinations made on claims submitted for treatment are largely unique to the specific facts and circumstances of a given case. Thus, it would prove extremely difficult to identify a set of decisions that could be appropriately afforded deference.

Finally, we note that section 931 of the MMA instructed DHHS to assess the feasibility of developing a process to give decisions of the DAB addressing broad legal issues, binding and precedential authority. After thorough consideration, DHHS determined that it is neither feasible, nor appropriate at this time to confer binding, precedential authority upon decisions of the MAC. Because MAC decisions are not given precedential weight, it would be impractical and illogical to afford any form of deference to ALJ decisions. Therefore, we do not believe it is appropriate to adopt the commenter's suggestion to require other adjudicators in the Medicare administrative appeals process to afford substantial deference to ALJ decisions.

We are finalizing §§ 405.1046 and 405.1048 with modification as discussed in section II.B.5.b. of this preamble. Additionally, we are finalizing § 405.1046 with modification as discussed in section II.B.5.a. of this preamble.

l. Removal of a Hearing Request From the ALJ to the MAC, Dismissal of a Request for ALJ Hearing, and the Effect of a Dismissal (§ 405.1050 Through § 405.1054)

In § 405.1050, we explain the process for the MAC to assume responsibility for holding a hearing if a request for hearing is pending before an ALJ. In § 405.1052, we explain the bases under which an ALJ dismisses a request for hearing, and, in § 405.1054, we explain the effect of a dismissal of a request for ALJ hearing. Additional discussion is included in the interim final rule at 70 FR 11465 through 11466. We received no comments on these provisions.

We are finalizing §§ 405.1050 and 405.1054 without modification. We are finalizing § 405.1052 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble.

m. Applicability of Statutes, Regulations, Medicare Coverage Policies, CMS Rulings and Other Program Guidance (§ 405.1060 Through § 405.1063)

In § 405.1060, we explain the applicability of national coverage determinations (NCDs) to decisions made by fiscal intermediaries, carriers, QIOs, QICs, ALJs, and the MAC. In § 405.1062, we provide that ALJs and the MAC must afford LCDs, LMRPs and CMS program guidance (including program memoranda and manual instructions) substantial deference if they are applicable to a particular case. In § 401.108(c) and § 405.1063, we explain that CMS rulings are binding on all CMS components, on all DHHS components that adjudicate matters under the jurisdiction of CMS, and on the Social Security Administration to the extent that components of the Social Security Administration adjudicate matters under the jurisdiction of CMS.

We received several comments with respect to the requirement that ALJs and the MAC afford Medicare local coverage determinations and program guidance substantial deference. A summary of the comments, and our response to those comments are included below. Additional discussion is included in the interim final rule at 70 FR 11457 through 11458.

Comment: We received several comments concerning the provisions requiring ALJs and the MAC to give substantial deference to Medicare LCDs, LMRPs and CMS program guidance, if the pertinent policy or guidance is applicable to the specific case (§ 405.1062). Most of these commenters objected to the substantial deference provisions. Some commenters objected to the presumption of validity attributed to policies and guidance under this provision, and believed it would lead to adjudicators "rubber-stamping" the previous appeal decision, while another commenter noted that ALJs and the MAC currently decide whether informal policies are entitled to deference based on Supreme Court precedents.

Response: As noted above and further discussed below, ALJs and the MAC are bound by the Medicare statute, CMS regulations, CMS Rulings, and NCDs. *See* sections 405.1060, 405.1063, 401.108; in addition *see* our discussion at 70 FR 11457 through 11458. In § 405.1062, we explain the degree to which ALJs and the MAC must defer to non-binding CMS program guidance (such as manual instructions and program memoranda), LMRPs and LCDs. ALJs and the MAC consider whether guidance documents, LMRPs and LCDs should apply to a specific claim for benefits. If it is determined that the policy is applicable in the instant case, then the adjudicator must grant substantial deference to the policy. However, if the adjudicator declines to follow a policy in a particular case, the adjudicator must explain why the policy was not followed. The decision to disregard a policy in a specific case does not have precedential effect. *See* § 405.1062(a) and (b). Thus, ALJs will continue their traditional role as independent evaluators of the facts presented in specific, individual cases. Requiring an ALJ to consider CMS policy and give substantial deference to it, if applicable to a particular case, does not alter the ALJ's role as an independent fact finder. *See* 70 FR

11458. Thus we do not believe this regulation will lead to adjudicators "rubber-stamping" the previous appeal decision.

In this final regulation, we are making a technical correction to § 405.1063. In § 405.1063, we did not include a provision that expressly stated our longstanding policy, as described in the interim final rule, regarding the applicability of the Medicare statute and CMS regulations to ALJs and the MAC. *See* 70 FR 11457. We are making this correction by adding paragraph (a) to § 405.1063 to specify that ALJs and the MAC are bound by all laws and regulations pertaining to the Medicare and Medicaid programs, including, but not limited to Titles XI, XVIII, and XIX of the Social Security Act and applicable implementing regulations.

Accordingly, we are finalizing § 405.1060 and § 405.1062 without modification. We are finalizing § 405.1063 with modifications as noted.

n. ALJ Decisions Involving Statistical Samples (§ 405.1064)

In § 405.1064, we explain that when an appeal from the QIC involves an overpayment, and the QIC relied on a statistical sample in reaching its decision, the ALJ must base his or her decision on a review of all claims in the sample. We received two comments regarding this provision. A summary of the comments, and our responses are provided below. Additional detailed discussion is included in the interim final rule at 70 FR 11466.

Comment: Two commenters expressed concern that the regulation does not address the authority of an ALJ to consider challenges to the sampling methodology when an overpayment assessment is estimated through extrapolation, and requested that we clarify our position on this issue in the regulation. One of these commenters also suggested that we include a provision requiring that appellants be given all documentation concerning the contractor's sampling process.

Response: Medicare's longstanding policy has been to allow appellants a full opportunity to challenge issues related to the calculation of overpayments estimated by extrapolation from a sample. We outlined in detail the basis for our authority to extrapolate overpayments in CMS (HCFA) Ruling 86–1, and since 1986, have included procedures for contractors in operating instructions. As explained in Ruling 86–1, we agree with the commenter's assertion that appellants may challenge, and an ALJ may review, the sampling methodology used to calculate the overpayment.

Sampling does not deprive a provider of its rights to challenge the sample, nor of its rights to procedural due process. Sampling only creates a presumption of validity as to the amount of an overpayment which may be used as the basis for recoupment. The burden then shifts to the appellant to take the next step. The appellant could attack the statistical validity of the sample, or it could challenge the correctness of the determination in specific cases identified by the sample (including waiver of liability [under section 1879 of the Act] where medical necessity or custodial care is at issue). In either case, the appellant is given a full opportunity to demonstrate that the overpayment is wrong. If certain individual cases within the sample are determined to be decided erroneously, the amount of overpayment projected to the universe of claims can be modified. If the statistical basis upon which the projection was based is successfully challenged, the overpayment determination can be corrected. (HCFAR 86–1–9, 10)

Adjudicators are bound by CMS rulings. Thus, we do not believe it is necessary to include further clarification in the regulation.

Furthermore, parties may request and receive the information contained in the case file. *See* § 405.1042 and § 405.1118. The case file should include all documentation regarding the sampling methodology used to calculate an overpayment. If such documentation is not in the administrative record, a party may request the pertinent documentation from the contractor or adjudicator. Thus, we believe that appellants already have adequate access to documentation concerning the contractor's sampling process, and that it is not necessary to include an additional provision in the final rule.

Accordingly, we are finalizing § 405.1064 without modification.

10. Review by the Medicare Appeals Council (§ 405.1100 Through § 405.1134)

Sections 405.1100 through 405.1134 set forth the procedures for MAC review of ALJ decisions and dismissals. We received comments with respect to the MAC's standard of review and submission of evidence during MAC review. A brief description of the pertinent regulatory provisions, a summary of the comments, and our responses to the comments follow below. Additional discussion regarding MAC review is included in the interim final rule at 70 FR 11454 through 11456, 11459 through 11464, and 11466 through 11467.

a. MAC Review of an ALJ's Action (§ 405.1100 Through § 405.1120)

Section 405.1100 states that the MAC undertakes a *de novo* review of an ALJ decision, and provides a general description of the MAC review process. Section 405.1102 describes the process for requesting MAC review of an ALJ decision or dismissal. Section 405.1104 describes an appellant's right to request escalation of a case from the ALJ level to the MAC. In § 405.1106, we specify the locations where parties must file requests for MAC review or escalation. Section 405.1108 sets forth the actions a MAC may take upon receipt of a request for review or escalation. Section 405.1110 describes the MAC's authority to review ALJ decisions or dismissals on its own motion. Section 405.1112 sets forth the content requirements for requests for MAC review. Section 405.1114 describes the circumstances in which the MAC dismisses a request for review, and § 405.1116 describes the effect of a dismissal by the MAC. Section 405.1118 explains the process by which a party may request a copy of the administrative record developed at the ALJ hearing and an opportunity to comment on the evidence. Section 405.1120 discusses filing briefs with the MAC.

Comment: Two of the comments we received expressed concern about the standard of review at the MAC level. One commenter suggested modifying § 405.1100 to provide for a "substantial evidence" standard of review as is applicable in judicial review, or alternatively, a "preponderance of evidence" standard. However, both commenters stated that although § 405.1100 provides for the MAC to undertake *de novo* review of an ALJ decision, the MAC's rules limit the opportunity for face-to-face hearings and restrict a party's right to submit evidence. The commenters indicated that these restrictions do not constitute a *de novo* review.

Response: The *de novo* standard of review that is applicable at the MAC level is statutorily required by section 1869(d)(2)(B) of the Act, as added by BIPA. Thus, the MAC may not review ALJ decisions under a substantial evidence standard as it had under previous rules, nor may it utilize a preponderance of evidence standard to adjudicate appeals. Similarly, the limitation on the submission of evidence set forth in § 405.1122 is required under section 1869(b)(3) of the Act. We note that this limitation restricts the scope of the MAC's review, not the applicable standard of review.

Finally, with respect to the commenter's concern about the limitations on face-to-face hearings, while most cases before the MAC are resolved without oral argument, under § 405.1124, parties may request to

appear before the MAC to present oral argument, or the MAC may determine on its own that oral argument is necessary to decide the issues in the case. The fact that the MAC may not grant a party's request to permit oral argument in a case does not alter the *de novo* standard of review by the MAC.

In this final rule, we are making certain technical revisions to § 405.1106 and § 405.1110, and a technical correction to § 405.1112(a). In § 405.1106(a), parties seeking MAC review of an ALJ hearing decision must send the request for review to the entity specified in the notice of the ALJ's decision, and send a copy of the request to the other parties to the ALJ decision or dismissal. Similarly, when CMS or its contractor refers a case to the MAC for the MAC to consider reviewing under its own motion review authority, in accordance with § 405.1110(b)(2), CMS sends a copy of the referral to the ALJ and to all the parties to the ALJ's action. Furthermore, in § 405.1110(b)(2), a party may file exceptions to CMS' referral to the MAC by submitting written comments to the MAC, to CMS and to all other parties to the ALJ's decision.

We would like to clarify that, for the purposes of MAC review, when an appellant is required to send a copy of the request for review to the "other parties to the ALJ decision or dismissal" under § 405.1106(a), this means the appellant must send a copy of the review request to the other parties to the ALJ decision or dismissal who received a notice of the ALJ's hearing decision under § 405.1046(a), or a notice of the ALJ's dismissal under § 405.1052(b). Similarly, if CMS refers a case to the MAC for the MAC to consider under its own motion review authority, when CMS sends a copy of the referral to "all parties to the ALJ's action" under § 405.1110(b)(2), this means CMS must send a copy of the referral to all parties to the ALJ's action who received a copy of the ALJ's hearing decision under § 405.1046(a) or a notice of the ALJ's dismissal under § 405.1052(b). Finally, when a party submits written comments regarding CMS' referral to the MAC to "all other parties to the ALJ's decision" under § 405.1110(b)(2), this means that the party must send a copy of such comments to all other parties to the ALJ's decision who received a copy of the hearing decision under § 405.1046(a) or a notice of the ALJ's dismissal under § 405.1052(b). We note that if the ALJ sends a copy of the ALJ hearing decision or dismissal to a person or entity that is not a party to the ALJ's decision or dismissal order (for example, a Medicare contractor who has not elected party status at the hearing under § 405.1012), the appellant is not required under § 405.1106(a) to send a copy of the request for MAC review to that person or entity because that person or entity is not a party. *See* § 405.906(b) and § 405.1008(b) for a description of the parties to an ALJ hearing. Pursuant to § 405.906, unless a beneficiary undertakes an assignment of appeal rights under § 405.912, the beneficiary is always considered a party to the ALJ hearing.

If the MAC determines that additional parties should receive a copy of the request for MAC review, the CMS referral to the MAC, or comments regarding CMS' referral to the MAC, the MAC may instruct the party or CMS, as appropriate, to send copies to such party or parties. We believe this will minimize any confusion regarding the parties an appellant or CMS must notify, and will ensure that those parties with an interest in the proceedings will be notified of the status of the appeal action.

We are also making a technical correction to § 405.1112(a) to replace a comma with a semi-colon following the phrase, "if any".

Accordingly, we are finalizing §§ 405.1108, 405.1114, 405.1116, and 405.1120 without modification. We are finalizing §§ 405.1102 and 405.1118 with modification as discussed in section II.B.5.a. of this preamble. We are finalizing §§ 405.1100, 405.1104, 405.1106, and 405.1110 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble. We are finalizing § 405.1112 with modification as discussed in section II.B.5.b. of this preamble. We are finalizing §§ 405.1106, 405.1110, and 405.1112 with additional modifications as noted above.

b. Evidence That May Be Submitted to the MAC and Subpoenas (§ 405.1122)

Section 405.1122 describes the evidence that may be submitted to and considered by the MAC, the process the MAC follows in issuing subpoenas, the reviewability of MAC subpoena rulings, and the process for seeking enforcement of subpoenas.

Comment: One commenter expressed concern about a party's ability to submit new evidence for MAC review. The commenter acknowledged the value of submitting evidence early in the appeals process. However, the commenter believed new evidence should be allowed at the MAC level if the evidence becomes pertinent following the ALJ's decision.

Response: As noted above, the limitation on submission of evidence is set forth at section 1869(b)(3) of the Act. However, we believe that there are certain circumstances in which submission of new evidence for MAC review may be appropriate. We have described these circumstances at § 405.1122. As explained in § 405.1122(a)(1), when the MAC undertakes review of an ALJ decision, the MAC reviews all of the evidence contained in the administrative record. However, as explained in § 405.1122(a)(1), if the hearing decision decides a new issue that the parties were not afforded an opportunity to address at the ALJ level, the MAC considers any evidence related to that issue if it is submitted with the request for review. In addition, as set forth in § 405.1122(a)(2), if the MAC determines that additional evidence is necessary to resolve the issues in the case, and the hearing record indicates that there were no attempts to obtain such evidence in the proceedings below, the MAC may remand the case to the ALJ to obtain the evidence and issue a new decision.

Consistent with § 405.1122(c), if a provider, supplier, or a beneficiary represented by a provider or supplier, submits new evidence related to issues previously considered by the QIC, the MAC determines whether the party had good cause for submitting the evidence for the first time at the MAC level. The MAC must exclude evidence from consideration if good cause for late filing is not established, and must notify all parties of the exclusion. However, the MAC may remand a case to an ALJ if the new evidence was previously submitted by a provider, supplier, or beneficiary represented by a provider or supplier at the ALJ level, and was excluded from consideration because the ALJ determined that good cause did not exist under § 405.1028, but the MAC determines that good cause for late filing existed under § 405.1028 and the ALJ should have reviewed the evidence. *See* § 405.1122(c)(3). As set forth in § 405.1122(c)(3)(iii), the MAC may also remand a case to an ALJ if the new evidence is submitted by a party that is not a provider, supplier, or beneficiary represented by a provider or supplier. Therefore, we believe the regulations provide an appropriate balance between the need for appellants to submit evidence when the evidence becomes pertinent following the ALJ decision, and the need for the full and early presentation of evidence as required by the statute.

Although we received no comments on § 405.1122(d) through (f), we have determined that it is necessary to make certain technical revisions to these subsections to clarify our policies.

Sections 405.1122(d) through (f) explain the procedures the MAC follows when issuing subpoenas, the review process with respect to MAC rulings on subpoena requests, and the enforcement procedures to be followed if the MAC determines that either a party or non-party has failed to comply with a subpoena. As explained above in section II.B.9.i. of this preamble, we are revising § 405.1122(d)(1) to clarify that the MAC may not issue subpoenas to CMS or its contractors, on its own initiative or at the request of a party, to compel the production of evidence.

In addition, we note that § 405.1122 contains several technical errors that were not corrected in our previous technical correction notice. First, we are correcting the numbering of § 405.1122(e). Second, we are revising paragraph (e)(2)(v) (renumbered in this final rule as paragraph (e)(6)) to replace the word "lifed" with the word "lifted." Third, in § 405.1122(f)(1), we are correcting the statutory reference to the process followed by the Secretary when seeking enforcement of a subpoena issued by the MAC; we incorrectly referenced section 205(c) of the Act and 42 U.S.C. 405(c) instead of section 205(e) of the Act and 42 U.S.C. 405(e).

Accordingly, we are finalizing § 405.1122 with modifications as noted and with modification as discussed in section II.B.5.a. of this preamble.

c. Oral Argument, Cases Remanded By the MAC, the Effect of MAC Actions, Escalation to Federal District Court, and Extensions of Time To File Actions in Federal District Court (§ 405.1124 Through § 405.1134)

In § 405.1124, we explain the circumstances in which the MAC may hear oral argument and the procedures that apply when the MAC hears oral argument. Section 405.1126 explains the MAC's remand authority and the procedures that apply when the MAC receives a recommended decision from the ALJ. Section 405.1128 describes the actions the MAC may take after reviewing the administrative record and any additional evidence (subject to the limitations on MAC consideration of additional evidence), and § 405.1130 describes the effect of the MAC's decision.

Section 405.1132 explains the process for an appellant to seek escalation of an appeal (other than an appeal of an ALJ dismissal) from the MAC to Federal district court if the MAC does not issue a decision or dismissal or remand the case to an ALJ within the adjudication period specified in § 405.1100, or as extended as provided in subpart I. Section 405.1134 explains how parties may request an extension of time to file an action in Federal district court.

We received no comments on these provisions. We are finalizing §§ 405.1128 and 405.1134 without modification. We are finalizing § 405.1124 with modification as discussed in section II.B.5.a. of this preamble. We are finalizing §§ 405.1126, 405.1130 and 405.1132 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble.

11. Judicial Review (§ 405.1136 Through § 405.1140)

Section 405.1136 sets forth the requirements and procedures for filing requests for judicial review of a MAC decision in Federal district court, specifies the Federal district court in which such actions must be filed, and describes the standard of review. Sections 405.1138 and 405.1140 set forth the procedures that apply to cases that are remanded by a Federal district court to the Secretary for further consideration. We received two comments on these provisions. A summary of these comments, and our responses are included below.

Comment: One commenter noted that, in § 405.1136(b), we state that a party to a MAC decision (or an appellant who requests escalation from the MAC to Federal court) must file a civil action in the district court of the United States for the judicial district in which the party resides or where such individual, institution, or agency has its primary place of business. The commenter believed that a party should be able to file a civil action in Washington, DC or the judicial district in which a regional office of DHHS exists.

Response: Section 1869(b)(1)(A) of the Act states that any individual dissatisfied with any initial determination shall be entitled to reconsideration of the determination, a hearing by the Secretary to the same extent as is provided in section 205(b) of the Act, and to judicial review of the Secretary's final decision after such hearing as provided in section 205(g) of the Act. Section 205(g) of the Act sets forth the filing requirements for judicial review. Our regulation restates these statutory requirements. We do not have the authority or discretion to alter the filing procedures established in Federal statute.

Comment: A commenter suggested that the standard of review established in § 405.1136(f) restricts Federal judges from applying the Administrative Procedure Act and evolving doctrines of judicial review of administrative decisions that govern other agencies.

Response: We appreciate the commenter's concerns regarding the standard of review applicable to judicial review of Medicare claim determinations. As discussed above, section 1869(b)(1)(A) of the Act provides for judicial review of the Secretary's final decision as provided in section 205(g) of the Act. Section 205(g) of the Act sets forth the standard of review that applies to actions in Federal district court, and our regulation implements these statutory requirements. We do not have the authority or discretion to alter the standard of review established in the statute.

Accordingly, we are finalizing § 405.1138 without modification. We are finalizing § 405.1136 with modification as discussed in section II.B.5.b. of this preamble and with modification as discussed in section II.B.5.a. of this preamble. We are finalizing § 405.1140 with modification as discussed in section II.B.5.a. of this preamble.

III. Provisions of the Final Regulations

In this final rule, we made the following changes to the interim final rule published on March 8, 2005:

- In section 405.902, we are adding a definition for the term contractor.
- In §§ 405.922, 405.942(a)(1), 405.942(b), 405.946(b), 405.950(b)(1), 405.950(b)(2), 405.950(b)(3), 405.962(a)(1), 405.962(a)(2), 405.962(b), 405.966(b), 405.966(c), 405.970(a)(2), 405.970(b)(1), 405.970(b)(2), 405.970(b)(3), 405.970(c), 405.970(e)(2), 405.974(b)(1), 405.974(b)(1)(i), 405.974(b)(1)(ii), 405.980(d)(1), 405.980(d)(2), 405.980(d)(3), 405.980(e)(1), 405.980(e)(2), 405.980(e)(3), 405.990(f)(2), 405.990(f)(4), 405.990(h)(2), 405.990(i)(2), 405.990(j)(1), 405.1002(a)(1), 405.1002(a)(3), 405.1002(a)(4), 405.1002(b)(2), 405.1004(a)(1), 405.1004(a)(3), 405.1004(a)(4), 405.1006(e)(1)(ii), 405.1010(b), 405.1012(b), 405.1014(b)(1), 405.1014(b)(2), 405.1016(a), 405.1016(c), 405.1018(a), 405.1018(b), 405.1020(g)(3)(ii), 405.1022(a), 405.1024(a), 405.1028(a), 405.1036(f)(5)(iv), 405.1037(c)(5), 405.1037(e)(2)(iii), 405.1042(b)(2), 405.1044(d), 405.1046(d), 405.1052(a)(2)(ii), 405.1052(a)(2)(iii), 405.1100(c), 405.1100(d), 405.1102(a)(1), 405.1102(a)(2), 405.1104(a)(2), 405.1106(b), 405.1110(a), 405.1110(b)(2), 405.1110(d), 405.1118, 405.1122(e)(4), 405.1124(b), 405.1126(d)(1), 405.1130, 405.1132(b), 405.1136(c)(3), 405.1136(d)(2),

405.1140(b)(1), 405.1140(c)(1), 405.1140(c)(4), 405.1140(d), we added the word "calendar" in front of the word "day" or "days" to clarify the timeframes referenced therein.

• In § 405.924, we removed paragraph (b)(7), because a determination regarding the number of home health visits used by a beneficiary is no longer considered an initial determination. We are renumbering the remaining paragraphs accordingly.

• In sections 405.952(e), 405.958, 405.972(e), 405.974(b)(3), 405.978, 405.980(a)(1), 405.980(a)(5), 405.1004(c), and 405.1052(a)(6), we made technical corrections by removing the term "final" or "final and binding" and replacing it with "binding" to clarify that the actions taken by an adjudicator described in the above sections are not considered final decisions of the Secretary for the purposes of exhausting administrative remedies when seeking judicial review in Federal court.

• In § 405.962(a) and § 405.972(b)(3), we made a technical correction by adding a reference to § 405.974(b)(1), which, as amended in this final rule, provides for a 60 calendar day filing timeframe to request a reconsideration of a contractor's redetermination dismissal action, as an exception to the 180 calendar day timeframe for filing a request for reconsideration of a contractor's redetermination decision.

• In § 405.972(e), we added a provision to clarify that a QIC's dismissal of a request for reconsideration of a contractor's dismissal action is binding and not subject to further review.

• In § 405.980(b), we made technical corrections by (1) replacing the word "its" with the word "an", and (2) removing the words "and revise" from the introductory sentence, so the sentence will now read: "A contractor may reopen an initial determination or redetermination on its own motion— * * *". We are replacing the word "its" with "an" to more clearly convey our longstanding policy to permit certain contractors, other than those who issue initial determinations, to reopen initial determinations when appropriate. In addition, removing the words "and revise" reflects our longstanding policy that the timeframes for reopening a determination or decision are measured by the date of the reopening not the date of the revision of the determination or decision.

• In § 405.990(b)(1)(i)(A), we made a technical correction to replace the phrase "final decision" with "decision, dismissal order, or remand order" to specify the types of actions that, if taken by an ALJ, preclude a request for EAJR and to be consistent with our clarification regarding the term "final".

• In § 405.990(b)(1)(i)(B), we made a technical correction by adding the phrase ", dismissal order, or remand order" after "final decision" to specify the types of actions that, if taken by the MAC, preclude a request for EAJR and to be consistent with our clarification regarding the term "final."

• In § 405.990(b)(1)(ii), we made a technical correction by replacing the phrase "final action" with "decision or dismissal order" in order to clarify the nature of the QIC's action and to be consistent with our clarification regarding the term "final."

• In § 405.990(f)(3), we made a technical correction by removing the words "final and" to state that the decision of the review entity to certify or deny a request for EAJR is not subject to further review.

• In § 405.1000(c), we removed the phrase ", including the QIC, QIO, fiscal intermediary or carrier" consistent with our revision to § 405.902 in which we define the term contractor.

• In § 405.1000(d), we made a technical revision to clarify that the ALJ conducts a *de novo* review.

• In § 405.1002(b)(2), we made a technical correction by replacing the words "final action" with "decision or dismissal order" in order to state the nature of the QIC's action and to be consistent with our clarification regarding the term "final."

• In § 405.1004(c), we made a technical correction to clarify that an ALJ's dismissal of a request for review of a QIC's dismissal action is binding and not subject to further review unless vacated by the MAC under § 405.1108(b).

• In § 405.1010(a) and § 405.1012(a), we made technical corrections by removing the phrase ", including a QIC" consistent with our revision to § 405.902 in which we define the term contractor.

• In § 405.1020(c)(1), we removed the reference to, "the contractor that issued the initial determination" in specifying which entities are to receive notice of the ALJ hearing.

• We revised § 405.1020(i)(4) to state that when a party's request for an in-person hearing under § 405.1020(i)(1) is granted, the ALJ must issue a decision within the adjudication timeframe specified in § 405.1016 (including any applicable extensions provided in this subpart) unless the party requesting the hearing agrees to waive such adjudication timeframe in writing.

• In § 405.1022(a), we made a technical revision to clarify that when a party waives its right to receive the notice of hearing, the ALJ must still send the notice of hearing to all other parties and potential participants who have not waived their right to receive the notice of hearing, consistent with § 405.1020(c).

• In § 405.1034(a), we made several clarifications to the provisions allowing an ALJ to remand a case to the QIC. We explain that the phrase "can be provided only by CMS or its contractors" means the information is not publicly available and is not in the possession of and cannot be requested and obtained by any of the parties to the appeal. We explain that the term "publicly available" refers to information that is available to the general public via the Internet, or in a printed publication. We clarify that if the missing information is not information that can be provided only by CMS or its contractors (as that phrase is clarified above), the ALJ must retain jurisdiction of the case and obtain the missing information on his or her own, or directly from one of the parties.

• In § 405.1036(f)(1), we clarified that an ALJ may not issue subpoenas to CMS or its contractors, to compel an appearance, testimony or the production of evidence.

• In § 405.1036(f)(3), we revised the time period for submitting requests for subpoenas to an ALJ, and now require parties to submit a request for a subpoena no later than the end of the discovery period established by the ALJ under § 405.1037(c).

• In § 405.1038(b)(1)(i), we changed the term "videoconferencing" to "videoteleconferencing" consistent with the use of the term throughout this regulation.

• In § 405.1046(c), we made a technical correction by replacing the term "final" with "binding on the contractor" consistent with our clarification regarding the term "final."

• In § 405.1048(a), we made a technical correction by replacing the phrase "either issues a final action" with "issues a final decision or remand order" to clarify the types of actions issued by the MAC that cause an ALJ decision to not become binding, and to be consistent with our clarification regarding the term "final."

• Added § 405.1063(a) to clarify the additional authorities that are binding on ALJs and the MAC. The original paragraph in § 405.1063 is reassigned to subsection (b).

• In § 405.1100(c) and § 405.1100(d), we made technical corrections by replacing the phrase "final action" with "final decision or dismissal order" to specify the actions taken by the MAC

and to be consistent with our clarification regarding the term "final."

- In § 405.1104(a)(2) we made a technical correction by replacing the phrase "final action or remand the case to the QIC" with "decision, dismissal order, or remand order" to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1104(b)(1), we made a technical correction by replacing the phrase "final action or remand" with "decision, dismissal order, or remand order" to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1104(b)(2), we made a technical correction by replacing the phrase "final action or remand order" with "decision, dismissal order, or remand order" to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1104(b)(3), we made a technical correction by replacing the phrase "a final administrative decision for purposes of MAC review" with the phrase "the decision that is subject to MAC review consistent with § 405.1102(a)" in order to clarify the effect of the QIC decision and to be consistent with our clarification regarding the term "final."
- In § 405.1104(c), we made a technical correction by replacing the phrase "final action" with the phrase "decision, dismissal order, or remand order" in order to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1106(a), we clarified the meaning of the phrase "other parties to the ALJ decision or dismissal."
- In § 405.1106(b), we made a technical correction by replacing the phrase "final action or remand the case to the ALJ" with the phrase "final decision, dismissal order, or remand order" in order to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1110(b)(2), we clarified the meaning of the phrases "all parties to the ALJ's action" and "all other parties to the ALJ's decision."
- In § 405.1110(d), we made a technical correction by replacing the phrase "remains the final action in the case" with the phrase "is binding on the parties to the ALJ decision" consistent with our clarification regarding the term "final."
- In § 405.1112(a), we made a technical correction by replacing the phrase "final action" with the phrase "decision or dismissal order" in order to specify the actions taken by the ALJ and to be consistent with our clarification regarding the term "final". We also made a technical correction by replacing a comma with a semi-colon following the phrase "if any."
- In § 405.1122(d)(1), we clarified that the MAC may not issue subpoenas to CMS or its contractors to compel the production of evidence.
- We made a technical correction in paragraph § 405.1122(e)(2)(v), correcting the word "lifed" to read "lifted."
- We renumbered the paragraphs in § 405.1122(e).
- In § 405.1122(f)(1), we corrected the reference to the Social Security Act regarding the Secretary's authority to seek enforcement of subpoenas from "section 205(c) of the Act, 42 U.S.C. 405(c)" to "section 205(e) of the Act, 42 U.S.C. 405(e)."
- In § 405.1126(a), we made a technical correction by removing the word "final" consistent with our clarification regarding the term "final."
- In § 405.1130, we made a technical correction by adding the words "final and" before the word "binding" consistent with our clarification regarding the term "final."
- In § 405.1132(b), we made a technical correction by replacing the phrase "final action or remand" with "final decision, dismissal order, or remand order" to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final."
- In § 405.1136(a)(2), we made a technical correction by replacing the phrase "final action" with "final decision, dismissal order, or remand order" to specify the actions taken by the MAC and to be consistent with our clarification regarding the term "final.kathe"

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 30 day notice in the **Federal Register** and solicit public comment when a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comments on each of these issues for the information collection requirements discussed below.

The PRA exempts most of the information collection activities referenced in this interim final rule. In particular, 5 CFR § 1320.4 excludes collection activities during the conduct of administrative actions such as redeterminations, reconsiderations, and/or appeals. Specifically, these actions are taken after the initial determination or a denial of payment. There is, however, one requirement contained in this rule that is subject to the PRA because the burden is imposed prior to an administrative action or denial of payment. This requirement is discussed below.

Appointed Representatives (§ 405.910)

In summary, § 405.910 states that an individual or entity may appoint a representative to act on their behalf in exercising their right to receive an initial determination on a request for payment, or to pursue an appeal of an initial determination. This appointment of representation must be in writing and must include all of the required elements specified in this section.

The burden associated with this requirement is the time and effort of the individual or entity to prepare an appointment of representation containing all of the required information of this section. In an effort to reduce some of the burden associated with this requirement, we have developed a standardized form that the individual/entity may use. This optional standardized form is currently approved under OMB# 0938–0950.

We estimate that approximately 13,413 individuals and entities will elect to appoint a representative to act on their behalf each year. Because we have developed the optional standardized form, we estimate that it should only take approximately 15 minutes to supply the required information to comply with the requirements of this section. Therefore, we estimate the total burden to be 3,353 hours on an annual basis.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this final rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer, CMS 4064–F; *Fax:* (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

V. Regulatory Impact Statement

We have examined the impact of this final rule under the criteria of Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended by Executive Orders 13258 and 13422 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As detailed above, this final rule makes only minimal changes to the existing Medicare claims appeals procedures. Thus, this rule will have negligible financial impact on beneficiaries, providers or suppliers.

Therefore, this does not constitute a major rule and, consistent with Executive Order 12866, we are not preparing an RIA.

The RFA requires agencies, in issuing certain rules, to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. For purposes of the RFA, all providers and suppliers affected by this regulation are considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a RIA for a rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. As noted above, this final rule makes only minimal changes to the existing appeals procedures and thus, does not have a significant impact on small entities or the operations of a substantial number of small rural hospitals. Therefore, we are not preparing analyses for either the RFA or section 1102(b) of the Act.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that would include any Federal mandate that may result in expenditure in any one year by State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation). In 2009, the threshold is approximately $133 million. This rule will not meet this threshold, in any 1 year, with respect to expenditures by State, local, or Tribal governments, in the aggregate, or by the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent interim final and final rules) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule does not have a substantial effect on State or local governments.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR Part 405 as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 1. The authority citation for part 405 is revised to read as follows:

Authority: Secs. 205(a), 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 405(a), 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

■ 2. Section 405.902 is amended by adding the definition of contractor in alphabetical order to read as follows:

§ 405.902 Definitions.

* * * * *

Contractor means an entity that contracts with the Federal government to review and/or adjudicate claims, determinations and/or decisions.

* * * * *

§ 405.922 [Amended]

■ 3. Section 405.922 is amended by removing the phrase "30 days" and adding in its place the phrase "30 calendar days."

§ 405.924 [Amended]

■ 4. Section 405.924 is amended by—
■ A. Removing paragraph (b)(7).
■ B. Redesignating paragraphs (b)(8) through (b)(15) as paragraphs(b)(7) through (b)(14), respectively.

§ 405.942 [Amended]

■ 5. Section 405.942 is amended by—
■ A. In paragraph (a)(1), removing the phrase "5 days" and adding in its place the phrase "5 calendar days".
■ B. In paragraph (b) introductory text, removing the phrase "120-day" and adding in its place the phrase "120 calendar day".

§ 405.946 [Amended]

■ 6. Section 405.946(b) is amended by removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

§ 405.950 [Amended]

■ 7. Section 405.950 is amended by—
■ A. In paragraph (b)(1), removing the phrase "120-day" and adding in its place the phrase "120 calendar day", and removing the phrase "60-day" and adding in its place the phrase "60 calendar day".
■ B. In paragraph (b)(2), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".
■ C. In paragraph (b)(3), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ 8. Section 405.952 is amended by revising paragraph (e) to read as follows:

§ 405.952 Withdrawal or dismissal of a request for redetermination.

* * * * *

(e) *Effect of dismissal.* The dismissal of a request for redetermination is binding unless it is modified or reversed by a QIC under § 405.974(b) or vacated under paragraph (d) of this section.

■ 9. Section 405.958 is amended by revising the introductory text to read as follows:

§ 405.958 Effect of a redetermination.

In accordance with section 1869(a)(3)(D) of the Act, once a

redetermination is issued, it becomes part of the initial determination. The redetermination is binding upon all parties unless—

* * * * *

■ 10. Section 405.962 is amended by—

■ A. Revising paragraph (a) introductory text.

■ B. In paragraph (a)(1), removing the phrase "5 days" and adding in its place the phrase "5 calendar days".

■ C. In paragraphs (a)(2) and (b)(1), removing the phrase "180-day" and adding in its place the phrase "180 calendar day".

The revision reads as follows:

§ 405.962 Timeframe for filing a request for a reconsideration.

(a) *Timeframe for filing a request.* Except as provided in paragraph (b) of this section and in § 405.974(b)(1), regarding a request for QIC reconsideration of a contractor's dismissal of a redetermination request, any request for a reconsideration must be filed within 180 calendar days from the date the party receives the notice of the redetermination.

* * * * *

§ 405.966 [Amended]

■ 11. Section 405.966 is amended by—

■ A. In paragraph (b), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ B. In paragraph (c), removing the phrase "14-day" and adding in its place the phrase "14 calendar day".

§ 405.970 [Amended]

■ 12. Section 405.970 is amended by—

■ A. In paragraph (a)(2), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (b)(1), removing the phrase "180-day" and adding in its place the phrase "180 calendar day", and removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ C. In paragraph (b)(2), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ D. In paragraph (b)(3), removing the phrase "60-day" and adding in its place the phrase "60 calendar day", and removing the phrase "14 days" and adding in its place the phrase "14 calendar days".

■ E. In paragraph (c) introductory text, removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ F. In paragraph (e)(2) introductory text, removing the phrase "5 days" wherever it appears and adding in its place the phrase "5 calendar days".

■ 13. Section 405.972 is amended by revising paragraphs (b)(3) and (e) to read as follows:

§ 405.972 Withdrawal or dismissal of a request for a reconsideration.

* * * * *

(b) * * *

(3) When the party fails to file the reconsideration request in accordance with the timeframes established in § 405.962, or fails to file the request for reconsideration of a contractor's dismissal of a redetermination request in accordance with the timeframes established in § 405.974(b)(1);

* * * * *

(e) *Effect of dismissal.* The dismissal of a request for reconsideration is binding unless it is modified or reversed by an ALJ under § 405.1004 or vacated under paragraph (d) of this section. The dismissal of a request for reconsideration of a contractor's dismissal of a redetermination request is binding and not subject to further review unless vacated under paragraph (d) of this section.

■ 14. Section 405.974 is amended by—

■ A. In paragraph (b)(1) introductory text, removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (b)(1)(i), removing the phrase "5 days" and adding in its place the phrase "5 calendar days".

■ C. In paragraph (b)(1)(ii), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ D. Revising paragraph (b)(3).

The revision reads as follows:

§ 405.974 Reconsideration.

* * * * *

(b) * * *

(3) A QIC's reconsideration of a contractor's dismissal of a redetermination request is binding and not subject to further review.

■ 15. Section 405.978 is amended by revising the introductory text to read as follows:

§ 405.978 Effect of a reconsideration.

A reconsideration is binding on all parties, unless—

* * * * *

■ 16. Section 405.980 is amended by—

■ A. Revising paragraphs (a)(1) introductory text and (a)(5).

■ B. In paragraph (b) introductory text, removing the phrase "and revise its" and adding in its place the word "an".

■ C. In paragraphs (d)(1), (d)(2), and (d)(3), removing the phrase "180 days" wherever it appears and adding in its place the phrase "180 calendar days".

■ D. In paragraphs (e)(1), (e)(2) and (e)(3), removing "180 days" and adding in its place the phrase "180 calendar days".

The revisions are as follows:

§ 405.980 Reopenings of initial determinations, redeterminations, and reconsiderations, hearings and reviews.

(a) * * *

(1) A reopening is a remedial action taken to change a binding determination or decision that resulted in either an overpayment or underpayment, even though the binding determination or decision may have been correct at the time it was made based on the evidence of record. That action may be taken by—

* * * * *

(5) The contractor's, QIC's, ALJ's, or MAC's decision on whether to reopen is binding and not subject to appeal.

* * * * *

■ 17. Section 405.990 is amended by—

■ A. Revising paragraphs (b)(1)(i)(A), (b)(1)(i)(B), (b)(1)(ii), and (f)(3).

■ B. In paragraphs (f)(2), (f)(4) and (h)(2), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ C. In paragraph (i)(2), removing the phrase "90-day" and adding in its place the phrase "90 calendar day".

■ D. In paragraph (j)(1), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

The revisions are as follows:

§ 405.990 Expedited access to judicial review.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(A) An ALJ hearing in accordance with § 405.1002 and a decision, dismissal order, or remand order of the ALJ has not been issued;

(B) MAC review in accordance with § 405.1102 and a final decision, dismissal order, or remand order of the MAC has not been issued; or

(ii) The appeal has been escalated from the QIC to the ALJ level after the period described in § 405.970(a) and § 405.970(b) has expired, and the QIC does not issue a decision or dismissal order within the timeframe described in § 405.970(e).

* * * * *

(f) * * *

(3) A determination by the review entity either certifying that the requirements for EAJR are met pursuant to paragraph (g) of this section or denying the request is not subject to review by the Secretary.

* * * * *

■ 18. Section 405.1000 is amended by revising paragraphs (c) and (d) to read as follows:

§ 405.1000 Hearing before an ALJ: General rule.

* * * * *

(c) In some circumstances, a representative of CMS or its contractor may participate in or join the hearing as a party. (*See*, § 405.1010 and § 405.1012.)

(d) The ALJ conducts a *de novo* review and issues a decision based on the hearing record.

* * * * *

■ 19. Section 405.1002 is amended by—

■ A. In paragraph (a)(1), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (a)(3), removing the phrase "5 days" and adding in its place the phrase "5 calendar days".

■ C. In paragraph (a)(4), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ D. Revising paragraph (b)(2) to read as follows:

§ 405.1002 Right to an ALJ hearing.

* * * * *

(b) * * *

(2) The QIC does not issue a decision or dismissal order within 5 calendar days of receiving the request for escalation in accordance with § 405.970(e)(2); and

* * * * *

■ 20. Section 405.1004 is amended by—

■ A. In paragraph (a)(1), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (a)(3), removing the phrase "5 days" and adding in its place the phrase "5 calendar days".

■ C. In paragraph (a)(4), removing the phrase "60-day" and adding in its place the phrase "60 calendar day".

■ D. Revising paragraph (c) to read as follows:

§ 405.1004 Right to ALJ review of QIC notice of dismissal.

* * * * *

(c) An ALJ's decision regarding a QIC's dismissal of a reconsideration request is binding and not subject to further review. The dismissal of a request for ALJ review of a QIC's dismissal of a reconsideration request is binding and not subject to further review, unless vacated by the MAC under § 405.1108(b).

§ 405.1006 [Amended]

■ 21. Section 405.1006(e)(1)(ii) is amended by removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ 22. Section 405.1010 is amended by—

■ A. Revising paragraph (a).

■ B. In paragraph (b), removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

The revision reads as follows:

§ 405.1010 When CMS or its contractors may participate in an ALJ hearing.

(a) An ALJ may request, but may not require, CMS and/or one or more of its contractors to participate in any proceedings before the ALJ, including the oral hearing, if any. CMS and/or one or more of its contractors may also elect to participate in the hearing process.

* * * * *

■ 23. Section 405.1012 is amended by—

■ A. Revising paragraph (a).

■ B. In paragraph (b), removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

The revision reads as follows:

§ 405.1012 When CMS or its contractors may be a party to a hearing.

(a) CMS and/or one or more of its contractors may be a party to an ALJ hearing unless the request for hearing is filed by an unrepresented beneficiary.

* * * * *

§ 405.1014 [Amended]

■ 24. Section 405.1014 is amended by—

■ A. In paragraph (b)(1), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (b)(2), removing the phrase "90-day" where it appears and adding in its place the phrase "90 calendar day".

§ 405.1016 [Amended]

■ 25. Section 405.1016 is amended by—

■ A. In paragraph (a), removing the phrase "90-day" where it appears and adding in its place the phrase "90 calendar day".

■ B. In paragraph (c), removing the phrase "180-day" where it appears and adding in its place the phrase "180 calendar day".

§ 405.1018 [Amended]

■ 26. Section 405.1018(a) and (b) is amended by removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

■ 27. Section 405.1020 is amended by—

■ A. Revising paragraph (c)(1).

■ B. In paragraph (g)(3)(ii), removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

■ C. Revising paragraph (i)(4).

The revisions read as follows:

§ 405.1020 Time and place for a hearing before an ALJ.

* * * * *

(c) * * *

(1) The ALJ sends a notice of hearing to all parties that filed an appeal or participated in the reconsideration, any party who was found liable for the services at issue subsequent to the initial determination, and the QIC that issued the reconsideration, advising them of the proposed time and place of the hearing.

* * * * *

(i) * * *

(4) When a party's request for an in-person hearing as specified under paragraph (i)(1) of this section is granted, the ALJ must issue a decision within the adjudication timeframe specified in § 405.1016 (including any applicable extensions provided in this subpart) unless the party requesting the hearing agrees to waive such adjudication timeframe in writing.

* * * * *

■ 28. Section 405.1022 is amended by revising paragraph (a) to read as follows:

§ 405.1022 Notice of a hearing before an ALJ.

(a) *Issuing the notice.* After the ALJ sets the time and place of the hearing, notice of the hearing will be mailed to the parties and other potential participants, as provided in § 405.1020(c) at their last known address, or given by personal service. The ALJ is not required to send a notice of hearing to a party who indicates in writing that it does not wish to receive this notice. The notice is mailed or served at least 20 calendar days before the hearing.

* * * * *

§ 405.1024 [Amended]

■ 29. Section 405.1024(a) is amended by removing the phrase "5 days" and adding in its place the phrase "5 calendar days".

§ 405.1028 [Amended]

■ 30. Section 405.1028(a) is amended by removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

■ 31. Section 405.1034 is amended by revising paragraph (a) to read as follows:

§ 405.1034 When an ALJ may remand a case to the QIC.

(a) *General rules.* (1) If an ALJ believes that the written record is missing information that is essential to resolving the issues on appeal and that information can be provided only by CMS or its contractors, then the ALJ may either:

(i) Remand the case to the QIC that issued the reconsideration or

(ii) Retain jurisdiction of the case and request that the contractor forward the missing information to the appropriate hearing office.

(2) If the information is not information that can be provided only by CMS or its contractors, the ALJ must retain jurisdiction of the case and obtain the information on his or her own, or directly from one of the parties.

(3) "Can be provided only by CMS or its contractors" means the information is not publicly available, and is not in the possession of, and cannot be requested and obtained by one of the parties. Information that is publicly available is information that is available to the general public via the Internet or in a printed publication. It includes, but is not limited to, information available on a CMS or contractor Web site or information in an official CMS or DHHS publication (including, but not limited to, provisions of NCDs or LCDs, procedure code or modifier descriptions, fee schedule data, and contractor operating manual instructions).

* * * * *

■ 32. Section 405.1036 is amended by—

■ A. Revising paragraphs (f)(1) and (f)(3).

■ B. In paragraph (f)(5)(iv), removing the phrase "15 days" and adding in its place the phrase "15 calendar days".

The revisions read as follows:

§ 405.1036 Description of an ALJ hearing process.

* * * * *

(f) * * *

(1) Except as provided in this section, when it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. An ALJ may not issue a subpoena to CMS or its contractors, on his or her own initiative or at the request of a party, to compel an appearance, testimony, or the production of evidence.

* * * * *

(3) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the requirements set forth in paragraph (f)(2) of this section with the ALJ no later than the end of the discovery period established by the ALJ under § 405.1037(c).

* * * * *

§ 405.1037 [Amended]

■ 33. Section 405.1037 is amended by—

■ A. In paragraph (c)(5), removing the phrase "45 days" and adding in its place the phrase "45 calendar days".

■ B. In paragraph (e)(2)(iii), removing the phrase "15 days" and adding in its place the phrase "15 calendar days".

§ 405.1038 [Amended]

■ 34. Section 405.1038(b)(1)(i) is amended by removing the word "videoconferencing" and adding in its place the word "videoteleconferencing".

§ 405.1042 [Amended]

■ 35. Section 405.1042(b)(2) is amended by removing the phrase "90-day" and adding in its place the phrase "90 calendar day".

§ 405.1044 [Amended]

■ 36. Section 405.1044(d) is amended by removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

■ 37. Section 405.1046 is amended by—

■ A. Revising paragraph (c).

■ B. In paragraph (d), removing the phrase "90-day" where it appears and adding in its place the phrase "90 calendar day".

The revision reads as follows:

§ 405.1046 Notice of an ALJ decision.

* * * * *

(c) *Limitation on decision.* When the amount of payment for an item or service is an issue before the ALJ, the ALJ may make a finding as to the amount of payment due. If the ALJ makes a finding concerning payment when the amount of payment was not an issue before the ALJ, the contractor may independently determine the payment amount. In either of the aforementioned situations, an ALJ's decision is not binding on the contractor for purposes of determining the amount of payment due. The amount of payment determined by the contractor in effectuating the ALJ's decision is a new initial determination under § 405.924.

* * * * *

■ 38. Section 405.1048 is amended by revising paragraph (a) to read as follows:

§ 405.1048 The effect of an ALJ's decision.

* * * * *

(a) A party to the hearing requests a review of the decision by the MAC within the stated time period or the MAC reviews the decision issued by an ALJ under the procedures set forth in § 405.1110, and the MAC issues a final decision or remand order or the appeal is escalated to Federal district court under the provisions at § 405.1132 and the Federal district court issues a decision.

* * * * *

§ 405.1052 [Amended]

■ 39. Section 405.1052 is amended by—

■ A. In paragraphs (a)(2)(ii) and (a)(2)(iii), removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

■ B. In paragraph (a)(6), removing the word "final" and adding in its place the word "binding".

■ 40. Section 405.1063 is revised to read as follows:

§ 405.1063 Applicability of laws, regulations and CMS Rulings.

(a) All laws and regulations pertaining to the Medicare and Medicaid programs, including, but not limited to Titles XI, XVIII, and XIX of the Social Security Act and applicable implementing regulations, are binding on ALJs and the MAC.

(b) CMS Rulings are published under the authority of the Administrator, CMS. Consistent with § 401.108 of this chapter, rulings are binding on all CMS components, on all HHS components that adjudicate matters under the jurisdiction of CMS, and on the Social Security Administration to the extent that components of the Social Security Administration adjudicate matters under the jurisdiction of CMS.

§ 405.1100 [Amended]

■ 41. Section 405.1100 is amended by revising paragraphs (c) and (d) to read as follows:

§ 405.1100 Medicare Appeals Council review: General.

* * * * *

(c) When the MAC reviews an ALJ's decision, it undertakes a *de novo* review. The MAC issues a final decision or dismissal order or remands a case to the ALJ within 90 calendar days of receipt of the appellant's request for review, unless the 90 calendar day period is extended as provided in this subpart.

(d) When deciding an appeal that was escalated from the ALJ level to the MAC, the MAC will issue a final decision or dismissal order or remand the case to the ALJ within 180 calendar days of receipt of the appellant's request for escalation, unless the 180 calendar day period is extended as provided in this subpart.

§ 405.1102 [Amended]

■ 42. Section 405.1102 is amended by—

■ A. In paragraph (a)(1), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. In paragraph (a)(2), removing the phrase "5 days" and adding in its place "5 calendar days".

■ 43. Section 405.1104 is amended by revising paragraphs (a)(2), (b) and (c) to read as follows:

§ 405.1104 Request for MAC review when an ALJ does not issue a decision timely.

(a) * * *

(2) The ALJ does not issue a decision, dismissal order, or remand order within the later of 5 calendar days of receiving the request for escalation or 5 calendar days from the end of the applicable adjudication period set forth in § 405.1016.

(b) *Escalation.* (1) If the ALJ is not able to issue a decision, dismissal order, or remand order within the time period set forth in paragraph (a)(2) of this section, he or she sends notice to the appellant.

(2) The notice acknowledges receipt of the request for escalation, and confirms that the ALJ is not able to issue a decision, dismissal order, or remand order within the statutory timeframe.

(3) If the ALJ does not act on a request for escalation within the time period set forth in paragraph (a)(2) of this section or does not send the required notice to the appellant, the QIC decision becomes the decision that is subject to MAC review consistent with § 405.1102(a).

(c) *No escalation.* If the ALJ's adjudication period set forth in § 405.1016 expires, the case remains with the ALJ until a decision, dismissal order, or remand order is issued or the appellant requests escalation to the MAC.

■ 44. Section 405.1106 is revised to read as follows:

§ 405.1106 Where a request for review or escalation may be filed.

(a) When a request for a MAC review is filed after an ALJ has issued a decision or dismissal, the request for review must be filed with the entity specified in the notice of the ALJ's action. The appellant must also send a copy of the request for review to the other parties to the ALJ decision or dismissal who received a copy of the hearing decision under § 405.1046(a) or a copy of the notice of dismissal under § 405.1052(b). Failure to copy the other parties tolls the MAC's adjudication deadline set forth in § 405.1100 until all parties to the hearing receive notice of the request for MAC review. If the request for review is timely filed with an entity other than the entity specified in the notice of the ALJ's action, the MAC's adjudication period to conduct a review begins on the date the request for review is received by the entity specified in the notice of the ALJ's action. Upon receipt of a request for review from an entity other than the entity specified in the notice of the ALJ's action, the MAC sends written notice to the appellant of the date of receipt of the request and commencement of the adjudication timeframe.

(b) If an appellant files a request to escalate an appeal to the MAC level because the ALJ has not completed his or her action on the request for hearing within the adjudication deadline under § 405.1016, the request for escalation must be filed with both the ALJ and the MAC. The appellant must also send a copy of the request for escalation to the other parties. Failure to copy the other parties tolls the MAC's adjudication deadline set forth in § 405.1100 until all parties to the hearing receive notice of the request for MAC review. In a case that has been escalated from the ALJ, the MAC's 180 calendar day period to issue a final decision, dismissal order, or remand order begins on the date the request for escalation is received by the MAC.

■ 45. Section 405.1110 is amended by—

■ A. In paragraph (a), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ B. Revising paragraphs (b)(2) and (d) to read as follows:

§ 405.1110 MAC reviews on its own motion.

* * * * *

(b) * * *

(2) CMS' referral to the MAC is made in writing and must be filed with the MAC no later than 60 calendar days after the ALJ's decision or dismissal is issued. The written referral will state the reasons why CMS believes the MAC must review the case on its own motion. CMS will send a copy of its referral to all parties to the ALJ's action who received a copy of the hearing decision under § 405.1046(a) or the notice of dismissal under § 405.1052(b), and to the ALJ. Parties to the ALJ's action may file exceptions to the referral by submitting written comments to the MAC within 20 calendar days of the referral notice. A party submitting comments to the MAC must send such comments to CMS and all other parties to the ALJ's decision who received a copy of the hearing decision under § 405.1046(a) or the notice of dismissal under § 405.1052(b).

* * * * *

(d) *MAC's action.* If the MAC decides to review a decision or dismissal on its own motion, it will mail the results of its action to all the parties to the hearing and to CMS if it is not already a party to the hearing. The MAC may adopt, modify, or reverse the decision or dismissal, may remand the case to an ALJ for further proceedings or may dismiss a hearing request. The MAC must issue its action no later than 90 calendar days after receipt of the CMS referral, unless the 90 calendar day period has been extended as provided in this subpart. The MAC may not, however, issue its action before the 20 calendar day comment period has expired, unless it determines that the agency's referral does not provide a basis for reviewing the case. If the MAC does not act within the applicable adjudication deadline, the ALJ's decision or dismissal is binding on the parties to the ALJ decision.

■ 46. Section 405.1112 is amended by revising paragraph (a) to read as follows:

§ 405.1112 Content of request for review.

(a) The request for MAC review must be filed with the MAC or appropriate ALJ hearing office. The request for review must be in writing and may be made on a standard form. A written request that is not made on a standard form is accepted if it contains the beneficiary's name; Medicare health insurance claim number; the specific service(s) or item(s) for which the review is requested; the specific date(s) of service; the date of the ALJ's decision or dismissal order, if any; if the party is requesting escalation from the ALJ to the MAC, the hearing office in which the appellant's request for hearing is pending; and the name and signature of the party or the representative of the party; and any other information CMS may decide.

* * * * *

§ 405.1118 [Amended]

■ 47. Section 405.1118 is amended by removing the phrase "90-day" and adding in its place the phrase "90 calendar day".

■ 48. Section 405.1122 is amended by—

■ A. Revising paragraph (d)(1).

■ B. Redesignating paragraph (e)(2)(i) as paragraph (e)(2).

■ C. Redesignating paragraphs (e)(2)(ii) through (e)(2)(v) as paragraphs (e)(3) through (e)(6), respectively.

■ D. In new redesignated paragraph (e)(4), removing the phrase "15 days" and adding in its place "15 calendar days".

■ E. In new redesignated paragraph (e)(2)(6), removing the word "lifed" and adding in its place the word "lifted".

■ F. In paragraph (f)(1), removing the reference to "section 205(c) of the Act, 42 U.S.C. 405(c)." and adding in its place the reference "section 205(e) of the Act, 42 U.S.C. 405(e).".

The revision reads as follows:

§ 405.1122 What evidence may be submitted to the MAC.

* * * * *

(d) * * *

(1) Except as provided in this section, when it is reasonably necessary for the full presentation of a case, the MAC may, on its own initiative or at the request of a party, issue subpoenas requiring a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. The MAC may not issue a subpoena to CMS or its contractors, on its own initiative or at the request of a party, to compel the production of evidence.

* * * * *

§ 405.1124 [Amended]

■ 49. Section 405.1124(b) is amended by removing the phrase "10 days" and adding in its place the phrase "10 calendar days".

§ 405.1126 [Amended]

■ 50. Section 405.1126 is amended by—

■ A. In paragraph (a), removing the word "final" from the last sentence.

■ B. In paragraph (d)(1), removing the phrase "20 days" and adding in its place the phrase "20 calendar days".

■ 51. Section 405.1130 is revised to read as follows:

§ 405.1130 Effect of the MAC's decision.

The MAC's decision is final and binding on all parties unless a Federal district court issues a decision modifying the MAC's decision or the decision is revised as the result of a reopening in accordance with § 405.980. A party may file an action in a Federal district court within 60 calendar days after the date it receives notice of the MAC's decision.

■ 52. Section 405.1132 is amended by revising paragraph (b) to read as follows:

§ 405.1132 Request for escalation to Federal court.

* * * * *

(b) A party may file an action in a Federal district court within 60 calendar days after the date it receives the MAC's notice that the MAC is not able to issue a final decision, dismissal order, or remand order unless the party is appealing an ALJ dismissal.

■ 53. Section 405.1136 is amended by—

■ A. Revising paragraph (a)(2).

■ B. In paragraphs (c)(3) and (d)(2), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

The revision reads as follows:

§ 405.1136 Judicial review.

(a) * * *

(2) If the MAC's adjudication period set forth in § 405.1100 expires and the appellant does not request escalation to Federal district court, the case remains with the MAC until a final decision, dismissal order, or remand order is issued.

* * * * *

§ 405.1140 [Amended]

■ 54. Section 405.1140 is amended by—

■ A. In paragraph (b)(1), removing the phrase "30 days", wherever it appears and adding in its place the phrase "30 calendar days", and removing the phrase "30-day" wherever it appears and adding in its place the phrase "30 calendar day".

■ B. In paragraph (c)(1), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

■ C. In paragraph (c)(4), removing the phrase "30 days" and adding in its place the phrase "30 calendar days".

■ D. In paragraph (d), removing the phrase "60 days" and adding in its place the phrase "60 calendar days".

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 6, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: August 6, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–28707 Filed 12–8–09; 8:45 am]

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Wednesday,
December 9, 2009

Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 423

Medicare Program; Application of Certain Appeals Provisions to the Medicare Prescription Drug Appeals Process; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 423

[CMS–4127–F]

RIN 0938–AO87

Medicare Program; Application of Certain Appeals Provisions to the Medicare Prescription Drug Appeals Process

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule will implement the procedures that the Department of Health and Human Services will follow at the Administrative Law Judge and Medicare Appeals Council levels in deciding appeals brought by individuals who have enrolled in the Medicare prescription drug benefit program. In addition, it will implement the reopening procedures that will be followed at all levels of appeal.

DATES: *Effective date:* This final rule is effective on January 8, 2010.

FOR FURTHER INFORMATION CONTACT:

Arrah Tabe-Bedward, (410) 786–7129 (for issues related to reopenings and expedited access to judicial review).

Peggy McFadden-Elmore, (703) 235–0126 (for issues related to ALJ level appeals policies).

Mary Peltzer, (202) 565–0169 (for issues related to MAC level appeals).

SUPPLEMENTARY INFORMATION:

Abbreviations

Because of the many terms to which we refer by abbreviation in this final rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

ALJ Administrative Law Judge
CMS Centers for Medicare & Medicaid Services
DAB Departmental Appeals Board
EAJR Expedited Access to Judicial Review
IRE Independent Review Entity
LCD Local Coverage Determination
MAC Medicare Appeals Council
NCD National Coverage Determination
QIC Qualified Independent Contractor

I. Background

The voluntary prescription drug benefit program ("Part D") was enacted into law by section 101 of Title I of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173). The MMA specified that the prescription drug benefit would become available on January 1, 2006 for individuals entitled to benefits under Medicare Part A or enrolled under Medicare Part B. On January 28, 2005, the final rule (70 FR 4194) implementing the Part D program appeared in the **Federal Register** . (hereinafter "Part D rule"). This rule became effective on March 22, 2005.

Section 1860D–4(h) of the Social Security Act (the Act) provides that Part D plan sponsors follow appeals procedures specified in section 1852(g)(5) of the Act in a manner similar to the manner such requirements apply to Medicare Advantage (MA) organizations for Part C appeals. Part D plan sponsors include a prescription drug plan sponsor, an MA organization offering a Medicare Advantage prescription drug plan (MA–PD plan), a Program of All-Inclusive Care for Elderly (PACE) organization offering a PACE plan, and a cost plan offering qualified prescription drug coverage.

Section 1852(g)(5) of the Act provides that enrollees in MA plans who are dissatisfied with determinations regarding their Part C benefits are entitled, if they meet the amount in controversy requirement, to a hearing before the Secretary to the same extent as is provided in section 205(b) of the Act and judicial review of the Secretary's final decision as provided in section 205(g) of the Act.

Section 1869(b)(1)(A) of the Act, which sets forth the requirements for Part A and Part B appeals, contains similar language to that set forth in section 1852(g)(5) of the Act and also refers to sections 205(b) and (g) of the Act.

These statutory concepts are reflected in the Part D rule and a closely related rule concerning MA organizations that also appeared in the **Federal Register** on January 28, 2005 (70 FR 4588), and became effective March 22, 2005 (hereinafter "Part C rule"). The Part D rule is codified at 42 CFR part 423, and addresses grievances, coverage determinations, reconsiderations, and appeals in subpart M. The Part C rule is codified at 42 CFR part 422, and similarly addresses grievances, organization determinations, and appeals in subpart M. The Part D rule states that, unless otherwise provided, the Part C rules regarding appeals and reopenings will apply "to the extent they are appropriate." (*See* 42 CFR 423.562(c).) Likewise, the Part C rule governing appeals at the Administrative Law Judge (ALJ) and Medicare Appeals Council (MAC) levels of appeal provides that adjudicators apply the Part A and Part B appeals and reopening procedures specified in 42 CFR part 405 "to the extent they are appropriate." (*See* 42 CFR 422.562(d).)

Based on this statutory and regulatory framework, CMS stated in the preamble to the interim final rule entitled "Changes to the Medicare Claims Appeal Procedures," which established new procedures for appeals under Medicare Part A and Part B, the differences in the appeals procedures for Part D enrollees would be addressed in a future Part D rulemaking document (70 FR 11420), (hereinafter, "Part 405, subpart I rule"). The purpose of this final appeals rule is to provide guidance on the differences in appeals procedures for Part D enrollees by implementing more detailed regulations to govern Part D appeals (requests for drug benefits and payment) to the ALJ, MAC, and Federal District Court and reopenings of determinations and decisions.

II. Highlights and Organization of Final Rule

This final appeals rule contains revisions to Part 423, subpart M of title 42 of the CFR. We renamed, reorganized, and consolidated similar requirements into one section, and added a new subpart "U". We believe that these changes will maintain or clarify our original intent, making the revised regulation easier to read and understand. Specifically, we renamed subpart M, "Grievances, Coverage Determinations, Redeterminations, and Reconsiderations". This subpart will continue to set forth the requirements for Part D plan sponsors with respect to grievances, coverage determinations, redeterminations, and reconsiderations. We also added a new subpart U, "Reopenings, ALJ Hearings, MAC Review, and Judicial Review" that will set forth the requirements for Part D plan sponsors, the Part D Independent Review Entity (IRE), ALJs, and the MAC with respect to reopenings, ALJ hearings, and MAC review of Part D appeals. In addition, we redesignated and reserved § 423.610, § 423.612, § 423.620, § 423.630, and § 423.634. We note that while we made conforming changes to the language of some of these redesignated sections, we did not make any substantive changes to the policies established by those provisions.

Below we are providing a crosswalk table that enables the reader to easily locate where the requirements have been relocated. The crosswalk lists the former subparts and former sections along with the new subparts and new sections as they appear in this final appeals rule.

TABLE—CROSSWALK

Former subpart	Former section	New subpart	New section
Subpart M—Grievances, Coverage Determinations, and Appeals.	423.610 Right to an ALJ hearing	Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review.	423.1970 Right to an ALJ hearing.
Subpart M—Grievances, Coverage Determinations, and Appeals.	423.612 Request for an ALJ hearing.	Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review.	423.1972 Request for an ALJ hearing.
Subpart M—Grievances, Coverage Determinations, and Appeals.	423.620 Medicare Appeals Council (MAC) review.	Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review.	423.1974 Medicare Appeals Council (MAC) review.
Subpart M—Grievances, Coverage Determinations, and Appeals.	423.630 Judicial review	Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review.	423.1976 Judicial review.
Subpart M—Grievances, Coverage Determinations, and Appeals.	423.634 Reopening and revising determinations and decisions.	Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review.	423.1978 Reopening determinations and decisions.

III. Technical Changes Based on Finalization of the Part 405, Subpart I Rule

As indicated above, the purpose of this final appeals rule is to provide guidance on the differences between the Part D appeals procedures and the appeals procedures for Medicare Part A and Part B found in the Part 405, subpart I rule. The final rule for Medicare Part A and Part B claims appeals (referenced above as the Part 405, subpart I rule) published elsewhere in this **Federal Register**, and therefore, for this final rule, it is necessary based on statutory and regulatory framework discussed above in section I, and below in section IV.A., to make a number of technical changes to this final Part D appeals rule in order to be consistent with the provisions contained in the final rule for Part 405, subpart I. These changes are discussed and explained in greater detail in the final Medicare Parts A and B claims appeals rule, and thus, we will not include an extensive discussion of these technical corrections in this preamble. Rather we discuss generally the technical corrections being made in this final appeals rule, and provide references to the sections within the final Parts A and B claims appeals rule preamble for more in depth discussions on these changes.

The technical corrections being made in this final Part D appeals rule include the following:

- Technical corrections to clarify the terms "final" and "binding," by reserving the term "final" to describe those actions or decisions for which judicial review may be immediately sought." *See* §§ 423.1978, 423.1980(a)(1) and (a)(4), 423.2004(c), 423.2046(c), 423.2052(a)(6), 423.2126(a)(1), and 423.2130. For a more detailed discussion on these technical changes, please reference section II.B.5.b. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- A number of technical changes are also being made to clarify the decisions or actions issued by adjudicators, and to further clarify the effect of a specific action issued by an adjudicator, and when judicial review may be available; similar technical corrections to clarify which actions, if taken by the ALJ or the MAC, may preclude a party from seeking EAJR, and to clarify that the decision of the review entity to certify or deny a request for EAJR is not subject to further review. These are technical corrections where the terms "final action" or "final decision" had been used. *See* §§ 423.1990(b)(1)(i), (b)(1)(ii), and (e)(3), 423.2048(a), 423.2100(c) and (d), 423.2048(a), and 423.2110(d)(5). For a more detailed discussion on these technical changes, please reference section II.B.5.b. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- A technical correction clarifying that the reopening time frames apply to the reopening of a determination or decision and not to the revision of a determination or decision. *See* § 423.1980(b). For a more detailed discussion on these technical changes, please reference section II.B.7.a. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- A technical revision to clarify that ALJs conduct de novo reviews. *See* § 423.2000(d). For a more detailed discussion on these technical changes, please reference section II.B.9.b. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- A technical correction regarding the adjudication timeframe when a request for an in-person hearing is granted. *See* § 423.2020(i)(4). For a more detailed discussion on these technical changes, please reference section II.B.9.e. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- Technical corrections to the remand provisions to clarify when an ALJ can remand a case to the IRE based on missing information. *See* § 423.2034(a). For a more detailed discussion on these technical changes, please reference section II.B.9.h. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- Technical corrections to clarify the appropriate use of subpoenas by an ALJ or the MAC. *See* §§ 423.2036(f)(1), 423.2122(b). For a more detailed discussion on these technical changes, please reference sections II.B.9.i. and II.B.10.b. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures," published elsewhere in this issue of the **Federal Register**.
- A technical correction to clarify the applicability of laws, regulations, and CMS rulings to ALJs and the MAC. *See* § 423.2063(a). For a more detailed discussion on these technical changes, please reference section II.B.9.m. contained in the final rule entitled "Medicare Program: Changes to the Medicare Claims Appeals Procedures,"

published elsewhere in this issue of the **Federal Register**.

Also, the reader can easily refer to section VI., Provisions of the Final Rule, in this document to see a comprehensive review of the modifications being made to this final rule, most of which are technical corrections made to ensure consistency between this final appeals rule, and the Medicare Part A and Part B claims appeals rule, upon which this rule is modeled.

IV. Summary of the Proposed Provisions and Response to Comments on the March 17, 2008 Proposed Rule

Discussed below are the comments and technical corrections to the proposed rule. We include a brief explanation of each regulatory provision, provide a summary of, and responses to, the comments received, and describe the changes, if any, to be made in finalizing the provision in this rulemaking.

We received 22 public comments on the proposed rule published in the **Federal Register** on March 17, 2008. Most of the comments received were from beneficiary advocacy organizations. Summaries of the public comments and our responses to those comments are set forth below.

On January 12, 2009, we published CMS–4131–FC (74 FR 1494). In that final rule, we added a definition for "other prescriber" in § 423.560. We also inserted "or other prescriber" after "prescribing physician" or "physician" throughout subpart M of part 423 in order to authorize non-physician prescribers to carry out the same functions that prescribing physicians currently perform with respect to the coverage determination and appeals processes for the prescription drug program. To ensure consistency with CMS–4131–FC and current CMS policy, we revised §§ 423.2014, 423.2016, 423.2102, and 423.2108 of CMS–4127–F to include "or other prescriber" after "prescribing physician" or "physician" where appropriate.

A. General Appeals Provisions

Section 1860D–4(h)(1) of the Act, which sets forth the statutory requirements for Part D appeals, requires the Secretary to establish an appeals process that is "similar" to the process used for MA organizations under section 1852(g)(5) of the Act. Section 1852(g)(5) of the Act provides the right to a hearing "before the Secretary to the same extent as is provided in section 205(b)" of the Act, and to judicial review "of the Secretary's final decision as provided in section 205(g)" of the Act. Thus, an enrollee dissatisfied by reason of the enrollee's failure to receive a Part D drug to which the enrollee believes he or she is entitled, and at no greater charge than the enrollee believes he or she is required to pay, is entitled to a hearing and may also request judicial review of the final decision of the Secretary.

Section 1852(g)(5) of the Act also specifies the amount in controversy needed to pursue a hearing and judicial review. Like section 1852(g)(5) of the Act, section 1869(b)(1)(A) of the Act, which sets forth the statutory requirements for Part A and Part B appeals, provides the right to a hearing "by the Secretary to the same extent as is provided in section 205(b)" and the right to judicial review "of the Secretary's final decision after such hearing as is provided in section 205(g)" of the Act. Under this authority, we believe that Congress gave us discretion in designing procedural rules for appeals under Part D.

Section 423.562(c) of the Part D rule states that "[u]nless this subpart provides otherwise, the regulations in part 422, subpart M of this chapter (concerning administrative review and hearing processes under titles II and XVIII, and representation of parties under title XVIII of the Act) and any interpretive rules or CMS rulings issued under these regulations, apply under this subpart to the extent they are appropriate." Section 422.562(d) of the Part C rule states that "[u]nless this subpart provides otherwise, the regulations in part 405 of this chapter (concerning the administrative review and hearing processes and representation of parties under titles II and XVIII of the Act), apply under this subpart to the extent they are appropriate." Therefore, as discussed in the preamble to the Part D rule, since § 423.562(c) incorporates part 422, and since part 422 incorporates part 405, the provisions of part 405 apply to Part D appeals to the extent that they are appropriate. (70 FR at 4343).

For these reasons, we are providing a similar appeals process for Part D appeals at the ALJ, MAC and judicial review levels as applies to Part A and Part B appeals, to the extent it is appropriate.

The part 405 regulations at subparts G and H, which continue to apply to certain pending Medicare claims appeals under Medicare Part A and Part B, respectively, were issued before the enactment of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), Public Law 106–554. BIPA made significant changes to Medicare claims appeals procedures. The MMA made further changes to these procedures. Part 405, subpart I, contains the new BIPA and MMA appeals procedures. Part 405, subpart I, applies to initial determinations issued by Medicare fiscal intermediaries on or after May 1, 2005, and to initial determinations issued by carriers on or after January 1, 2006. Part 405, subpart I, is tailored to the Medicare Part A and Part B claims appeals process, unlike the provisions in subparts G and H, which, in large part, follow the Social Security Administration's procedures for disability claims. For this reason, we have concluded that it is appropriate to apply the provisions of Part 405, subpart I, to Part D appeals at the ALJ and MAC levels with appropriate modifications to meet the needs of Part D appeals.

Specific comments and our responses to those comments are as follows:

Comment: We received a comment related to the statement in the preamble of the proposed rule that the Social Security Administration (SSA) does not process appeals related to enrollment in or entitlement to Part D. The commenter inquired about the responsible entity and applicable process when a beneficiary has an issue related to Part D enrollment, including eligibility for a special enrollment period.

Response: There currently is no formal appeals process that applies with respect to an application for Part D enrollment. Consistent with §§ 1860D–4(g)(1) and (h)(1) of the Act, only issues involving coverage of Part D benefits can be resolved through the Part D coverage determination and appeals processes. Enrollment disputes are distinct from disputes related to coverage of Part D benefits and therefore, cannot be resolved through the Part D coverage determination and appeals processes. However, beneficiaries not currently enrolled in a Part D plan, or who otherwise have problems related to eligibility and enrollment, may contact 1–800–Medicare and/or a CMS Regional Office (RO) caseworker for assistance in resolving the matter. Customer service representatives and RO caseworkers can resolve a wide range of enrollment issues, including matters related to eligibility for a special enrollment period.

Comment: Commenters believe that the following statement in the preamble's "Highlights and Organization of the Proposed Rule" section is misleading and disingenuous: "We note while we are proposing to make conforming changes to the language of some of the redesignated

sections, we are not proposing to make any substantive changes to the policies established by those provisions." The commenters stated that while some of the changes can be appropriately classified as nonconforming, many more of the general appeals provisions changes, especially those to the timeframes, submission of evidence, ALJ remand criteria and participants at a hearing, are definitely substantive.

Response: We believe that the commenters may have misinterpreted our statement. Our characterization of the changes as non-substantive applies only to the redesignated sections that are specifically referenced in the statement, which include sections 423.610, 423.612, 423.620, 423.630, and 423.634. These provisions have previously gone through the notice of proposed rulemaking process and are now only being redesignated to be included in the new subpart U. These provisions are also being cross-referenced in the new ALJ and MAC provisions that have been drafted to parallel Part 405, subpart I, as appropriate. For example, section 423.612, Request for an ALJ Hearing, has been redesignated as section 423.1972 and is cross-referenced in the new section 423.2014, Request for an ALJ Hearing. Section 423.2014 contains the requirements of § 423.1972 as well as new provisions that parallel Part 405, subpart I, such as specifying the required content of a request for an ALJ hearing.

We agree with the commenters that the new provisions of this rule are substantive in nature and, accordingly, we provided the public an opportunity to comment on these provisions through the notice of proposed rulemaking process. Accordingly, we are finalizing §§ 423.1968, 423.1970, 423.1972, 423.1974, 423.1976, and 423.1978 as noted above, and as discussed in subsection III.

B. Parties to the ALJ Hearing and MAC Review

Section 1860D–4(h) of the Act largely incorporates section 1852(g)(5) of the Act. We interpret that section as providing the right to a hearing and to judicial review for an enrollee dissatisfied by reason of the enrollee's failure to receive a Part D drug to which the enrollee believes he or she is entitled, and at no greater charge than the enrollee believes he or she is required to pay. Section 1860D–4(h)(1) of the Act specifies that "only the Part D eligible individual" is entitled to bring an appeal. Section 423.560 of the Part D rule states that an enrollee is a Part D eligible individual who has elected or has been enrolled in a Part D plan.

Former § 423.610 (now at § 423.1970) and former § 423.612 (now at § 423.1972) explain that, if an enrollee is dissatisfied with the reconsideration determination by an IRE, the enrollee may request a hearing before an ALJ, if the amount remaining in controversy meets the threshold requirement established annually by the Secretary. Consistent with § 1869(b)(1)(E)(iii) of the Act, the threshold amounts for ALJ hearings and judicial review must be adjusted annually by the Secretary, beginning in January of 2005, by the percentage increase in the medical care component of the consumer price index (CPI) for all urban consumers (U.S. city average) for July 2003 to the July of the preceding year involved and rounded to the nearest multiple of $10. The amounts are published annually in the **Federal Register**.

Under former § 423.620 (now at § 423.1974), if an enrollee is dissatisfied with the ALJ's action, the enrollee may request that the MAC review the ALJ's decision or dismissal. Having the enrollee as the only party to an appeal differs from the Part A and B processes where the term "party" includes a beneficiary, a provider, a supplier, a Medicaid State agency, and CMS and/or its contractors, and from the Part C appeals process where the term "party" includes an enrollee, a provider, an entity with rights with respect to the organization determination, or an MA organization. In light of the Part D statutory and regulatory provisions, this final appeals rule makes clear that only the enrollee may request and be a party to an ALJ hearing or MAC review. (We note that an enrollee may appoint a representative to act on his or her behalf as discussed in § 423.560 and as set forth in § 422.561 and § 405.910. A representative could include an enrollee's physician or other prescriber.)

We proposed not to make the Part D plan sponsor, the IRE, or CMS a party to an ALJ hearing or the MAC review in a Part D case. The statute and Part D rule do not explicitly provide these entities with party status, unlike Part C where the statute provides that the Secretary shall make an MA organization a party to ALJ hearings. Further, the preamble to the Part D rule (70 FR 4360) states that "[t]he plan is not a party to the ALJ hearing." As discussed later in the preamble, we recognize that the involvement of CMS, the IRE, and/or the Part D plan sponsor may be necessary to resolve the issue(s) on appeal and we will allow these entities to participate in ALJ hearings at the ALJ's discretion. The participation of Part D plan sponsors in ALJ hearings was also contemplated in the preamble to the proposed Part D rule (69 FR 46632, 46722), which noted that "[a]lthough a PDP sponsor generally is not a party to the IRE appeal and may not request a hearing before an ALJ, the sponsor is considered a party to the ALJ hearing for the limited purpose of participation in the hearing." We received a few comments relating to the participation of plan sponsors, the IRE, and CMS at ALJ hearings. Those comments are discussed in the section of the preamble relating to participation in an ALJ hearing (§ 423.2010).

C. Timeframes for Deciding Appeals at the ALJ and MAC Levels

Part 405, subpart I implements the provisions of section 1869 of the Act that require ALJs and the MAC to complete their actions within 90 days of the date an appeal is timely filed. The Part D statute and rule do not establish timeframes for an ALJ or the MAC to issue a decision. However, we recognize the need to ensure that Part D enrollees receive timely actions on their requests for hearing and review, particularly in cases where the enrollee has not obtained the drug and a delayed decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function.

We proposed to apply a 90-day adjudicatory timeframe to Part D appeals with an expedited process for certain types of appeals. Specifically, we proposed that an ALJ and the MAC must provide an expedited decision in situations where the appeal involves one of the issues specified in § 423.566(b), but does not include solely a request for payment of Part D drugs already furnished, and when the enrollee's prescribing physician indicates, or the ALJ or the MAC determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function. In these situations, the ALJ and the MAC must issue a decision, dismissal order, or remand as expeditiously as the enrollee's health condition requires, but no later than the end of the 10-day period beginning on the date the request for hearing or request for review is received.

In order to meet the shortened timeframes established for expedited appeals, we also proposed to allow certain requests, objections, decisions, orders, and notices to be conducted orally with written follow-up or documentation and to shorten certain timeframes for receiving certain notices, such as the notice of hearing. We note

that all time periods in this final appeals rule refer to calendar days.

We also proposed to not include provisions regarding escalation, but rather, to address the timeliness concerns of Part D enrollees by providing for an expedited process, discussed in greater detail below.

Specific comments received and responses to those comments are as follows:

Comment: A number of commenters stated that Part D plan sponsors and the IRE routinely fail to issue timely coverage and payment decisions. To help improve this situation, these commenters suggest the proposed rule be revised to state that any ALJ or MAC request that is not responded to within the applicable timeframe is deemed approved.

Response: Clearly, it is important that both Part D plan sponsors and subsequent adjudicators meet the applicable decision making timeframes for Part D appeals. CMS monitors Part D plan sponsor performance on meeting timeliness standards and although we do not believe timeliness issues are widespread, compliance action is taken when systemic problems are identified. Further, we note that the IRE's performance in this regard has been outstanding with a timeliness rate that is consistently close to 100 percent, based on calendar year 2007 data.

However, even in cases where Part D plan sponsors or adjudicators do not meet timeframes, we do not believe the commenters' recommendation is an appropriate remedy. There is no precedent in Part D, or anywhere in the Medicare program, for covering items and services solely on the grounds that a coverage or appeal determination was not made on a timely basis. Furthermore, if the request for coverage or reimbursement were to be deemed favorable solely because the adjudicator missed the decision making timeframe, the request would be covered without receiving any type of review, and possibly lead to the inappropriate coverage of drugs under the Medicare Part D drug benefit program. Instead, in cases where Part D plan sponsors do not meet the applicable timeframes, we have established, under both Parts C and D, a policy that an initial determination or plan-level appeal decision that is not made within the applicable timeframe is deemed unfavorable and the request is forwarded by the plan to the IRE for review. *See* 42 CFR 422.568(f), 422.572(f), 422.590(c) and (f), 423.568(e), 423.572(d), and 423.590(c) and (e). This approach puts in place a mechanism for moving appeals forward when decision making timeframes are missed, and ensures that all requests for Medicare Part D benefits or payment receive review as soon as possible. Under Part D, such review will ensure that payment is appropriate (for example, the drug is not an excluded drug). As noted above, the data we have collected thus far indicates that the IRE is meeting the applicable adjudication timeframes in the overwhelming majority of cases, and we do not expect missed timeframes to be a problem at the ALJ or MAC level. We will continue to monitor timeliness at all levels of appeal, but we do not believe the commenter's suggested approach is appropriate.

Comment: Some commenters recommended that the ALJ and MAC automatically expedite a decision if it was expedited at a lower level of appeal. Given the documentation needed to support a request to expedite an appeal, these commenters felt that requiring enrollees to demonstrate the need for an expedited appeal at each level of the process would be burdensome for enrollees and their physicians.

Response: Although we appreciate the commenters' interest in streamlining the appeals process, we disagree with the recommendation to require ALJs and the MAC to automatically expedite an appeal request if it was expedited at a lower level. If an enrollee's health status improves during the course of an appeal, or an enrollee purchases the drug in dispute while an appeal is pending, expedited status may no longer be warranted. Thus, we believe it is more appropriate for each adjudicator to make an independent determination about whether to expedite a request. In doing so, adjudicators may take into consideration a previous adjudicator's decision to expedite an appeal request. Under § 423.2016(b) and § 423.2108(d) of this rule the decision will be expedited if the appeal involves an issue specified in § 423.566(b), but is not solely a request for payment of Part D drugs already furnished, and the enrollee's prescribing physician or other prescriber indicates, or the ALJ or the MAC determines, that applying the standard timeframe may seriously jeopardize the enrollee's life, health, or ability to regain maximum function.

Comment: Several commenters noted that the preamble of the proposed rule stated that all time periods refer to calendar days. The commenters requested that the use of "calendar days" be explicitly stated in the applicable regulatory provisions.

Response: We agree with the commenters and have revised all "days" references in the regulatory provisions to "calendar days." We note that where the regulations provide for a time frame and that time frame ends on a Saturday, Sunday, legal holiday, or any other federal nonwork day, we apply a rollover period that extends the time frame within which an act must be done to the first day after the Saturday, Sunday, legal holiday, or other federal nonwork day.

We are also making a conforming change to the Part D grievance, plan sponsor, and IRE provisions to ensure consistency throughout the Part D appeals process, by changing "days" references to "calendar days" in 42 CFR 423.564(d)(2), (e)(1), and (e)(2); 423.582(c)(2); 423.584(d)(1) and (d)(2)(i); and 423.600(a).

Comment: Commenters indicated that a provision similar to § 405.1104 and 42 CFR 405.1132 should be added, allowing an enrollee's appeal before an ALJ to be escalated to the MAC and an appeal before the MAC to be escalated to Federal district court if an enrollee does not receive a timely decision from an ALJ or the MAC.

Response: The regulations referenced by the commenters are the result of explicit statutory provisions for appeals under Part A and Part B and there are no parallel statutory requirements for Part C and Part D appeals. We note also that the adjudication timeframes associated with escalated cases would be considerably longer than the decision making timeframes proposed in this rule. [Place holder] As we noted in the Part A and Part B final rule published elsewhere in the **Federal Register**, Part 405, subpart I implemented a 180-day adjudicatory timeframe for reviewing escalated appeals in light of the substantial additional burden on the adjudicator, including locating and acquiring relevant information, performing additional procedural and jurisdictional reviews, and organizing evidence in the case file. Thus, setting the adjudication timeframe by regulation at 180 days for escalated appeals balances the interests of the appellant in timely resolving the disputed appeal and an adjudicator's duty to collect the evidence and perform the administrative tasks necessary to fully and fairly adjudicate an appeal that has not been addressed at the prior level of appeal. However, given the lack of similar statutory direction with respect to Part D appeals, we believe the concerns of enrollees seeking timely decisions from an ALJ and the MAC for Part D appeals are better met by establishing a 90-day adjudicatory timeframe accompanied by an expedited process, similar to the process established at the coverage

determination, redetermination, and reconsideration levels.

D. Evidence

We proposed to provide enrollees with as much flexibility as possible concerning the evidence that may be presented for an ALJ hearing and MAC review. We also proposed that the entity that is best suited to review and evaluate the evidence be the entity that receives the evidence for review. We proposed that an enrollee may submit any written evidence about his or her condition at the time of the coverage determination that he or she wishes to have considered at the hearing. However, we proposed that in instances where an enrollee wishes to have evidence on changes in his or her condition since the coverage determination considered in the appeal, an ALJ or the MAC will remand the case to the Part D plan sponsor.

We proposed not to follow the full and early presentation of evidence provisions in Part 405, subpart I, including § 405.1028. For Part D appeals, we proposed that only the enrollee would be a party to the appeal and because the enrollee would not be represented by a provider or supplier we did not propose to include any provisions from Part 405, subpart I, on the full and early presentation of evidence. We proposed, as discussed above, that an enrollee may present new evidence at any time during the appeal.

Specific comments received and responses to those comments are as follows:

Comment: Numerous commenters expressed nonsupport of an ALJ and/or the MAC remanding the appeal to the Part D plan sponsor when an enrollee wishes to have evidence of a change in his or her condition since the coverage determination considered. Commenters suggested that where an enrollee wishes to have such evidence considered, the appeal should be remanded to the Part D IRE instead of to the Part D plan sponsor for a new determination. The commenters expressed concern that the proposal would result in further delays in the adjudication process and force unrepresented beneficiaries to make a strategic decision about whether to forfeit the right to consideration of all evidence, including evidence of a worsening condition, in order to get review by an ALJ or the MAC.

Response: Similar to the regulations found in Part 405, subpart I, an enrollee has been provided under the proposed regulations with as much flexibility as possible to submit evidence throughout the appeals process. We appreciate the commenters' concerns about the impact on the enrollee if the ALJ and the MAC remand a case to the Part D plan sponsor to consider evidence of a change in condition. After further consideration, we agree that remanding these types of cases back to the Part D plan sponsors may prolong the appeals process because the enrollee, if dissatisfied with a Part D plan sponsor's new coverage determination, would have to go through the entire Part D appeals process a second time. Thus, while both the Part D plan sponsor and the Part D IRE have the appropriate medical expertise to provide an effective and efficient review of the evidence related to an enrollee's change in condition, we believe that it is more appropriate for the ALJ and the MAC to remand these cases to the Part D IRE. This approach will ensure that an enrollee who is dissatisfied with the Part D IRE's new decision can immediately appeal that decision to an ALJ without having to navigate the Part D plan sponsor and IRE appeals levels a second time. As the IRE's new decision can immediately be appealed to an ALJ, we also believe that remanding to the Part D IRE instead of to the Part D plan sponsor will aid unrepresented enrollees when making decisions on whether to have evidence of a change in his or her condition since the coverage determination considered. Accordingly, § 423.2034(c) and § 423.2126(b) have been modified to state that the ALJ and the MAC, respectively, will remand a case to the Part D IRE if an enrollee wishes to have the ALJ or MAC consider evidence of a change in condition after the coverage determination was made.

E. Claims and Overpayment

We proposed not to include any references to claims, overpayment, or underpayment since the Part A and Part B appeals process may involve claims for reimbursement from the Medicare Trust Fund made by parties to the appeal and issues of over- or underpayment by the Federal Government.

A specific comment received and response to comment is as follows:

Comment: One commenter expressed concern about the statements in the preamble to the proposed rule that the Part D appeals process does not involve overpayments or underpayments because, unlike Part A and Part B appeals, Part D appeals do not involve claims against the Medicare Trust Fund by enrollees. The commenter believes that this statement overlooks how the Part D program is funded and the statutory obligations of Part D plan sponsors because subsidy payments made by CMS to Part D plan sponsors to pay for covered Part D drugs and low-income qualifying enrollees are Trust Fund dollars.

Response: We continue to believe that the Part D beneficiary appeals process does not involve disputes about claims for reimbursement from the Medicare Trust Fund by enrollees and issues of overpayments or underpayments by the Federal Government. The Part A and Part B appeals process frequently involves claims for direct reimbursement from the Trust Fund by parties to the appeal and issues of large overpayments or underpayments by the Federal Government. Part D plan sponsors cannot be parties under the Part D appeals process and any claim for reimbursement by the enrollee would be made against the Part D plan sponsor, not the Medicare Trust Fund.

F. Other General Provisions

We proposed not to include language similar to that in § 405.990(j) and § 405.1006 regarding amount in controversy requirements for Part A and Part B appeals since the Part D rule already contains provisions in former § 423.610 (now at § 423.1970), former § 423.612 (now at § 423.1972), and former § 423.630 (now at § 423.1976) regarding the amount in controversy requirements for ALJ hearings and judicial review. Similarly, we did not see a reason to include Part 405, subpart I, references to the applicability of national coverage determinations (NCDs) and local coverage determinations (LCDs). Because neither of these types of coverage policies applies to Part D, we proposed not to include any reference to NCDs and LCDs and not to include any provision that applies solely to the application of NCDs and/or LCDs from Part 405, subpart I (for example, language from § 405.1060).

Part 405, subpart I, also refers to SSA rules for entitlement and enrollment appeals performed by SSA. We proposed not to include similar references to SSA because SSA does not perform appeals regarding enrollment in or entitlement to Part D.

Finally, Part 405, subpart I includes a provision at § 405.1064 regarding ALJ decisions involving statistical samples. We are not including similar language for Part D appeals because, as discussed above, Part D appeals do not involve overpayment issues.

We did not receive any comments related to these proposals. Accordingly, we are finalizing § 423.1972 subject to the modification discussed in section III, which changes the word "days" to

"calendar days," and are finalizing the other provisions without modification.

G. Reopenings (§ 423.1980 Through § 423.1986)

As revised (based on technical corrections discussed above in section III), § 423.1978(a) (former § 423.634(a)) states that a coverage determination, a redetermination, a reconsideration or a decision of an ALJ or the MAC "that is otherwise binding may be reopened and revised by the entity that made the determination or decision, under the rules in part 422, subpart M of this chapter." Section 422.616 of subpart M discusses reopenings and states that a determination or decision "that is otherwise binding may be reopened and revised by the entity that made the determination or decision, under the rules in part 405 of this chapter." Therefore, we proposed reopening regulations that generally track the Part A and Part B reopening provisions in § 405.980, § 405.982, § 405.984, and § 405.986. We note that these regulations define reopening, explain who may initiate and revise determinations and decisions and when, and the effect of a revised determination or decision. We proposed at § 423.1980(a)(1), (a)(3), and (a)(4), and § 423.1984(g) to add language that is consistent with former § 423.634 (now at § 423.1978) on Part D reopenings. Since Part D appeals differ in part from Part A and Part B appeals, we proposed not to include several provisions from § 405.980, § 405.982, and § 405.986.

Specific comments received and responses to those comments are as follows:

Comment: Many commenters asked that CMS acknowledge a Part D enrollee's right to request a reopening of an unfavorable decision. Additionally, these same commenters recommended that we revise the proposed rule to include a provision stating that a request to reopen extends the 60-day timeframe to appeal an unfavorable decision. The commenters argue this regulatory change is necessary because many enrollees believe the deadline to appeal an unfavorable decision is extended when a reopening request is filed.

Response: While enrollees do have a right to request that an unfavorable decision be reopened, reopenings are at the discretion of the adjudicator and an adjudicator's decision about whether to reopen is not subject to appeal. This policy is consistent with the reopening provisions contained in Part 405, subpart I of the regulations. The deadlines for requesting appeals are clearly explained in the decision letters, including the ALJ hearing decisions. While we understand the commenters' concerns regarding the potential effect a denied reopening request may have on appeal rights, we believe that allowing additional time to file an appeal once a reopening is requested would provide an inappropriate extension of the appeals filing time frames. If an enrollee misses the filing deadline for an appeal while awaiting a decision on a reopening request, he or she may request the adjudicator consider granting an extension to the filing time limit consistent with § 423.2014(d). Thus, we are not adopting the commenters' suggestion to extend appeals filing time limits when a reopening is requested.

1. Reopenings of Coverage Determinations, Redeterminations, Reconsiderations, Hearings, and Reviews (§ 423.1980)

We proposed in this section to track the language of § 405.980 on the general rules and timeframes for reopening determinations and decisions, except as discussed above and below. We proposed to define reopenings in § 423.1980(a)(1), without referring to overpayments and underpayments because these terms do not apply to Part D appeals, as discussed above. We also proposed in § 423.1980 not to include the provision in § 405.980(a)(2) that involves situations where a fiscal intermediary or carrier denies a claim because it did not receive information that it requested about a claim during medical review. In addition, we proposed not to include §§ 405.980(a)(3), (b)(4), and (c)(3), as these sections refer to clerical errors related to claims submissions by providers to fiscal intermediaries and carriers, which is not applicable to Part D.

In this final appeals rule, we are clarifying in § 423.1980 that a Part D plan sponsor may request a reopening of a reconsideration, hearing decision, or MAC review decision. Though not explicitly stated, nothing in the proposed rule prevented a Part D plan sponsor from asking an adjudicator to reopen a decision on its own motion. Thus, this option existed for Part D plan sponsors under the proposed rule. To make this option more clear, § 423.1980 of this final appeals rule has been revised to explicitly state that a Part D plan sponsor may ask an adjudicator to reopen a decision on its own motion. We received no public comments on § 423.1980. Accordingly, we are finalizing it subject to this clarification and the modifications discussed in section III, which include removing the term "final" and replacing it with "binding," removing the words "and revise," and changing the term "days" to "calendar days."

2. Notice of a Revised Determination or Decision (§ 423.1982)

We proposed in § 423.1982 to follow the process established for Part A and Part B reopenings regarding notification of revised determinations or decisions. However, unlike § 405.982, proposed § 423.1982 does not refer to revised electronic or paper remittance for full or partial reversals. We are not incorporating this language because revised electronic or paper remittance advice notices are not issued for Part D appeals. Further, we proposed language requiring the IRE, ALJ, or the MAC to mail revised determinations or decisions to the Part D plan sponsor. We did not receive any public comments on the proposed provision, and accordingly, are finalizing this provision without modification.

3. Effect of a Revised Determination or Decision (§ 423.1984)

In section 423.1984, we proposed that the revision of a coverage determination or appeal decision is binding unless the determination or decision is appealed and the appeal request is accepted and processed in accordance with the appropriate regulatory provisions. We also proposed to allow only the portion of the coverage determination or appeal decision revised by reopening to be appealed. We did not receive any comments on this section. Therefore, we are finalizing § 423.1984 without modification.

4. Good Cause for Reopening (§ 423.1986)

We proposed in § 423.1986 language similar to § 405.986 regarding good cause for reopening a determination or decision. We believe it is appropriate where possible for Part D reopenings to have the same good cause standards as Part A and Part B reopenings. We proposed in § 423.1986(b)(1), to include the requirement in § 405.986(b) regarding good cause for reopening a determination or decision based on a change in substantive law or interpretive policy for appeals. However, many Part D appeals involve drug benefit appeals, where an enrollee has not received the drug. With respect to these appeals, we proposed in § 423.1986(b)(2) that an adjudicator may reopen a determination or decision to apply the current law or CMS or Part D plan sponsor policy (rather than the law or CMS or Part D plan sponsor policy at the time the original coverage

determination was made). Because the enrollee has not received the drug, any change to the law or CMS or Part D plan sponsor policies since the initial coverage determination may affect whether the drug should be received.

A specific comment received and response to comment is as follows:

Comment: We received one comment suggesting the proposed good cause standards for reopening should be revised to allow an ALJ to reopen a decision when third party payor error occurs or there is a change in substantive law or interpretive policy. The commenter believes the ALJ should reopen the decision and review it in light of the third party payor error or new law or policy.

Response: As with other Medicare programs, coverage policies in Part D are applied prospectively. Therefore, the coverage policy that applies for purposes of making a coverage determination is the policy that is in place at the time the drug is purchased. If there is a change in substantive law or interpretive policy and the enrollee is requesting benefits (not reimbursement), § 423.1986(b)(2) allows reopenings to consider such changes. With respect to the commenter's request to amend the proposed rule to allow ALJs to reopen decisions in order to consider third party payor error, we note that the rules in part 405, subpart I, upon which the provisions in question are modeled, do not permit reopenings for this reason. Moreover, we do not believe it is necessary to establish a different policy in the Part D program.

Accordingly, we are finalizing § 423.1986 without modification.

H. Expedited Access to Judicial Review (EAJR) (§ 423.1990)

Section 1869(b)(2) of the Act requires the Secretary to establish a process for Part A and Part B appeals where a provider, supplier or a beneficiary may obtain expedited access to judicial review in situations where the Departmental Appeals Board (DAB) does not have authority to decide the question of law or regulation relevant to the matters in controversy and where there is no material issue of fact in dispute.

Unlike Part A and Part B appeals, there is no statutory requirement for enrollees to have access to an EAJR process for Part D appeals. However, we believe that it is appropriate to provide Part D enrollees with an EAJR process that mirrors the process established for Part A and Part B appeals. Under the Part A and Part B appeal process, a review entity determines whether the DAB has the authority to decide the question of law or regulation relevant to the matters in controversy after finding that there is no material issue of fact in dispute.

If the review entity certifies that the requirements for expedited access to judicial review are met, a party may appeal directly to the United States District Court. Even though the Part D statute does not require this process for Part D, we believe that Part D enrollees would benefit from this process because it provides access to judicial review more quickly in cases where the DAB does not have the authority to decide the question of law or regulation relevant to the matters in controversy and there is no material issue of fact in dispute, resulting in a more efficient appeals process. We proposed in § 423.990 to provide Part D enrollees the opportunity to seek EAJR and requested specific comments on this proposal.

Specific comments received and responses to those comments are as follows:

Comment: Commenters stated that providing expedited access to judicial review will benefit many enrollees. The commenters suggested that for those enrollees whose claims do not raise issues that can only be resolved by a federal court, a provision similar to 42 CFR 405.1104 and 42 CFR 405.1132 allowing escalation to the MAC or to federal court should be added for instances when an enrollee has not received a decision in a timely manner from an appeal to an ALJ or the MAC.

Response: As discussed previously, we believe that in addition to providing for expedited access to judicial review, providing a 90-day adjudicatory timeframe with an expedited process similar to the process established at the coverage determination, redetermination, and reconsideration levels more appropriately addresses the concerns of enrollees seeking timely decisions from an ALJ and the MAC. Therefore, we are finalizing § 423.1990 with modifications as discussed in section III of this preamble, which include adding additional regulation text language to specify the various actions that may be taken by the ALJ, removing the words "final and," and changing the word "days" to "calendar days."

I. Appeals to an ALJ (§ 423.2000 Through § 423.2063)

1. General

The Part D rule contains two specific provisions that apply to appeals before an ALJ. Former § 423.610 (now at § 423.1970) describes an enrollee's right to an ALJ hearing and explains how the amount in controversy requirements may be satisfied. Former § 423.612 (now at § 423.1972) describes when and where to file a request for hearing, specifies that the time and place of the hearing will be set in accordance with the regulation governing Part A and Part B appeals at § 405.1020, and explains when the ALJ will dismiss a request for hearing because it does not meet the amount in controversy requirement.

We proposed to follow the process set forth under Part A and Part B for appeals to an ALJ, except as noted above and below. We tracked the language in the Part 405 rule for proposed § 423.2000, § 423.2004, § 423.2008, § 423.2030, § 423.2032, § 423.2042, § 423.2044, § 423.2048, § 423.2050, § 423.2054, § 423.2062, and § 423.2063. We believe that it is appropriate for Part D appeals to follow the Part A and Part B appeals procedures set forth in these provisions.

2. Hearing Before an ALJ (§ 423.2000) and Right to an ALJ Hearing (§ 423.2002)

Section 423.2000 provides an overview of the ALJ hearing process. Former § 423.610(a) (now at § 423.1970(a)) provides that an enrollee who is dissatisfied with the IRE reconsideration and meets the remaining amount in controversy threshold has a right to a hearing before an ALJ. We proposed to include this provision in § 423.2002. We also proposed to include in this section language similar to that in § 405.1002 on how to request an ALJ hearing, what is the date of receipt of the reconsideration, and when a request is considered filed.

We believe it is appropriate to include this information (now at § 423.2002) because it would be helpful to the enrollee and any representative of the enrollee to understand how to file a request, how we would determine the date of receipt of the reconsideration, and when a request would be considered filed.

We also proposed in § 423.2002(b) that an enrollee may request an expedited ALJ hearing, if the enrollee meets the amount in controversy threshold and submits a request for an ALJ hearing within 60 days after receipt of the written notice of the IRE's reconsideration where the appeal involves an issue specified in § 423.566(b) but is not solely a request for payment of Part D drugs already furnished, as discussed previously. However, we proposed in § 423.2016(b) that the ALJ grant the request only if the enrollee's prescribing physician indicates or the ALJ determines that

applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function.

In addition, we proposed at § 423.2002(b)(2) a more informal process for requesting an expedited hearing by proposing to permit an enrollee to make a request for hearing orally. We believe that the oral request would make the initiation of the ALJ appeals process faster and easier for the enrollee. However, for the reasons stated below, an enrollee may only file an oral request for an expedited hearing after receiving the written IRE reconsideration notice. We also proposed to require the ALJ hearing office to document and maintain documentation of any oral request.

Specific comments received and responses to those comments are as follows:

Comment: Some commenters stated that provisions of the rule are inconsistent. They pointed out that § 423.1972 requires an enrollee to file a request for a hearing within 60 days of the date of the notice of an IRE decision, while § 423.2002(a) requires an enrollee to file a written request for an ALJ hearing within 60 days after receipt of the written notice of the IRE's reconsideration. Commenters also pointed out that while § 423.2002(a) requires an enrollee to file a written request for an ALJ hearing, § 423.2002(b) allows an enrollee to submit a written or oral request for an expedited ALJ hearing. The commenters ask that the regulations be made consistent so to minimize enrollee confusion. The commenters also asked that enrollees be allowed to file oral requests for expedited hearings before receipt of a written IRE reconsideration when the IRE has not issued the written reconsideration notice within the regulatory timeframes and to be allowed to file oral requests for hearings and MAC review for non-expedited appeals.

Response: We do not believe that these regulations are inconsistent, but rather may require additional explanation. Sections 423.2002(a) and (b)(2) as well as § 423.2014(b) and (c) provide more specificity for the requirement in § 423.1972. Section 423.1972, that is, redesignated section 423.612, was drafted consistent with part 405. At the time of the implementation of § 423.612 there were no regulatorily established adjudication timeframes at the ALJ level. In particular, a regulatorily implemented expedited process that includes oral requests for hearings and a 10-day adjudication timeframe did not exist. In §§ 423.2002(a) and (b) and §§ 423.2014(b) and (c) we clarify that a request for hearing must be filed within 60 days after receipt of a written notice of an IRE reconsideration. We require an enrollee to have a written decision because in some instances the IRE will issue an oral notice of reconsideration before issuing the written notice of reconsideration. The Office of Medicare Hearings and Appeals cannot process a request for an ALJ hearing without a written IRE reconsideration, especially under the constraints of a 10-day adjudication period. This also holds true for review by the Medicare Appeals Council. In both circumstances, a written decision from the lower level is necessary to further process the appeal.

In §§ 423.2002(a)(2) and 423.2014(b), we provide an exception to the provision in § 423.2002(a)(1) that requires an enrollee to file a written request for an ALJ hearing. We permit the enrollee to either file a written or oral request for an expedited ALJ hearing. The ability to submit an oral request for an expedited hearing should help preserve time during the expedited process. We do not believe that the filing of oral requests is necessary in non-expedited appeals because there is not the same urgency with respect to an enrollee's health or function that would necessitate the appeals process to move more swiftly.

Comment: Commenters recommended that the filing timeframe begin with the date of receipt of the IRE decision with the date of receipt presumed to be 5 days after the date of the notice, absent evidence to the contrary. The commenters also called for the regulations to be consistent with part 405 by providing for an extension of the filing timeframe when good cause is shown for a late filing.

Response: The timeframe for submitting a request for an ALJ hearing will begin with receipt of the written notice of the IRE reconsideration. As specified in § 423.2002(c), the date of receipt will be presumed to be 5 days after the date of written reconsideration, unless there is evidence to the contrary.

Section 423.2014(d) provides the enrollee the opportunity to request an extension of the 60-day filing timeframe for good cause. This provision is consistent with § 423.1972(b) and Part 405, subpart I. We did not receive any comments on § 423.2000, and thus, are finalizing this provision consistent with the modifications described in section III of this preamble to clarify that the ALJ conducts a *de novo* review. With respect to § 423.2002, we are finalizing this provision subject to the modification discussed in section III, which changes the word "days" to "calendar days," and with a technical revision to § 423.2002(b)(3). The inclusion of the ALJ documentation requirement in subsection (b)(3) was a technical error and the requirement has now been placed in a separate subsection. The requirement that the ALJ must document all oral request for expedited hearings in writing and maintain documentation is now specified in § 423.2002(c) and the proposed subsections § 423.2002(c) and (d) have been redesignated as subsections § 423.2002(d) and (e), respectively.

3. Right to ALJ Review of an IRE Dismissal (§ 423.2004) and Parties to the ALJ Hearing (§ 423.2008)

Section 423.2004 describes the process for obtaining ALJ review of a QIC dismissal of a reconsideration request. Section 423.2008 states who may request an ALJ hearing and who is considered a party to the ALJ hearing. We received no comments on these sections. Accordingly, we are finalizing § 423.2004 with the modifications discussed in section III of this preamble to make a technical correction clarifying an ALJ's dismissal action is binding and not subject to further review unless vacated by the MAC, and changing the word "days" to "calendar days." We are finalizing § 423.2008 without modification.

4. Participation in an ALJ Hearing (§ 423.2010)

In Part D appeals all requests for an ALJ hearing are brought by enrollees. Even if an enrollee is represented by a provider or supplier, that provider or supplier will not have a direct financial interest in the appeal. Therefore, we proposed that CMS, the IRE, and the Part D plan sponsor not be a party with a right to request a hearing under Part D. As noted above, this proposed policy is consistent with the applicable statutory and regulatory provisions. Moreover, this proposal is consistent with the preamble to the Part D rule (70 FR at 4360) where we explicitly state that the Part D plan sponsor is not a party to the appeal.

In an effort to reduce the administrative burden and to assist the ALJ in resolving the issue(s) in an appeal more appropriately, we introduced specific procedures in Part 405, subpart I, to allow CMS and/or its contractors to participate in, or be a party to, an ALJ hearing. As explained in the preamble to the Part 405, subpart I rule (70 FR 11459 through 11460), if CMS and/or its contractors participate in an appeal, ALJs may be able to resolve issues of fact and law more

quickly and reduce the need for remands for additional factual development. CMS participation would also assist in creating a more complete record. Section 1860D–4(h) of the Act and the Part D rule neither require nor prohibit participation by CMS and/or its contractors in an ALJ hearing.

We proposed in § 423.2010, to allow CMS, the IRE, and/or the Part D plan sponsor to participate in an ALJ hearing at the ALJ's discretion, in a manner similar to § 405.1010 for Part A and Part B appeals. Participation in an ALJ hearing does not give the entities "party" status. We proposed in § 423.2010(c) to give the ALJ discretion about whether to allow CMS, the IRE, and/or the Part D plan sponsor to participate in situations where any of these entities requests participation. The ALJ would be precluded from drawing any adverse inference if CMS, the IRE, and/or the Part D plan sponsor elected not to participate under proposed § 423.2010(g).

We believe that this proposal would allow an ALJ to decide when an appeal would benefit from participation by one or more of these entities. An ALJ, however, would also have the flexibility to balance the interests of the enrollee with the interests of these other entities and to deny a request to participate. We believe this proposal is consistent with the preamble language to the Part D rule (70 FR 4360, 4361), with respect to the role of the Part D plan sponsor, which states, "[t]he plan is not considered a party to the ALJ hearing, but may participate in the hearing at the discretion of the ALJ * * * [u]nlike under MA, the plans do not have the right to request an appeal of an ALJ decision with which the plan disagrees." We noted in the Part D rule that "[e]ven though plans are not parties to ALJ hearings, we continue to believe that it is important to give plans the ability to participate in ALJ hearings. Therefore, plans may participate in hearings at the ALJ's discretion."

Further, if these entities do wish to participate, we proposed in § 423.2010(b) to require that the request to participate be made within a shorter timeframe. For expedited appeals, any request by CMS, the IRE, and/or the Part D plan sponsor to participate must be made within 1 day of receipt of the notice of hearing (5 days for non-expedited hearings). The ALJ must then notify the entity, the enrollee, and the Part D plan sponsor, if applicable, of his or her decision on the request to participate within 1 day of receipt of the request (5 days for non-expedited appeals). We proposed these limitations due to the very tight timeframes for expedited appeals.

Specific comments received and responses to those comments are as follows:

Comment: Commenters stated that the regulations provide insufficient time for notification to the enrollee of the participation of CMS, the IRE, and/or the Part D plan sponsor. Some commenters also believe that section 423.2010(a) should include a set timeframe by which the ALJ may request the participation of CMS, the IRE, or a Part D plan sponsor, preferably within 5 days of receipt of the hearing request for a non-expedited appeal.

Response: We believe that the regulations provide sufficient notification to the enrollee of any participation by CMS, the IRE, and/or the Part D plan sponsor and that the ALJ should not be subjected to a timeframe for requesting participation by these entities. Section 423.2010(b)(2) requires an ALJ, in a non-expedited appeal, to notify the enrollee of his or her decision on a request to participate by CMS, the IRE, and/or the Part D plan sponsor within 5 days of receipt of the request. Section 423.2010(b)(4) requires an ALJ, in expedited appeals, to notify the enrollee of his or her decision on a request to participate by CMS, the IRE, and/or the Part D plan sponsor within 1 day of receipt of the request. In both instances, an enrollee will know whether CMS, the IRE, and/or the Part D plan sponsor will be participating prior to the hearing.

The ALJ hearing process is a fluid process. ALJs and their staff conduct reviews of the case file, make requests for additional information and accept additional evidence up to and through the date of the hearing. It would not be beneficial to the hearing process to preclude an ALJ from obtaining valuable information due to a timeframe that has no apparent connection to the preservation of enrollee's rights or the appropriate resolution of an appeal.

We believe that participation by CMS, the IRE, and/or the Part D plan sponsor in ALJ hearings for Part D appeals has been constructed in a manner that allows for the resolution of an appeal more efficiently and appropriately while giving proper consideration to the interests of an enrollee. The participation of CMS, the IRE, and/or the Part D plan sponsor may allow the ALJ to resolve issues of fact and law more quickly, reduce the need for remands for additional factual development, and develop a more complete record. However, keeping with the interests of efficiency and fairness, participation is limited to filing position papers or providing written testimony to clarify factual or policy issues in a case. CMS, the IRE, and/or the Part D plan sponsor cannot be called as a witness, cannot call their own witnesses, and cannot cross-examine the witnesses of an enrollee at the hearing. Additionally, under § 423.2042, an enrollee can review and comment on the record, which would include any position papers and written testimony by CMS, the IRE, and/or the Part D plan sponsor, at the hearing or any time before the ALJ's notice of decision is issued. Finally, under the regulations, the ALJ maintains the flexibility to balance the interests of the enrollee with the interests of CMS, the IRE, and/or the Part D plan sponsor to deny a request to participate.

Comment: A commenter expressed concern about the 1-day timeframe provided to CMS, the IRE, and/or the Part D plan sponsor for requesting to participate in an expedited hearing. The commenter believes that the timeframe is too short and that meeting the timeframe will increase expenses because the only way to meet the timeframe with a written response would be by a process more expensive than regular mail.

Response: Under the expedited process, all applicable timeframes have been significantly reduced to facilitate meeting the 10-day adjudication timeframe. Section 423.1010(b)(3) provides CMS, the IRE, and/or Part D plan sponsor, upon receipt of the notice of hearing, 1 day to request to participate in the hearing. We believe that one day is sufficient time to review the notice of hearing, make a determination on whether to participate, and notify the ALJ. We want to emphasize that § 423.2010(b)(3) allows for requests to participate to be made orally or submitted by facsimile to the ALJ hearing office. Therefore, a request to participate, including a written request, should be able to be submitted timely and without any increased costs.

Comment: Some commenters stated that allowing the ALJ to request CMS, IRE, or Part D plan sponsor participation in an ALJ hearing is inappropriate given that the statute did not provide party status to these entities. The commenters stated that it is unclear why participation by these entities would be necessary or valuable. The commenters believe that such participation will add unnecessary confusion to the hearing, blindside the enrollee, and afford these entities a greater role than they are entitled to under the statute, including the opportunity to behave like a party. The commenters urge CMS to deny these entities the right to participate at

the ALJ hearing. If they are allowed to participate, the commenters believe the regulations should more clearly state that ALJs may not rely on statements made by representatives of CMS, the IRE, or a Part D plan sponsor.

Response: We continue to believe that affording the ALJ the discretion to request and allow participation in a hearing by CMS, the IRE, and/or the Part D plan sponsor provides significant benefit to the appeals process by promoting the efficient and accurate resolution of factual and legal issues and by creating a more complete administrative record in the case. These entities cannot be parties to the proceeding, thus we believe that ALJ's should retain the discretion to determine when requesting or allowing CMS, the IRE, or Part D plan sponsor participation in a hearing would be helpful in resolving the issues involved in the appeal. We disagree with the commenters' suggestion that, even if these entities are allowed to participate in the hearing, the regulations should prescribe that the ALJ may not rely on statements made by representatives of these entities. Establishing such a policy would impede an ALJ's ability to make an independent assessment about the information and evidence presented at the hearing. We also disagree that allowing participation gives these entities the ability to behave like a party to the proceedings. These rules specifically prohibit participants from calling witnesses or cross-examining the witnesses of an enrollee. Participation by CMS, the IRE, or the Part D plan sponsor is intended to be non-adversarial and for the purpose of aiding in the clarification of factual or policy issues.

Accordingly, we are finalizing § 423.2010 subject to the modification discussed in section III, which changes the word "days" to "calendar days."

5. Request for an ALJ Hearing (§ 423.2014)

The Part D rule formerly at §§ 423.612(a) and (b) (now at §§ 423.1972(a) and (b)) describes how, where, and when to file a request for an ALJ hearing. We proposed to include this requirement in § 423.2014. We also proposed to include in this section language similar to that in § 405.1014 on requests for an ALJ hearing, including the content of a request, where and when to file a request and any extension of time to request a hearing. We believe these provisions appropriately apply to Part D appeals.

Former § 423.612(b) (now at § 423.1978(b)) states that "[e]xcept when an ALJ extends the timeframe as provided in part 422, subpart M of this chapter, the enrollee must file a request for a hearing within 60 days of the date of the notice of an IRE reconsideration determination." Similarly, § 422.602(b) of the Part C rule states that "[e]xcept when an ALJ extends the timeframe as provided in part 405 of this chapter, a party must file a request for a hearing within 60 days of the date of the notice of a reconsidered determination." Therefore, we proposed in § 423.2014 to closely track the language of § 405.1014 regarding the time in which to request a hearing. Additionally, we proposed in §§ 423.2014(a)(1) and (a)(2) to require the telephone number of the enrollee and the appointed representative, if any, in any request for an ALJ hearing. This information would assist the ALJ in quickly contacting the enrollee or the appointed representative, particularly for expedited appeals. Because we proposed to adopt a specific provision to govern requests for ALJ hearings in Part D appeals, we proposed to revise former § 423.612 (now at § 423.1972) to replace the reference to the regulations in part 422, subpart M, with a cross reference to § 423.2014.

Furthermore, we proposed to require the plan name and the enrollee's Medicare health insurance claim number. This information would assist the ALJ in identifying the relevant plan and formulary involved in the appeal. We also proposed in § 423.2014(a)(7) that an enrollee who seeks an expedited hearing indicate that in his or her request.

As discussed previously, we proposed in § 423.2014(b), a more informal process for requesting an expedited hearing by proposing to permit an enrollee to make a request for an expedited hearing orally. We believe that the oral request would make the initiation of the ALJ appeals process faster and easier for the enrollee. However, as explained above in the discussion of § 423.2002(b)(2), an enrollee may only file an oral request for an expedited hearing after receiving the written IRE reconsideration notice. This requirement is reflected in § 423.2014(b). A prescribing physician may also provide oral or written support for an enrollee's request for expedited hearing by an ALJ. In the same section, we also proposed to require the ALJ hearing office to document and maintain documentation of this oral request.

Similarly, in § 423.2014(d)(2), we proposed that an enrollee requesting an expedited hearing be permitted to request orally an extension of time for filing the hearing request and that such request be documented in writing and maintained in the case file by the ALJ hearing office.

Specific comments received and responses to those comments are as follows:

Comment: We received several comments pertaining to oral requests for an expedited ALJ hearing. One commenter expressed concern about the potential of oral requests for hearing to become lost, and therefore suggested that the ALJ be required to provide prompt written confirmation within two business days that the oral request has been received, along with a consumer friendly explanation of the ALJ appeals process and the enrollee's rights and obligations.

Response: While we agree with the commenter's concern that it is possible for oral requests for hearing to become misplaced; we believe that we have sufficiently addressed this concern in § 423.2002(c) and § 423.2014(b) by requiring the ALJ hearing office to document all oral requests in writing and maintain the documentation in the case files. This procedure is similar to the expedited process established at the coverage determination, redetermination and reconsideration levels.

Considering the expedited timeframe, we do not believe that issuing a notice acknowledging receipt of the oral request will add any benefit to the process. Rather, such a notice may cause confusion because the enrollee will receive notices on whether the request for an expedited hearing was granted or denied and/or a notice of hearing shortly after submission of the request for an expedited ALJ hearing. As to the request for a beneficiary-friendly explanation of the process and notification of the enrollee's right and obligations, we believe that the enrollee will be provided with all the necessary information through the notice of IRE reconsideration, the ALJ hearing notice, and interaction with ALJ staff. Accordingly, we are finalizing our proposals subject to the modification discussed in section III, which changes the word "days" to "calendar days."

6. Timeframes for Deciding an Appeal Before an ALJ (§ 423.2016)

As discussed above, we proposed to apply a 90-day adjudicatory timeframe to Part D appeals with an expedited process for certain types of appeals. Specifically, we proposed in § 423.2016(b)(1), that an ALJ would provide an expedited decision in situations where the enrollee requests an expedited hearing, the appeal involves an issue specified in § 423.566(b), but does not include solely

a request for payment of Part D drugs already furnished and the enrollee's prescribing physician indicates, or the ALJ determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function. We also proposed that the ALJ may consider this standard as met if a lower level adjudicator has granted a request for an expedited appeal. The expedited appeals process is similar to the process established at the Part D plan sponsor and IRE levels under the Part D rule at § 423.570, § 423.584, and § 423.600.

In § 423.2016(b), we proposed that the ALJ rule on a request for expedited hearing within 5 days of receiving the request. If the ALJ grants the request for expedited hearing, the ALJ will promptly provide the enrollee with oral notice of the decision and subsequently provide written notice of the decision, likely through the notice of hearing. We proposed in § 423.2016(b)(5), that in a granted expedited hearing, the ALJ must issue a written decision, dismissal order, or remand as expeditiously as the enrollee's health condition requires, but no later than the end of the 10-day period beginning on the date the request for hearing is received.

If the ALJ denies a request for an expedited hearing, the ALJ will provide prompt oral notice explaining that the appeal would be processed using the 90-day timeframe, and send an equivalent written notice within 3 days of issuance of the oral notice to the enrollee and to the Part D plan sponsor. We proposed in § 423.2016(b)(4), that a decision on a request for an expedited hearing cannot be appealed to the MAC.

Although the standard and expedited timeframes for the issuance of a written decision are somewhat longer than at the lower levels, we believe they are appropriate. The ALJ hearing is more complicated than the IRE reconsideration because it involves the scheduling and conducting of a hearing. The hearing entails the presentation of evidence including testimony by the enrollee and witnesses, which necessitates a longer adjudication period.

Specific comments received and responses to those comments are as follows:

Comment: Many commenters appreciated the establishment of regulatory adjudication timeframes for Part D appeals at the ALJ and MAC levels. One commenter, however, requested shorter timeframes for both standard and expedited appeals, proposing 45- to 60-day timeframes for standard appeals and 72 hour timeframes for expedited appeals. One entity stated that it supported the proposed 5-day adjudication timeframe for expedited appeals, but noted that the timeframe conflicted with the 10-day expedited adjudication timeframe stated in the preamble.

Response: The 90-day adjudication timeframe for standard appeals is consistent with the statutory and regulatory instruction to apply Part 405, subpart I to Part D appeals, as appropriate. Part 405, subpart I establishes a 90-day adjudication period for Parts A and B appeals. Standard Part D appeals do not have characteristics that would justify deviating from the statutory and regulatory guidance or that would justify treating them differently than standard Parts A and B appeals relative to the adjudication timeframe.

We have established an expedited adjudication timeframe for Part D appeals in situations where the appeal involves an issue specified in § 423.566(b), but does not include solely a request for payment of Part D drugs already furnished, and the enrollee's prescribing physician or other prescriber indicates, or the ALJ or the MAC determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function. In these situations, the ALJ or the MAC must issue a decision, dismissal order, or remand as expeditiously as the enrollee's health condition requires, but no later than the end of the 10-day period beginning on the date the request for hearing or request for review is received.

An ALJ or the MAC will always strive to resolve an appeal as expeditiously as the enrollee's health requires. The 10-day timeframe, which is the maximum time period for expedited appeals, takes into account such factors as federal agencies operating only on business days, receiving the case file from the previous adjudicating entity, complying with all notice requirements, scheduling and holding a hearing, and issuing a written decision.

The 5-day timeframe alluded to by one of the commenters is for ruling on a request for an expedited hearing. The timeframe provides an ALJ with sufficient time to review all the evidence and render an appropriate decision. As a practical matter, the timeframe is truly inconsequential to the enrollee because an ALJ must issue a decision as expeditiously as the enrollee's health condition requires or no later than within the applicable adjudication period. The 10-day expedited adjudication period and 90-day standard adjudication period begin on the day the request for hearing is received. *See* §§ 423.2016(a)(1), (2) and (b)(5)(i) and (ii). Therefore, the time it takes for an ALJ to issue a decision on a request for an expedited hearing will always count towards the applicable adjudication period. For instance, if an ALJ took 5 days to grant a request for an expedited hearing, then the ALJ would only have 5 more days to issue a decision before the applicable 10-day adjudication period expired. This would similarly hold true if the request for an expedited hearing is denied. If the request was denied on the 5th day, then there would be 85 days left in the standard adjudication period.

Accordingly, we are finalizing our proposals subject to the modification discussed in section III, which changes the term "days" to "calendar days."

7. Submitting Evidence Before the ALJ Hearing (§ 423.2018)

We proposed in § 423.2018 to adopt concepts from § 405.1018 regarding when an enrollee must submit written evidence. However, we also proposed in this section to permit an enrollee to submit any written evidence that he or she wishes to have considered at the hearing. An ALJ will not consider any evidence submitted regarding a change in the enrollee's condition after the coverage determination was made. As explained above in section IV., D., under the provisions of this final appeals rule, if an enrollee wishes such evidence to be considered, the ALJ will remand the case to the Part D IRE. *See* §§ 423.2034(c), 423.2126(b).

Specific comments received and responses to those comments are as follows:

Comment: We received several comments regarding the timeframes proposed for the enrollee to submit all written evidence to be considered at the hearing. These timeframes require the enrollee to submit evidence within 10 days, for standard appeals, and 2 days, for expedited appeals, of receiving the notice of hearing. Several commenters advised that the proposed regulations are supposed to, but do not mirror the regulations in part 405, which state that the timeframes for admission of evidence do not apply to oral testimony given at a hearing or to evidence submitted by an unrepresented beneficiary. The commenters contend that "unrepresented beneficiary" includes beneficiary advocates, who are often not contacted by the beneficiary soon enough to enable compliance. The commenters believe that there should be

no time constraints on the enrollee's ability to submit evidence.

Response: We disagree with the comments that the proposed provisions must be exactly the same as the parallel provisions in part 405. As contained in § 423.562(c) and as discussed in the proposed rule, we will apply the provisions of Part 405 to Part D appeals at the ALJ level with appropriate modifications to meet the needs of Part D appeals.

In § 423.2018 we are adopting concepts from § 405.1018 regarding when an enrollee must submit written evidence. We have proposed that an enrollee must submit all written evidence that he or she wishes to have considered at the hearing within 2 days of receiving the notice of hearing for expedited appeals and 10 days for non-expedited appeals. We believe that requiring evidence to be submitted within the 2-day timeframe provides the adjudicator sufficient time to review all evidence submitted before the hearing and issue a decision as expeditiously as the enrollee's health condition requires or within the 10-day adjudication period.

In response to the comment, we have modified the 10-day timeframe in non-expedited appeals to apply to only represented enrollees. We believe this is more appropriately consistent with part 405. As the commenter noted, the timeframe requirements for the submission of evidence do not apply to unrepresented beneficiaries in part 405. We agree with the commenter that the same exception should apply to unrepresented enrollees in non-expedited appeals. Accordingly, we have revised § 423.2018(b) to include this exception and to make clear that the 10-day timeframe only applies to represented enrollees.

Finally, we also note that "unrepresented beneficiary" does not include beneficiary "advocates." Section 423.560 states that an enrollee may have an appointed or authorized representative act on his or her behalf, but does not provide any role or rights for an "advocate" in the appeals process.

Therefore, § 423.2018 is finalized with the modification exempting unrepresented enrollees from the 10-day evidence submission timeframe for non-expedited appeals, and subject to the modification discussed in section III, which changes the word "days" to "calendar days."

8. Time and Place for a Hearing Before an ALJ (§ 423.2020)

Former § 423.612(b) (now at § 423.2020(a)) describes the time and place for a hearing before an ALJ and requires that it be set in accordance with § 405.1020. Therefore, we proposed to include in § 423.2020 language similar to that set forth in § 405.1020, including information on the determination of how appearances are made, the notice of a hearing, an enrollee's right to waive a hearing, an enrollee's objection to the time and place of hearing, good cause for changing the time and place of the hearing, the effect of rescheduling a hearing, and an enrollee's request for an in-person hearing.

As discussed previously, we proposed a more informal process for expedited hearings by proposing in §§ 423.2020(e)(3) and (i)(3) to allow objections to the time and place for a hearing and requests for in-person hearings to be made orally, and to require the ALJ hearing office to document all oral objections or requests and maintain such documentation in the case files. We also proposed in § 423.2020(i)(4) to not waive the adjudication period for expedited hearings when an enrollee's request for an in-person hearing is granted because a waiver of the adjudication period under the circumstances of an expedited appeal could be detrimental to the enrollee's health condition.

Specific comments received and responses to comments are as follows:

Comment: We received several comments regarding the rescheduling of hearings. The commenters stated that, although the good cause examples listed in § 423.2020(g)(3) for requesting the rescheduling of a hearing are not all-inclusive, experience has shown that the examples are often regarded as all-inclusive. The commenters suggested that the provision be more explicit in stating that the examples listed are not the only acceptable situations in which good cause can be found.

Response: Section 423.2020(g)(3) is consistent with the parallel provision in Part 405, § 405.1020(g)(3). Further, the provision clearly states that the good cause examples are not an all-inclusive list. Accordingly, we do not believe the provision requires additional clarification.

Accordingly, § 423.2020 is finalized consistent with the modifications discussed in section III of this preamble, which change the term "days" to "calendar days," and provide clarification that when an enrollee's request for an in-person hearing is granted, the ALJ must issue a decision within the adjudication timeframe specified in § 423.2016 (including any applicable extension provided in this subpart), unless the enrollee agrees to waive the adjudication timeframe in writing.

9. Notice of a Hearing Before an ALJ (§ 423.2022)

We proposed to mirror the language in § 405.1022 regarding notice of hearing before an ALJ in § 423.2022. We believe that it is appropriate to apply to Part D appeals procedures similar to the Part A and Part B procedures regarding notice of a hearing. We also proposed a more informal process with respect to expedited hearings by proposing in § 423.2022(a) to allow ALJs to transmit the notice of the hearing to the enrollee and other potential participants orally followed by an equivalent written notice within one day of the oral notice. Additionally, we proposed in the same provision that expedited hearing notices be mailed or served at least 3 days before the hearing.

A specific comment received and response to comment is as follows:

Comment: A commenter suggested that the ALJ hearing office be required to notify potential hearing participants by fax and/or telephone of an ALJ hearing, particularly in the event of an expedited appeal.

Response: Section 423.2022(a)(1) requires the notice of hearing to be either mailed or otherwise transmitted, or given by personal service. For expedited appeals, § 423.2022(a)(2) provides that notice may also be provided orally followed by an equivalent written notice within one day of the oral notice. If a party or participant indicates a preference for receipt of the notice of hearing by a particular method, we believe that section 423.2022 provides sufficient flexibility for the notice of hearing to be mailed or served by various means, including facsimile and e-mail. We believe that the inherent flexibility of § 423.2022 allows the ALJ hearing process to appropriately adapt to technological advancements and enrollee and participant preferences. Requiring the notice of hearing to be provided in a limited manner would be contrary to our goal of providing flexibility to this process and would not be conducive to an efficient and beneficiary-friendly hearing process.

We are making a technical correction to clarify that other potential participants may also indicate in writing that he or she does not wish to receive notice of a hearing before an ALJ. We are finalizing this provision with this technical correction, and subject to the modification discussed in section III, which changes the term "days" to "calendar days."

10. Objections to the Issues and Disqualification of the ALJ (§ 423.2024 and § 423.2026)

We proposed to follow in § 423.2024 and § 423.2026 the language in § 405.1024 and § 405.1026, which discusses the process for objecting to issues in the notice of hearing and disqualification of the ALJ. We believe it is appropriate to allow enrollees to object to the issues described in the notice of hearing and to maintain the processes set forth for Part A and Part B appeals for disqualification of the ALJ for Part D appeals.

Additionally, for expedited hearings, we proposed in § 423.2024(a) and § 423.2026(b), that an enrollee may submit oral or written notice of objections to issues described in the notice of hearing no later than 2 days before the hearing and orally notify the ALJ no later than 2 days after the date of the notice of hearing about any objections to the ALJ who will conduct the hearing. Further, in the same sections, we proposed that the ALJ document all oral objections or requests in writing and maintain the documentation in the case files.

We received no comments on §§ 423.2024 and 423.2026, and therefore, are finalizing them subject to the modification discussed in section III, which changes the word "days" to "calendar days.".

11. ALJ Hearing Procedures (§ 423.2030) and Issues Before an ALJ (§ 423.2032)

Section 423.2030 establishes general procedures for ALJ hearings, including the procedures that apply when an ALJ determines that there is material evidence missing at the hearing. In § 423.2032 we discuss the types of issues that an ALJ may consider at a hearing, the conditions under which an ALJ may consider new issues at a hearing, and the restrictions imposed on adding new claims to pending appeals. We received no comments on these sections and, therefore are finalizing them without modification.

12. When an ALJ May Remand a Case (§ 423.2034)

We proposed to include language in § 423.2034 similar to that in § 405.1034 regarding when an ALJ may remand a case. This language is appropriate for Part D appeals because, like Part A and Part B appeals, it may be necessary for an ALJ to remand a case to a lower level. We proposed at § 423.2034(c), to require the ALJ to remand a case to the Part D plan sponsor if the ALJ determines that the enrollee wishes to have evidence on his or her change in condition after the coverage determination considered in the appeal. However, as discussed in greater detail above in section IV.D., we have revised § 423.2034(c) to require the ALJ to remand a case to the appropriate Part D IRE if the enrollee wishes to have evidence of a change in condition considered. Accordingly, § 423.2034 is finalized with the modifications specified above and that discussed in section III of this preamble, which clarifies when an ALJ can remand a case to the IRE based on missing information.

13. Description of an ALJ Hearing Process (§ 423.2036)

We reviewed the language in § 423.1036 to determine whether to incorporate similar language in proposed § 423.2036. In general, we follow the procedures set forth in Part A and Part B appeals regarding the right to appear and present evidence, waiver of the right to appear, presenting written statements and oral arguments, wavier of the adjudication period, what evidence is admissible at a hearing, and witnesses at a hearing. With respect to waiver of the right to appear for expedited hearings, we proposed at § 423.2036(b), to allow an enrollee to indicate orally that he or she does not wish to appear at a hearing (with appropriate documentation of this request and maintenance of this documentation by the ALJ hearing office). At § 423.2036(b)(2), we proposed to allow an enrollee to withdraw his or her waiver in writing. We also proposed that by withdrawing his or her waiver, the enrollee agrees to an extension of the adjudication period as specified in § 423.2016 that may be necessary to schedule and hold a hearing. We proposed in § 423.2036(e) (what evidence is admissible at a hearing) that an ALJ may not consider evidence on any change in condition of the enrollee after the coverage determination by the Part D plan sponsor is made. We have finalized this provision, but have modified proposed § 423.2036(e) by requiring the ALJ to remand the case to the appropriate Part D IRE as set forth in § 423.2034(b)(2).

We also proposed not to include language similar to that in § 405.1036(f) on requests for subpoenas by a party. In Part 405, subpart I, requests for subpoena by a party are limited to instances where discovery has been sought. Discovery is permissible under Part 405, subpart I only when CMS and/or its contractors participate in an ALJ hearing as a party, because it is appropriate to permit discovery when an ALJ hearing is adversarial (that is, whenever CMS and/or its contractor is a party).

For Part D appeals, however, section 1860D–4(h)(1) of the Act states "only the Part D eligible individual" is entitled to bring an appeal under Part D. We believe this statutory language prohibits CMS, the IRE, and the Part D plan sponsors from obtaining party status at an ALJ hearing. Thus, we proposed that only an enrollee may be a party, and therefore, Part D appeals will not be adversarial in nature. Accordingly, we also proposed not to apply to Part D appeals the provisions in § 405.1036(f), which address subpoenas issued at the request of a party, and § 405.1037, which address discovery. However, in the limited circumstances described in section 423.2036(f), we proposed to allow an ALJ to issue a subpoena on his or her own initiative for the appearance and testimony of witnesses, and for the enrollee and/or the Part D plan sponsor to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. We believe this policy will ensure that an ALJ is able to obtain information relevant to an appeal because these entities have access to the documents and records, such as medical records and plan formularies and marketing materials, that are needed in Part D appeals.

In instances when an ALJ issues a subpoena, we intend to follow similar procedures regarding the reviewability and enforcement of subpoenas as outlined in § 405.1036(f).

Specific comments received and responses to those comments are as follows:

Comment: We received several comments regarding an ALJ's authority to request expert testimony. Commenters suggested that the regulations should provide an ALJ with the authority to request expert testimony from outside medical professionals who are not connected in any way with CMS, the IRE, or the Part D plan sponsor. Numerous commenters also disagreed with our decision not to allow a party to request that the ALJ issue a subpoena in a Part D appeal. The commenters advised that some physicians are reluctant to provide medical records or to participate in the hearing because of the already burdensome nature of the appeals process in Part D cases. Therefore, the ability to request a subpoena may be necessary in order to protect a beneficiary's right to present evidence and state his or her position at the hearing.

Response: The regulations clearly provide an ALJ with authority to request

expert testimony, including medical expert testimony from individuals unassociated with CMS, the IRE, or Part D plan sponsors. As mentioned in § 423.2000(f), if an ALJ determines that it is necessary to obtain testimony from a person other than the enrollee, he or she may hold a hearing to obtain the testimony. This authority is made even more clear under § 423.2036(f)(1). Section 423.2036(f)(1) states that, "when it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative, issue subpoenas for the appearance and testimony of witnesses and for the enrollee and/or the Part D plan sponsor to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying." This provision grants an ALJ the authority to subpoena medical experts to testify, and addresses the commenters' concerns about physicians reluctant to provide records or testify.

In the event that a physician or other prescriber is reluctant to provide medical records or is unwilling to participate in a hearing, an ALJ has the authority to subpoena the records or the testimony of the physician or other prescriber. Of course, the issuance of a subpoena in such circumstances can only be done by the ALJ on his or her own initiative and only when the ALJ has determined that the information is reasonably necessary for the full presentation of the case.

We continue to believe that the ability for an enrollee to request that the ALJ issue a subpoena is not appropriate in Part D appeals. As set forth in § 405.1036(f), requests for subpoenas by a party are limited to instances where discovery has been sought. Discovery is permissible under part 405 only when CMS and/or its contractors are a party to the ALJ hearing. In Part D appeals, only an enrollee may be a party to the hearing. As such, Part D appeals will not be adversarial in nature, and therefore, the ability for a party to request a subpoena is unnecessary.

Therefore, § 423.2036 is finalized consistent with the modifications described in section III of this preamble, which change the term "days" to "calendar days," and make a technical correction to clarify that the ALJ may not issue a subpoena to CMS or the IRE to compel an appearance, testimony, or the production of evidence, or to the Part D plan sponsor to compel an appearance or testimony.

14. Deciding a Case Without a Hearing Before an ALJ and Prehearing and Posthearing Conferences (§ 423.2038 and § 423.2040)

We proposed in § 423.2038 and § 423.2040 to follow the language set forth in § 405.1038 and § 405.1040, which discusses the process for deciding a case without a hearing before an ALJ and prehearing and posthearing conferences. We believe it is appropriate to use these processes for Part D appeals. Additionally, for expedited hearings, we proposed in § 423.2038(b)(1)(i) and § 423.2040(c), that an enrollee may orally notify the ALJ that he or she does not wish to appear before the ALJ at a hearing and may also orally indicate that he or she does not wish to receive a written notice of the conference.

Further, we proposed that the ALJ document all objections or requests in writing and maintain the documentation in the case files.

Finally, we proposed in § 423.2040(c) that, for expedited hearings, the ALJ inform the enrollee of the time, place, and purpose of the conference within a shorter timeframe (at least 2 days before the conference date) than for non-expedited appeals (at least 7 days before the conference date). We received no comments on these provisions. Therefore, we finalize § 423.2038 without modification, and § 423.2040 subject to the modification discussed in section III, which changes the word "days" to "calendar days."

15. The Administrative Record (§ 423.2042)

Section 423.2042 explains the requirements applicable to the creation of the administrative record of the ALJ proceedings, and for requesting and receiving copies of the administrative record.

Specific comments received and responses to those comments are as follows:

Comment:

One commenter stated that the costs for obtaining a copy of the administrative record unfairly impact enrollees who cannot afford to pay for a copy of the record. The commenter suggests revising the proposed regulation to allow each enrollee to receive one free copy of his or her administrative record. As an alternative, the commenter suggests adding regulatory language allowing any enrollee who can show he or she is unable to afford a copy of the administrative record to receive one free copy.

Response: The requirements contained in proposed § 423.2042 were carried over from, and are consistent with, the requirements contained in § 405.1042. As the commenter notes, there may be a cost associated with producing a copy of the administrative record for parties who request it. As a general matter we do not believe that a regulatory change to direct this cost to the appeals adjudicators is necessary or appropriate. The regulations do not require an ALJ to charge an enrollee a fee to copy the record, but rather state that the enrollee may be asked to pay the costs of providing such copies. Thus, an enrollee may ask an ALJ to waive any suggested fee based on financial hardship or for any other reason. Also, we do not have any evidence suggesting enrollees are encountering any difficulties requesting copies of case files.

Comment: We received a related comment asking us to amend the regulation to allow Part D plan sponsors, the Part D IRE, or CMS to request a copy of the administrative record. The commenter suggests that receipt of the case file would assist Part D plan sponsors, the IRE, and CMS in making requests for own motion review by the MAC and would also afford participants an opportunity to review the record for accuracy.

Response: We agree with the commenter's assessment that entities making referrals for own motion review should have access to case files when making these determinations. However, we believe the suggested revision is unnecessary. CMS and the IRE are the only entities that may refer cases to the MAC for own motion review under § 423.2110. The Part D IRE is able to access Part D appeals case files because it is the final repository for all such files. In addition, CMS has access to Part D case files as a result of its contracting relationship with the Part D IRE. Thus, the entities responsible for referring cases to the MAC currently have access to any Part D case file that may be referred to the MAC for own motion review. Additionally, § 423.2046(a)(4) requires ALJs to send a copy of the decision to both the IRE that issued the reconsideration and the Part D plan sponsor that issued the coverage determination. To the extent a Part D plan sponsor wants additional information related to the ALJ hearing, it may contact the IRE to request such information. For these reasons, we believe it is unnecessary to revise the proposed regulations to allow Part D plan sponsors, the Part D IRE, or CMS to request a copy of the administrative record.

Accordingly, we are finalizing § 423.2042 without modification.

16. Consolidation of a Hearing Before an ALJ (§ 423.2044)

Section 423.2044 describes the requirements applicable to holding a consolidated hearing before the ALJ. We received no comments on this section and, therefore are finalizing it subject to the modification discussed in section III, which changes the term "days" to "calendar days."

17. Notice of an ALJ Decision (§ 423.2046) and the Effect of an ALJ's Decision (§ 423.2048)

We proposed in § 423.2046 to follow the procedures in § 405.1046 regarding notice of an ALJ decision. We believe it is appropriate to provide a similar notice process in Part D appeals. We did not propose to include language from § 405.1046(a) regarding overpayment cases involving multiple beneficiaries because Part D appeals do not involve overpayments. We proposed in § 423.2046(d), that an ALJ issue a decision, as expeditiously as the enrollee's health condition requires, but no later than the end of the 10-day period for expedited hearings.

In § 423.2048, we also proposed to follow the policy established in § 405.1048 which explains the effect of an ALJ decision on all parties to the hearing.

Specific comments received and responses to those comments are as follows:

Comment: We received several comments concerning the notice of an ALJ decision. The commenters suggested that § 423.2046(a)(3) include a requirement that a copy of the ALJ decision also be mailed to the enrollee's representative, if one has been appointed. The commenters advised that including this requirement will allow advocates to better assist beneficiaries, saving time and potential confusion.

Response: We believe that the commenters' concern has already been adequately addressed. Section 423.560 defines the rights and responsibilities of an appointed representative. This provision provides an individual either appointed or authorized by State law or other applicable law with all the rights and responsibilities of an enrollee in obtaining a coverage determination and in dealing with any of the levels of the appeals process, including the right to receive a copy of the ALJ decision. Moreover, it has been the standard practice of OMHA and the MAC to send copies of decisions to all appropriately appointed representatives.

Accordingly, we finalize §§ 423.2046 and 423.2048 consistent with the modifications described in section III of this preamble. With respect to § 423.2046, the modifications replace the term "final" with "binding on the Part D plan sponsor," and change the word "days" to "calendar days." In § 423.2048, the modification replaces the phrase "issues a final action" with "issues a final decision or remand order."

18. Removal of a Hearing Request From an ALJ to the MAC (§ 423.2050)

In § 423.2050 we explained the process for the MAC to assume responsibility for holding a hearing if a request for hearing is pending before an ALJ. We did not receive any comments on this section. Therefore, we are finalizing § 423.2050 without modification.

19. Dismissal of a Request for Hearing Before an ALJ (§ 423.2052) and Effect of a Dismissal of a Request for a Hearing Before an ALJ (§ 423.2054)

We proposed in § 423.2052, to follow the language in § 405.1052 regarding dismissal of a request for an ALJ hearing because we believe that it is appropriate for an ALJ to dismiss Part D appeals for the same reasons as an ALJ would dismiss Part A and Part B appeals. We also proposed to shorten the timeframes for expedited appeals in two instances.

First, we proposed at § 423.2052(a)(2)(ii), that an ALJ may dismiss a request for expedited hearing when the enrollee (or his or her representative) does not appear at the time and place set for the hearing and has not contacted the ALJ hearing office within 2 days (instead of the standard 10 days for non-expedited appeals) and provided good cause (as determined by the ALJ) for not appearing.

Second, we proposed at § 423.2052(a)(2)(iii), that an ALJ may dismiss a request for hearing when the enrollee (or his or her representative) does not appear at the time and place set for the hearing and if the ALJ sends a notice to the enrollee asking why the enrollee did not appear, the ALJ does not receive a response to the notice from the enrollee within 2 days for expedited hearings (and 10 days for non-expedited hearings) or the enrollee does not provide good cause for failing to appear.

We also proposed at § 423.2052(a)(5), that a request for hearing may be dismissed if the enrollee dies while the request for hearing is pending and the enrollee's representative has no remaining financial interest in the case and does not continue the appeal. Unlike Medicaid State agencies in Part A and Part B appeals, State Pharmaceutical Assistance Programs (SPAPs) do not have an independent right to appeal. While a SPAP may have a financial interest and may wish to pursue an appeal, the SPAP would have authority to do so only if the SPAP was appointed as the enrollee's representative. Therefore, we proposed that if an SPAP has been appointed as the enrollee's representative, the SPAP could continue an appeal after an enrollee dies provided that the appointment continues to be valid.

Additionally, we proposed at § 423.2052(b) to follow the language of § 405.1052(b), which requires the ALJ to mail a written notice of dismissal to the enrollee. In proposed § 423.2054 we explained the effect of a dismissal of a request for ALJ hearing.

Section 423.2052 is therefore finalized consistent with the modifications discussed in section III of this preamble, which replace the word "final" with "binding," and change the term "days" to "calendar days." We did not receive any comments on § 423.2054 and therefore finalize it without modification.

20. Applicability of Policies Not Binding on the ALJ and MAC (§ 423.2062) and Applicability of Laws, Regulations, and CMS Rulings (§ 423.2063)

In § 423.2062, we proposed that ALJs and the MAC give substantial deference to CMS program guidance, and if they decline to follow such guidance provide an explanation for why the policy is inapplicable. We also proposed that such a determination had no precedential effect.

In § 423.2063, consistent with § 405.1063, we proposed that CMS Rulings be binding on all CMS components and on all HHS components that adjudicate matters under CMS' jurisdiction.

We received no comments on these sections. Therefore, we finalize § 423.2062 without medication and § 423.2063 consistent with the modifications described in section III of this preamble, which clarify the additional authorities that are binding on ALJs and the MAC.

J. Appeals to the MAC (§ 423.2100 Through § 423.2134)

1. General

The Part D rule includes one provision concerning MAC review. Former § 423.620 (now at § 423.1974) provides that an enrollee who is dissatisfied with an ALJ's hearing decision may request that the MAC review the ALJ decision or dismissal. Further, it states that "[t]he regulations

under part 422, subpart M of this chapter regarding MAC review apply to matters addressed by this subpart, to the extent applicable." Section 422.608 of the Part C rule states that "[t]he regulations under part 405 of this chapter regarding MAC review apply to matters addressed by this subpart to the extent that they are appropriate." Therefore, we proposed in the provisions regarding MAC review to follow the language in Part 405, subpart I, as appropriate and have tracked the language in the Part 405, subpart I, for proposed § 423.2106, § 423.2116, § 423.2118, § 423.2120, § 423.2128, and § 423.2130. In addition, because we proposed to adopt a specific provision to govern requests for MAC review in Part D appeals, we proposed to revise former § 423.620 (now at § 423.1974) to replace the reference to the regulations in part 405, subpart I, with a cross reference to § 423.2102.

2. Medicare Appeals Council Review: General (§ 423.2100)

Former § 423.620 (now at § 423.1970) provides that an enrollee who is dissatisfied with an ALJ's hearing decision may request that the MAC review the ALJ decision or dismissal. We proposed to include this requirement in § 423.2100. We proposed in § 423.2100 to follow the language of § 405.1100, which describes who may request MAC review, the de novo standard of MAC review, and timeframes for issuing a decision or remand because we believe that Part D appeals should not differ from Part A and Part B appeals with respect to these provisions, except as discussed above. We further proposed language in § 423.2100(c) establishing the 10 day adjudicatory timeframe for expedited reviews.

We received no comments on this section. Therefore, we have finalized § 423.2100 consistent with the modifications described in section III of this preamble, which clarify the specific types of actions that may be taken by the MAC, and change the word "days" to "calendar days."

3. Request for MAC Review When ALJ Issues Decision or Dismissal (§ 423.2102)

We proposed to include in § 423.2102 language similar to that set forth in § 405.1102 on requests for MAC review when the ALJ issues a decision or dismissal. We believe it is appropriate to include this information at § 423.2102 because it would help the enrollee and any representative of the enrollee to understand how to file a request for MAC review, how the date of receipt of the request would be determined, and when a request would be considered filed. We also proposed at § 423.2102(a)(2), that an enrollee may request expedited review if the enrollee submits a written request for MAC review within 60 days after receipt of the ALJ's decision or dismissal and the appeal involves an issue specified in § 423.566(b) but does not include solely a request for payment of Part D drugs already furnished.

We proposed at § 423.2102(a)(2)(i), a more informal process for requesting an expedited review by proposing to permit an enrollee to make a request for review orally. We believe that the oral request would make the initiation of the MAC appeals process faster and easier for the enrollee. A prescribing physician may also provide oral or written support for an enrollee's request for expedited review by the MAC. We also proposed in § 423.2102(a)(2)(ii) to require the MAC to document and maintain documentation of this oral request.

Similarly, in § 423.2102(b)(1), we proposed that an enrollee requesting an expedited review be permitted to orally request an extension of time for filing the request, and that the request be documented in writing and maintained in the case file by the MAC.

We received no comments on this section. Therefore we are finalizing our proposed policies subject to the modification discussed in section III, which changes the word "days" to "calendar days."

4. Where a Request for Review May Be Filed (§ 423.2106)

In § 423.2106 we proposed to follow similar requirements in § 405.1106(a). We received no comments on this section. Therefore we are finalizing § 423.2106 without modification.

5. MAC Actions When Request for Review Is Filed (§ 423.2108)

We proposed to follow the requirements in § 405.1108 regarding MAC actions when a request for review is filed, including *de novo* review of an ALJ's decision.

Specifically, we proposed in § 423.2108(d) an expedited process for certain types of appeals. We proposed in § 423.2108(d)(1), to require the MAC to provide an expedited decision where an enrollee requests the review, the appeal involves an issue specified in § 423.566(b), but does not include solely a request for payment of Part D drugs already furnished, and the enrollee's prescribing physician indicates, or the MAC determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function. We also proposed that the MAC may consider this standard as met if a lower level of adjudicator has granted a request for an expedited appeal.

We proposed in § 423.2108(d)(3)(i) that the MAC deny a request for expedited review, because the standard for expedited review is not met, within 5 days after receiving the request for expedited review. We also proposed in § 423.2108(d)(3)(ii) that the MAC would send the enrollee and Part D plan sponsor written notice of the denial within 5 days after receiving the request that explains that the appeal will be processed using the 90-day timeframe. Instead of notifying the enrollee and Part D plan sponsor that the MAC has granted the request for expedited review, we proposed to use these resources to process the expedited appeal.

If the MAC accepts the request for expedited review, we proposed in § 423.2108(d)(2), that the MAC issue a decision, dismissal order, or remand, as expeditiously as the enrollee's health condition requires, but no later than the end of the 10-day period beginning on the date the request for review is received by the entity specified in the ALJ's written notice of decision. This process is similar to the process established at the coverage determination, redetermination, and reconsideration levels under the Part D rule at § 423.570, § 423.584, and § 423.600.

We received no comments on this section. Therefore, we are finalizing these proposals subject to the modification discussed in section III, which changes the term "days" to "calendar days."

6. MAC Review on Its Own Motion (§ 423.2110)

On March 23, 2007, CMS published a CMS Ruling (CMS–4083–NR) in the **Federal Register**. The CMS ruling established an interim process for referring Part D cases to the MAC for review under its own motion authority. This ruling permits CMS and its IRE to refer cases to the MAC for own motion review and largely applies the provisions of § 405.1110, with the notable exception of the standard of review.

We proposed to largely follow this Ruling and the requirements set forth in § 405.1110 regarding MAC own motion reviews, with certain modifications. Proposed § 423.2110, reflects our proposal that the enrollee is the only party to an ALJ hearing and that CMS and/or the Part D IRE may participate as

a non-party in the ALJ hearing. Proposed § 423.2110 differs from § 405.1110 in that § 423.2110 applies the same standard of review to such requests whether CMS or IRE simply requested to participate in the ALJ hearing or actually participated in the ALJ hearing. This proposed difference is due to the ALJ having the discretion under proposed § 423.2010 not to allow CMS or the Part D IRE to participate as a non-part in the ALJ hearing. Because ALJs have discretion to deny a CMS or IRE request to participate in an ALJ hearing, we believe it is appropriate under § 423.2110 to apply the same standard of review to requests for MAC own motion review whether CMS or IRE requested to participate or actually participated in the ALJ hearing.

For administrative efficiency, we proposed to limit to CMS and the Part D IRE the ability to refer a case to the MAC for review under its own motion authority. We expect that most of the referrals would be made through the Part D IRE, because it is responsible for monitoring plan effectuation of favorable decisions and serves as a repository for all completed Part D ALJ case files.

The Part D IRE does not have a financial or business interest in the outcome of the case. Therefore, we believe that the Part D IRE is in the best position to objectively examine whether an ALJ decision warrants review by the MAC. While Part D plan sponsors would not be permitted to refer a Part D case to the MAC for review under its own motion authority, Part D plan sponsors would have the opportunity to communicate with, and provide input to, CMS or the Part D IRE on ALJ decisions that may warrant a referral to the MAC. Given the large number of Part D plan sponsors, we believe that limiting own motion referrals to CMS and the Part D IRE is a more streamlined and efficient approach.

We also note that CMS Ruling (CMS–4083–NR) is superseded by these final regulations.

Specific comments received and responses to comments are as follows:

Comment: One commenter is opposed to the proposed language in § 423.2110(a) that precludes Part D plan sponsors from referring cases to the MAC for review on its own motion. The commenter strongly believes that the Part D plan sponsor should be allowed to refer cases to the MAC. It is the commenter's experience that the Part D plan sponsor is more likely than the IRE to participate in the ALJ hearing and in the best position to challenge the evidence considered by the ALJ. Finally, the commenter believes the Part D plan sponsor should be given due process to defend its coverage determination decisions through the ability to refer cases to the MAC.

Response: We do not agree with the commenter's assertion that Part D plan sponsors should be given the ability to refer cases to the MAC in order to properly defend its coverage determination decisions. The Part D plan sponsors make coverage determinations and adjudicate the first level of appeals, redeterminations of coverage determinations. An enrollee dissatisfied with a redetermination decision has a right to a reconsideration by the IRE, and possibly, to higher levels of appeal. As we have explained earlier in our discussion about party status, we believe that only the enrollee may be a party to a Part D appeal. Part D plan sponsors do not have a right to party status at the ALJ level, nor do they have the right to appeal a decision of the IRE to the ALJ level. Rather, those rights lie solely with the enrollee. However, as the administrators of the Part D drug benefit program, we believe the Part D appeals process is designed to provide Part D plan sponsors the ability to protect their interests. In conducting coverage determinations and redeterminations, Part D plan sponsors are afforded an opportunity to provide detailed explanations of the rationale used to support their decisions. Moreover, the Part D plan sponsors are afforded the opportunity to request to participate at the ALJ hearing level. Part D plan sponsors may also communicate with, and provide input to, CMS or the Part D IRE on ALJ decisions that may warrant a referral to the MAC. Further, in this final appeals rule we are clarifying in § 423.1980 that a Part D plan sponsor may request a reopening of a reconsideration, hearing or review. Thus, for the reasons set forth above, we believe the level of participation afforded to Part D plan sponsors is appropriate and adequate to protect their interests.

Comment: Commenters noted that the IRE is the repository of MAC decisions and the decisions are not available to enrollees or their representatives. Commenters expressed concern over the IRE discussing prior MAC decisions in its request for MAC review and making substantive arguments based on those opinions. The commenters urged a provision be added, which requires CMS or the IRE to provide a redacted copy of any prior MAC decision to which the entity cites with a referral memorandum.

Response: We do not agree that § 423.2110 should be revised to include a provision for redacted copies of prior MAC decisions to be included with referral memorandum submitted to the MAC and copied to the enrollee. MAC decisions are not precedential and are unpublished. While the commenters expressed feelings of unfairness that the IRE, as the repository of official administrative records, has access to unpublished MAC decisions, any legal arguments submitted by CMS or the IRE for review by the MAC are contained in the referral memorandum.

Comment: Commenters proposed that requiring the enrollee submitting comments to the MAC in response to an IRE referral memorandum to send the comments to CMS or the IRE is burdensome to unrepresented enrollees who are unlikely to understand their responsibilities and that the regulation should instead provide that the MAC will send copies of comments submitted by unrepresented enrollees to CMS or the IRE.

Response: We do not believe that the regulations preclude the MAC from assisting an unrepresented enrollee by providing CMS or the IRE with a copy of any submitted comments. However, we believe that shifting responsibility to the MAC to provide CMS or the IRE with a copy of comments submitted by any unrepresented enrollee will add to the time it takes to adjudicate the referral for review. We believe that this added administrative processing time to cases of all unrepresented enrollee claims subject to referral is counter to the interest of the enrollee to receive a decision, as expeditiously as possible, from the MAC.

Accordingly, we are finalizing this section consistent with the modifications described in section III of this preamble, which replace the phrase "remains the final action in the case" with the phrase "is binding," and change the word "days" to "calendar days."

7. Content of Request for Review (§ 423.2112)

We proposed to include in § 423.2112 language similar to that in § 405.1112 on content of a request for review. However, we proposed at § 423.2112(a)(4), to require the telephone number of the enrollee to be included in any request for MAC review. This information will assist the MAC in contacting the enrollee, particularly for expedited appeals. Additionally, we proposed in § 423.2112(a)(4) to require the plan name and the enrollee's Medicare health insurance claim number. We also proposed at § 423.2112(a)(4), that an enrollee who seeks an expedited review

indicate that his or her request is for an expedited review.

As discussed previously, we proposed in § 423.2112(a)(2) a more informal process for requesting an expedited review by proposing to permit an enrollee to make a request for review orally. We believe that the oral request would make the initiation of the MAC appeals process faster and easier for the enrollee. We also proposed to require the MAC to document and maintain documentation of this oral request.

Specific comments received and responses to those comments are as follows:

Comment: Numerous commenters expressed belief that the content requirements of the request for review are overly rigid for unrepresented enrollees and enrollees represented by family, friends or other untrained advocates. Commenters urged that if the information is incomplete the MAC must be required to contact the enrollee or representative to obtain missing information and not be permitted to dismiss the appeal unless reasonable inquiries have failed. Commenters also suggested that an enrollee should be allowed to amend a MAC request for review to add missing information, as appropriate, as well as a provision allowing liberal leave to amend the request for review to add issues as appropriate when the enrollee subsequently obtains assistance from a trained advocate.

Response: We disagree with the commenters' characterization of the review request content requirements as being overly rigid. The proposed regulation is similar to the requirements at § 405.1112, which have been used successfully since 2005. As a practical matter, we believe the information required by the regulations is important for the efficient and complete retrieval of the ALJ administrative record by the MAC. We note that the standard review request form is included as an enclosure with every ALJ decision or dismissal, and the instructions for this form direct enrollees to submit a copy of the ALJ decision or dismissal with the request for review. In doing so, enrollees can satisfy most of the content requirements for the request for review. Additionally, we believe it is important to state these requirements in the regulations to ensure that if enrollees or appointed representatives choose not to use the standard form, they will nevertheless know up front what information must be included in the request for review.

Finally, we note that the regulation does not preclude the MAC from contacting an enrollee to obtain missing information to correct any defects, which may impede the MAC from obtaining the administrative record or adjudicating the request for review. As for additional listed requirements for the request for review, § 423.2112(c) clearly indicates that if an enrollee is unrepresented, the MAC will not limit its review to the exceptions raised by the enrollee. Also, if an enrollee subsequently obtains assistance from a trained advocate, we believe that § 423.2120 addresses the commenters' concerns that the subsequently obtained advocate be allowed to amend the request for review and add issues by providing the opportunity for an enrollee or representative to file a brief or other written statements.

Accordingly, we are finalizing this section without modification.

8. Dismissal of Request for Review (§ 423.2114)

In § 423.2114, we proposed the process for dismissing a request for review for Part D appeals. The process tracks the Part A and Part B process, except for dismissals involving deceased enrollees. We proposed at § 423.2114(c), that a request for review may be dismissed if the enrollee dies while the request for review is pending and the enrollee's representative, if any, either has no remaining financial interest in the case or does not continue the appeal. As discussed above, unlike Medicaid State agencies in Part A and Part B appeals, SPAPs do not have an independent right to appeal. While an SPAP may have a financial interest and may wish to pursue an appeal, the SPAP would have authority to do so only if the SPAP was appointed as the enrollee's representative. Therefore, we proposed that an SPAP that has been appointed as the enrollee's representative could continue an appeal after an enrollee dies provided that the appointment continues to be valid.

Specific comments received and responses to those comments are as follows:

Comment: Commenters stated that if an enrollee dies while the request for review is pending, the current construction of the regulations does not protect the financial interests of the estate of a deceased beneficiary who paid for prescriptions drugs and was seeking reimbursement for those payments. Commenter suggested that the proceedings may be stayed for up to 90 days to provide time for the estate to review the matter and determine whether to continue the appeal. One commenter suggested that any entity with a financial interest, such as if a nonprofit organization advanced money to purchase necessary medications, should be able to pursue the enrollee's appeal upon the death of the enrollee.

Response: As only an enrollee may request review by the MAC, we disagree that any entity should be able to decide to continue the enrollee's appeal. We believe additional entities without appeal rights are protected by allowing a representative appointed by the enrollee to continue the appeal if the representative has a financial interest in the case. We agree with the commenters that an estate of an enrollee who was seeking reimbursement for paid prescription drugs should also be able to continue the enrollee's appeal. Therefore, in response to comments we are finalizing this provision with a revision to § 423.2114(c) to allow for an appeal to continue if the enrollee died while the request for review is pending and the enrollee's estate or representative, if any, has a remaining financial interest and wants to continue the appeal.

9. Effect of Dismissal of Request for MAC Review or Request for Hearing (§ 423.2116), Obtaining Evidence From the MAC (§ 423.2118), and Filing Briefs With the MAC (§ 423.2120)

Section 423.2116 details the effect of the MAC's dismissal of an enrollee's request for review or request for hearing. Section 423.2118 discusses the evidence an enrollee may request from the MAC, while § 423.2120 informs the enrollee how to file a brief. Both of these proposed sections indicated that the opportunities to comment on the requested evidence and to submit a brief do not count towards the MAC's adjudication deadline. The proposed language is similar to language in §§ 405.1116, 405.1118, and 405.1120. We received no comments on these sections. Therefore, we are finalizing §§ 423.2116, 423.2118 and 423.2120 without modification.

10. What Evidence May Be Submitted to the MAC (§ 423.2122)

We reviewed the language in § 405.1122 to determine whether to incorporate similar language in proposed § 423.2122. In general, we proposed to follow the procedures for Part A and Part B appeals regarding what evidence may be submitted to the MAC. We proposed in § 423.2122(a)(3) that the MAC would not consider evidence on any change in condition after a coverage determination by the Part D plan sponsor that the enrollee wishes to have considered and would remand such a case to the Part D plan sponsor. We have finalized this provision but, as discussed above, modified the rule to require the MAC to

remand the case to the Part D IRE. Like in § 405.1122, we proposed in § 423.2122 to allow the MAC to issue a subpoena when it determines certain information is reasonably necessary for a full presentation of a case. We also proposed in § 423.2122(b) not to include language similar to that in § 405.1122(d) on party requests for subpoenas, as only the enrollee is a party to a Part D appeal, and as a result, there will be no discovery in these appeals. For the reasons set forth above, we proposed to allow the MAC to issue a subpoena only on its own initiative. In addition, if necessary, the MAC may request enforcement of a subpoena by the Secretary. The time period for the MAC to issue a final decision, dismissal order, or remand the case would be stayed for 15 days or until the Secretary makes a decision with respect to the enforcement request, whichever occurs first.

A specific comment and our response to the comment is as follows:

Comment: One commenter suggested that, if a participant at the ALJ hearing, CMS, the IRE, or the Part D plan sponsor should be afforded the opportunity to provide written submissions to the MAC.

Response: We believe that since the Part D plan sponsor is not a party to a request for review, it is appropriate to limit submissions by CMS, the IRE and/or the Part D plan sponsor of briefs or position papers to when the MAC determines it is necessary to resolve the issues in the case as proposed under § 423.2120.

Accordingly, we are finalizing this section consistent with the modifications described in section III of this preamble, which clarify that the MAC may not issue a subpoena to CMS or the IRE to compel the production of evidence, and change the word "days" to "calendar days."

9. Oral Argument (§ 423.2124)

We proposed in § 423.2124, to follow the language similar to that in § 405.1124 because we believe that oral arguments may be necessary in some Part D appeals. We also proposed in § 423.2124(b) that, for expedited appeals, the enrollee be informed of the time and place of the oral argument at least 2 days before the scheduled date of the oral argument, which is shorter than our proposed 10-day timeframe for non-expedited appeals. We believe that providing notice of an oral argument within these timeframes provides the enrollee sufficient time to prepare for the oral argument. We received no comments on this section. Therefore we are finalizing § 423.2124 subject to the modification described in section III of this preamble, which changes the term "days" to "calendar days."

11. Case Remanded by the MAC (§ 423.2126)

We proposed in § 423.2126, to mirror the language in § 405.1126 regarding when the MAC may remand a case. This language is appropriate for Part D appeals because it may be necessary for the MAC to remand a case to a lower level. Additionally, we proposed in § 423.2126(a)(4), that when an ALJ has issued a recommended decision, an enrollee may file with the MAC briefs or other written statements about the facts and law relevant to the case within 20 days of the date on the recommended decision or with the request for review for expedited appeals. We also proposed in § 423.2126(b), to require the MAC to remand a case to the Part D plan sponsor if the MAC determines that the enrollee wishes to have evidence on his or her change in condition after the coverage determination by the Part D plan sponsor considered in the appeal. We are finalizing this provision consistent with the modifications discussed in sections III and IV of the preamble, which remove the word "final," require the MAC to remand the case to the Part D IRE, and change the word "days" to "calendar days."

12. Action of the MAC (§ 423.2128), Effect of the MAC's Decision (§ 423.2130), and Extension of Time To File Action in Federal District Court (§ 423.2134)

Section 423.2128 informs the enrollee of the actions the MAC will take when reviewing the administrative record, while § 423.2130 informs the enrollee that the MAC's decision is binding unless reopened or if the decision is modified by a Federal district court. Section 423.2130 also notifies the enrollee that he or she may file an action in a Federal district court within 60 days of receipt of the MAC decision. Section 423.2134 details the requirements for filing for an extension of time to file a civil action. The proposed language is similar to language in §§ 405.1128, 405.1130, and 405.1134. We received no comments on these sections. Therefore, we are finalizing §§ 423.2128, and 423.2134 without modification. We are finalizing § 423.2130 subject to the modifications discussed in section III of the preamble, which add the words "final and" before the word "binding," and change the term "days" to "calendar days."

K. *Judicial Review (§ 423.2136 Through § 423.2140)*

The Part D rule includes one provision concerning judicial review. Former § 423.630(a) (now at § 423.1976(a)) provides that an enrollee may request judicial review of an ALJ's decision if the MAC denied the enrollee's request for review and the amount in controversy threshold is met. Former § 423.630(b) (now at § 423.1976(b)) also states that an enrollee may request judicial review of the MAC decision if it is the final agency decision and the mount in controversy threshold is met. To request judicial review, this section states that an enrollee must file a civil action in a District Court of the United States in accordance with section 205(g) of the Act. Finally, former § 423.630(c) (now at § 423.1976(c)) tells the reader to "[s]ee part 422, subpart M of this chapter, for a description of the procedures to follow in requesting judicial review."

Section 422.612 explains that part 405 contains a description of the procedures to follow in requesting judicial review. Therefore, we proposed to follow the language of the Part 405, subpart I, as appropriate. Thus, we tracked the language in the Part 405, subpart I, for proposed § 423.2134, § 423.2138, and § 423.2140. We believe that it is appropriate for Part D appeals to follow the Part A and Part B appeals procedures set forth in these provisions. Because we proposed to adopt specific procedures for requesting judicial review of final Part D decisions, we proposed to delete the cross-reference to Part 422, subpart M, from former § 423.620(c) (now at § 423.1976(c)) and replace it with a cross-reference to the procedures for requesting judicial review in proposed § 423.2136. We received no comments on these sections. Therefore we are finalizing § 423.2138 without modification, and §§ 423.2136 and 423.2140 subject to the modification discussed in section III of the preamble, which changes the term "days" to "calendar days.".

L. Miscellaneous

Specific comments to this section and our responses to those comments are as follows:

Comment: One commenter stated that neither existing regulations nor the proposed rule adequately address appeals that may arise when the Part D plan makes a conditional payment under the MSP rules and subsequently demands repayment from the enrollee if the enrollee is subsequently reimbursed by automobile or liability insurance or by worker's compensation. The

commenter also noted that the proposed rule does not adequately address the process to be followed when an enrollee wishes to appeal or reopen a determination that affects both Part C and Part D benefits. The example cited is a situation where an individual is injured in an automobile accident and requires medical care and prescription drugs and the plan makes conditional payments and subsequently determines that Medicare is the secondary payer and demands repayment. The commenter believes the regulations should clarify whether these appeals can be consolidated or whether the enrollee must pursue separate appeals with the possibility of inconsistent decisions.

The commenter further stated that a determination by a Part D plan that a drug is not covered because another payer is or should be the primary payer should be considered an adverse coverage determination subject to appeal by the enrollee. The commenter believes there is a gap in the regulations on the applicability of the enrollee appeals regulations to determinations by Part D plan sponsors under the MSP rules.

Response: If a Part D plan sponsor makes a decision not to provide or pay for a Part D drug, this action is an adverse coverage determination that is subject to the Part D appeals process. If an adverse coverage determination is made based on the Part D plan sponsor's determination that Medicare is not the primary payer under the MSP rules, we agree with the commenter that this adverse decision is subject to the Part D appeals process. We believe the current Part D regulations are sufficiently clear about the application of the MSP rules. Section 423.462 cross-references the MSP provisions of § 422.108 and provides that the MSP procedures apply to Part D sponsors and Part D plans with respect to the offering of qualified prescription drug coverage in the same way they apply to MA organizations and plans.

With respect to the commenter's example of a plan making conditional payments for medical care and prescription drugs and then demanding repayment, we assume that the commenter is referring to this scenario arising in the context of an MA–PD enrollee. We disagree with the commenter's remark that the rules do not adequately address the process to be followed when an enrollee wishes to appeal or reopen a determination that affects both Part C and Part D benefits. The regulations at part 422 and part 423 clearly establish separate, but similar, appeals processes for Part C and Part D benefits, respectively. Since different adjudication timeframes apply based on whether it is a Part C or a Part D benefit, the appeals need to be processed under the applicable procedure and consolidation would not be appropriate.

Comment: One commenter stated that CMS should require the IRE to provide information on the right to request an ALJ hearing in a consumer-friendly format at a 5th grade reading level in multiple languages. This commenter also believes there should be a standard form for the enrollee to use to request review by an ALJ.

Response: All of the IRE's reconsideration decision notices that are not fully favorable to the enrollee contain an explanation of the enrollee's right to request further appeal before an ALJ and describe the process for obtaining an ALJ hearing. These notices are developed by the IRE in a manner calculated to be understood by the enrollee. We will consider the commenter's specific suggestions for future changes to the IRE's contractual obligations in terms of preparing reconsideration notices, although we do not believe this is an appropriate subject for rulemaking. We agree with the commenter's suggestion that a form should be made available for use by enrollees when requesting an ALJ hearing. The Office of Medicare Hearings & Appeals (OMHA) is developing such a form. However, even after such a form is available, any written request for an ALJ hearing that contains the information set out in § 423.2014(a) of this rule will be accepted as a valid request.

V. Comments Beyond the Scope of the Final Rule

In response to the proposed rule, some commenters chose to raise issues that are beyond the scope of our proposals. In this final rule, we are not summarizing or responding to those comments in this document. However, we will review the comments and consider whether to take other actions, such as revising or clarifying CMS program operating instructions or procedures, based on the information or recommendations in the comments.

VI. Provisions of the Final Rule

For the most part, this final appeals rule incorporates the provisions of the proposed appeals rule. The provisions of the final appeals rule that differ from the proposed appeals rule are as follows:

- In response to a public comment requesting that the use of "calendar days" be explicitly stated in the applicable regulatory provisions, we revised the regulatory text to include the word "calendar" as appropriate.
- We are also making conforming revisions to the Part D grievance, plan sponsor, and IRE provisions to ensure consistency throughout the Part D appeals process, by changing the word "days" to "calendar days" in 42 CFR 423.564(d)(2), (e)(1), and (e)(2); 423.582(c)(2); 423.584(d)(1) and (d)(2)(i); and 423.600(a).
- In § 423.1978, § § 423.1980(a)(1) and (a)(4), § 423.2004(c), and § 423.2052(a)(6), we made technical clarifications by removing the term "final" or "final and binding" and replacing it with "binding" to clarify that the actions taken by an adjudicator described in the above sections are not considered final decisions of the Secretary for the purposes of exhausting administrative remedies when seeking judicial review in federal court.
- In § 423.1980(b), we made a technical correction by removing the words "and revise" from the introductory sentence, so the sentence will now read: "A Part D plan sponsor may reopen its coverage determination or redetermination on its own motion— * * *". As discussed in greater detail in the final Part 405, subpart I rule, published elsewhere in this **Federal Register**, this provision, as revised, reflects our longstanding policy that the timeframes for reopening a determination or decision are measured by the date of the reopening, and not the date of the revision of the determination or decision.
- In § 423.1980(e) we are making a technical correction to clarify that a Part D plan sponsor may request that an IRE reopen its reconsideration, or an ALJ or the MAC reopen the hearing decision within 180 days from the date of the reconsideration or hearing decision for good cause in accordance with § 423.1986.
- In § 423.1990(b)(1)(i), we made a technical correction to replace the phrase "final decision" with "decision, dismissal order, or remand order" to specify the types of actions that if taken by an ALJ, preclude a request for EAJR and to be consistent with our clarification regarding the term "final".
- In § 423.1990(b)(1)(ii), we made a technical correction by adding the phrase "dismissal order, or remand order" after "final decision" to specify the types of action that, if taken by the MAC, preclude a request for EAJR and to be consistent with our clarification regarding the term "final".
- In § 423.1990(e)(3), we made a technical correction by removing the words "final and" to make clear that the decision of the review entity to certify

or deny a request for EAJR is not subject to further review.

- In § 423.2000(d), we made a technical revision to clarify that the ALJ conducts a de novo review.
- In § 423.2002(b)(3), we made a technical correction separating out the requirement for the ALJ to document oral hearing requests as subsection (c) and redesignated subsections (c) and (d) as subsections (d) and (e) respectively.
- In § 423.2004(c), we made a technical correction to clarify that an ALJ's dismissal action is binding and not subject to further review unless vacated by the MAC under § 423.2108(b).
- We modified § 423.2018(b) in response to public comments to exempt unrepresented enrollees from the 10-day evidence submission timeframe for non-expedited appeals.
- We clarified § 423.2020(i)(4) to state that when an enrollee's request for an in-person hearing is granted, the ALJ must issue a decision within the adjudication timeframe specified in § 423.2016 (including any applicable extension provided in this subpart), unless the enrollee agrees to waive the adjudication timeframe in writing.
- In § 423.2022(a) we made a technical correction to clarify that other potential participants may also indicate in writing that he or she does not wish to receive notice of a hearing before an ALJ.
- In § 423.2034(a) we clarified when an ALJ can remand a case to the IRE based on missing information.
- In § 423.2034(b)(2) and § 423.2126(b) we modified the final appeals rule in response to public comment to direct an ALJ and the MAC to remand a case to the appropriate Part D IRE when the enrollee wants evidence of a change in condition after the coverage determination is made considered.
- In § 423.2036(f)(1) we made technical corrections to clarify that the ALJ may not issue a subpoena to CMS or the IRE to compel an appearance, testimony, or the production of evidence, or to the Part D plan sponsor to compel an appearance or testimony. Similarly, in § 423.2122(b) we made a technical correction to clarify that the MAC may not issue a subpoena to CMS or the IRE to compel the production of evidence.
- In § 423.2046(c), we made a technical correction by replacing the term "final" with "binding on the Part D plan sponsor" consistent with our clarification regarding the term "final."
- In § 423.2048(a), we made a technical correction by replacing the phrase "issues a final action" with "issues a final decision or remand order" to clarify the types of actions issued by the MAC that cause an ALJ decision to not become binding, and to be consistent with our clarification regarding the term "final".
- We added § 423.2063(a) to clarify the additional authorities that are binding on ALJs and the MAC. The original paragraph is reassigned to subsection (b).
- In § § 423.2100(c) and (d), we made technical corrections by replacing the phrase "final action" with "final decision, dismissal order" to specify the types of actions that may be taken by the MAC and to be consistent with our clarification regarding the term "final".
- In § 423.2110(d)(5), we made a technical correction by replacing the phrase "remains the final action in the case" with the phrase "is binding" to be consistent with our clarification regarding the term "final".
- We modified § 423.2114(c) in response to public comments asking us to allow an appeal to continue when the enrollee dies while the request for review is pending and the enrollee's estate has a remaining financial interest and wants to continue the appeal.
- In § 423.2126(a)(1), we made a technical correction by removing the word "final" consistent with our clarification regarding the term "final".
- In § 423.2130, we made a technical correction by adding the words "final and" before the word "binding" consistent with our clarification regarding the term "final".

VII. Collection of Information Requirements

This document does contain information collection requirements; however, the Paperwork Reduction Act of 1995 exempts the information collection activities referenced in this Final Rule. In particular, 5 CFR 1320.4 excludes collection activities during the conduct of administrative actions such as redeterminations, reconsiderations, and/or appeals. Specifically, these actions are taken after the initial determination or a denial of payment.

VIII. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As explained in the analysis that follows, we have determined that this final appeals rule is not a major rule since it will impose no consequential costs and will not have an economic effect of $100 million or more. Accordingly, it is not a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses; if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that a number of Part D plan sponsors (insurers) are small entities as that term is used in the RFA (include small businesses, nonprofit organizations, and small governmental jurisdictions). As indicated above, a number of Part D plan sponsors (insurers) are small entities due to their nonprofit status. Few if any of the Part D plans sponsors meet the SBA size standard for a small insurance firm by having revenues of $7 million or less in any 1 year. Individuals and States are not included in the definition of a small entity.

This final appeals rule will affect primarily individual's enrolled in Part D plans who appeal Part D plan decisions. It makes no substantive changes in the Part D benefit and deals directly only with appeals procedures administered by Federal employees or Federal contractors. To date, the volume of Part D appeals is small and the amounts of money involved, although substantial to many of these individuals, are a very small percentage of aggregate Part D plan costs. Accordingly, we do not believe that there will be significant economic impacts on Part D plans. Therefore, the Secretary has determined that this final appeals rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section

1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule will not have any effect on hospitals. Therefore, the Secretary has determined that this final appeals rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $133 million. This final appeals rule contains no mandates on State, local, or tribal governments in the aggregate, or on the private sector in the amount of $133 million in any 1 year.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final appeals rule will not impose substantial direct requirement costs on State and local governments, preempt State law, or otherwise have Federalism implications.

B. Anticipated Effects

This final appeals rule has no direct effects on the original Medicare program, since it applies only to the Part D prescription drug program. It would have few direct effects on Part D plans, since it addresses primarily the details of appeals procedures and process at the ALJ hearing and MAC review levels. Most of the procedures do not vary substantially from existing appeals practices. For example, under the existing practices upon which this final appeals rule is largely modeled, neither the government nor the Part D sponsor is a "party" to the appeal and therefore neither incurs any legal costs, unless it chooses to participate in the ALJ hearing or MAC review. However, some provisions are new. Most importantly, we will provide for an expedited appeals process when a delay in obtaining a drug may seriously jeopardize the enrollee's life, health, or ability to regain maximum function. Although this change will require plans to provide coverage for drugs more quickly whenever enrollees obtain a favorable decision in an expedited appeal, we do not expect it to affect actual spending by Part D and the Medicare program.

The Part D appeals process is administered in large part by the Part D plan sponsors themselves. Our rules require Part D plan sponsors to have effective grievance and appeals processes that operate timely and effectively to meet enrollee needs. In addition, we impose substantive standards on issues such as plan formularies and the process for obtaining exceptions from formulary restrictions where medically necessary. We provide for within-plan appeals from initial plan decisions. If a problem cannot be resolved at the plan level, we provide for an independent external review through a CMS contractor. (Cases concerning the quality of care take a different route, through Quality Improvement Organizations.) Only those cases where the problem cannot be resolved at these lower levels go to the so-called third and fourth levels of appeal for a hearing before an ALJ and review by the Medicare Appeals Council, respectively.

The primary effects of this final appeals rule will be to tailor the third and fourth level appeal procedures, designed primarily for the original Medicare program, to the unique aspects of the Part D program. This final appeals rule reflects and builds upon recent changes in the third and fourth levels of appeals process for Part A and Part B claims appeals, published elsewhere in this **Federal Register**. We note that the effects of that rule were extensively analyzed in the Regulatory Impact Analysis published with the rule. The overall conclusion of that impact analysis was that costs to affected persons and entities would be minimal, although the anticipated costs to the Federal government from revised procedures would be substantial.

As discussed earlier in this preamble, our existing policy is that, unless otherwise provided, Part D procedures will follow the procedures established for appeals under Part A and Part B to the extent they are appropriate. The provisions parallel the Part A and Part B provisions, to the extent appropriate. For example, in this final appeals rule we eliminated references to national and local coverage determinations because these policies do not apply to Part D. Likewise, we eliminated references to Social Security appeals because they are irrelevant to Part D. We note that such changes do not necessarily imply an actual change in the procedures for processing Part D appeals. In addition, this final appeals rule will simply codify existing practices already in place. Other changes are intended to make the appeals process more flexible and responsive to the needs and circumstances of Part D enrollees. For example, a common type of appeal is an appeal from the denial of coverage for a drug used for an "off-label" indication (one that has not been officially approved by the Food and Drug Administration). Medicare Part D pays for many, but not all, "off-label" uses. The process and procedure changes we proposed do not directly change the likelihood an enrollee will prevail in appeal, although they may slightly raise the number of such appeals by clarifying the procedures that will apply to such appeals and affording an opportunity to request an expedited appeal. The new expedited appeals procedures will allow us to respond quickly to urgent medical needs of enrollees.

As of August 2009, total enrollment in Part D plans is about 27 million persons (including enrollment in Medicare Advantage Plans that cover prescription drugs). We estimate the total number of third level appeals (ALJ hearings) in fiscal year 2007 to be approximately 350, or about 15 appeals per million enrollees. Only a fraction of these would ever be appealed to the fourth level (MAC review). While the dollar value of these appeals has not been tabulated, the amount is likely to reach several thousand dollars on average (the amount in controversy threshold for an appeal in 2008 is $120 for ALJ hearings and $1,180 for Federal District Court review, but the time and effort involved to pursue an appeal is likely to foster appeals most frequently when the amount is considerably higher). Consequently, the annual total of the amounts in controversy is likely to be in the range of several million dollars. In contrast, total Part D spending in calendar 2007 (which is roughly equivalent to the fiscal year total) is estimated to be approximately $50 billion dollars. Thus, viewed either in absolute or relative terms, any effects of this final appeals rule either on the administrative costs or outcomes of these cases are unlikely to be more than a fraction of one percent of the major rule threshold. Likewise, effects on overall plan costs or benefit payments are likely to be minimal.

Accordingly, we do not believe that these procedures, which include both codifications of existing practices and new procedures for the third and fourth levels of appeal will have any consequential net effect on the Part D program, except to clarify the procedures that will apply to the relatively small number of cases that

reach the third and fourth levels of the appeals process. While the volume of appeal cases may increase slightly, adopting the procedures outlined in this final appeals rule will benefit enrollees by clarifying the procedures that will apply to these upper levels of appeals and affording an opportunity to request an expedited appeal in certain circumstances where a faster decision is necessary in order to protect the life and health of the enrollee. In the proposed rule, we solicited public comments on these conclusions.

C. Alternatives Considered

In the proposed rule, we indicated that no major alternatives existed even though we proposed a number of specific provisions and provided justification for each in the preamble. Therefore, we solicited comments on the proposals and on any effects that we may not have anticipated, as well as comments on additional or alternative reforms that could improve the appeals process further.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 1. The authority citation for part 423 continues to read as follows:

Authority: Secs 1102, 1106, 1860D–1 through 1860D–42, and 1871 of the Social Security Act (42 U.S.C. 1302, 1306, 1395w–101 through 1395w–152, and 1395hh).

Subpart M—Grievances, Coverage Determinations, Redeterminations, and Reconsiderations

■ 2. The heading for Subpart M is revised to read as set forth above.

■ 3. A new § 423.558 is added to subpart M to read as follows:

§ 423.558 Scope.

(a) This subpart sets forth the requirements relating to the following:

(1) Part D plan sponsors with respect to grievances, coverage determinations, and redeterminations.

(2) Part D IRE with respect to reconsiderations.

(3) Part D enrollees' rights with respect to grievances, coverage determinations, redeterminations, and reconsiderations.

(b) The requirements regarding reopenings, ALJ hearings, MAC review, and Judicial review are set forth in subpart U of this chapter.

§ 423.562 [Amended]

■ 4. Section 423.562 is amended by—

■ A. In paragraph (b)(4)(iv), the cross-reference to "§ 423.610" is removed and the cross-reference to "§ 423.1970" is added in its place.

■ B. In paragraph (b)(4)(v), the cross-reference to "§ 423.620" is removed and the cross-reference to "§ 423.1974" is added in its place.

■ C. In paragraph (b)(4)(vi), the cross-reference to "§ 423.630" is removed and the cross-reference to "§ 423.1976" is added in its place.

§ 423.564 [Amended]

■ 5. Section 423.564 is amended by—

■ A. In paragraph (d)(2), the word "days" is removed and "calendar days" is added in its place.

■ B. In paragraph (e)(1), the word "days" is removed and "calendar days" is added in its place.

■ C. In paragraph (e)(2), the word "days" is removed and "calendar days" is added in its place, and the phrase "30-day" is removed and "30 calendar day" is added in its place.

§ 423.576 [Amended]

■ 6. Section 423.576 is amended by—

■ A. The cross-reference to "§ 423.580 through § 423.630" is removed and the cross-references to "§ 423.580 through § 423.604 and § 423.1970 through § 423.1976" are added in its place.

■ B. The cross-reference to "423.634" is removed and the cross-reference to "§ 423.1978" is added in its place.

§ 423.580 [Amended]

■ 7. Section 423.580 is amended by removing the cross-reference to "§ 423.634", and adding in its place the cross-reference to "§ 423.1978".

§ 423.582 [Amended]

■ 8. Section § 423.582(c)(2) is amended by removing the phrase "60-day" and adding in its place "60 calendar day".

§ 423.584 [Amended]

■ 9. Section 423.584 is amended by—

■ A. In paragraph (d)(1), the phrase "7-day" is removed and "7 calendar day" is added in its place.

■ B. In paragraph (d)(2)(i), the phrase "7-day" is removed and "7 calendar day" is added in its place.

§ 423.600 [Amended]

■ 10. Section 423.600(a) is amended by removing the word "days" and adding in its place "calendar days".

§ 423.602 [Amended]

■ 11. Section 423.602(b)(2) is amended by removing the cross-reference to "§ 423.610", and adding in its place the cross-reference to "§ 423.1970".

§ 423.604 [Amended]

■ 12. Section 423.604 is amended by removing the cross-reference to "§ 423.612", and adding in its place the cross-reference to "§ 423.1972".

§ 423.610 [Removed and Reserved]

■ 13. Section 423.610 is removed and reserved.

§ 423.612 [Removed and Reserved]

■ 14. Section 423.612 is removed and reserved.

§ 423.620 [Removed and Reserved]

■ 15. Section 423.620 is removed and reserved.

§ 423.630 [Removed and Reserved]

■ 16. Section 423.630 is removed and reserved.

§ 423.634 [Removed and Reserved]

■ 17. Section 423.634 is removed and reserved.

■ 18. A new subpart U is added to read as follows:

Subpart U—Reopening, ALJ Hearings, MAC Review, and Judicial Review

Sec.

Subpart U—Reopening, ALJ Hearings, MAC review, and Judicial Review

§ 423.1968 Scope.

This subpart sets forth the requirements relating to the following:

(a) Part D sponsors, the Part D IRE, ALJs, and the MAC with respect to reopenings.

(b) ALJs with respect to hearings.

(c) MAC with respect to review of Part D appeals.

(d) Part D enrollees' rights with respect to reopenings, ALJ hearings, MAC reviews, and judicial review by a Federal District Court.

§ 423.1970 Right to an ALJ hearing.

(a) If the amount remaining in controversy after the IRE reconsideration meets the threshold requirement established annually by the Secretary, an enrollee who is dissatisfied with the IRE reconsideration determination has a right to a hearing before an ALJ.

(b) If the basis for the appeal is the refusal by the Part D plan sponsor to provide drug benefits, CMS uses the projected value of those benefits to compute the amount remaining in controversy. The projected value of a Part D drug or drugs shall include any costs the enrollee could incur based on the number of refills prescribed for the drug(s) in dispute during the plan year.

(c) *Aggregating appeals to meet the amount in controversy* (1) *Enrollee.* Two or more appeals may be aggregated by an enrollee to meet the amount in controversy for an ALJ hearing if—

(i) The appeals have previously been reconsidered by an IRE;

(ii) The request for ALJ hearing lists all of the appeals to be aggregated and each aggregated appeal meets the filing requirement specified in § 423.1972(b); and

(iii) The ALJ determines that the appeals the enrollee seeks to aggregate involve the delivery of prescription drugs to a single enrollee.

(2) *Multiple enrollees.* Two or more appeals may be aggregated by multiple enrollees to meet the amount in controversy for an ALJ hearing if—

(i) The appeals have previously been reconsidered by an IRE;

(ii) The request for ALJ hearing lists all of the appeals to be aggregated and each aggregated appeal meets the filing requirement specified in § 423.1972(b); and

(iii) The ALJ determines that the appeals the enrollees seek to aggregate involve the same prescription drug.

§ 423.1972 Request for an ALJ hearing.

(a) *How and where to file a request.* The enrollee must file a written request for a hearing with the entity specified in the IRE's reconsideration notice.

(b) *When to file a request.* Except when an ALJ extends the timeframe as provided in § 423.2014(d), the enrollee must file a request for a hearing within 60 calendar days of the date of the notice of an IRE reconsideration determination. The time and place for a hearing before an ALJ will be set in accordance with § 423.2020 of this chapter.

(c) *Insufficient amount in controversy.* (1) If a request for a hearing clearly shows that the amount in controversy is less than that required under § 423.1970, the ALJ dismisses the request.

(2) If, after a hearing is initiated, the ALJ finds that the amount in controversy is less than the amount required under § 423.1970, the ALJ discontinues the hearing and does not rule on the substantive issues raised in the appeal.

§ 423.1974 Medicare Appeals Council (MAC) review.

An enrollee who is dissatisfied with an ALJ hearing decision may request that the MAC review the ALJ's decision or dismissal as provided in § 423.2102.

§ 423.1976 Judicial review.

(a) *Review of ALJ's decision.* The enrollee may request judicial review of an ALJ's decision if—

(1) The MAC denied the enrollee's request for review; and

(2) The amount in controversy meets the threshold requirement established annually by the Secretary.

(b) *Review of MAC decision.* The enrollee may request judicial review of the MAC decision if it is the final decision of CMS and the amount in controversy meets the threshold established in paragraph (a)(2) of this section.

(c) *How to request judicial review.* In order to request judicial review, an enrollee must file a civil action in a district court of the United States in accordance with section 205(g) of the Act. (See § 423.2136 for a description of the procedures to follow in requesting judicial review.)

§ 423.1978 Reopening determinations and decisions.

(a) A coverage determination or redetermination made by a Part D plan sponsor, a reconsideration made by the independent review entity specified in § 423.600, or the decision of an ALJ or the MAC that is otherwise binding may be reopened and revised by the entity that made the determination or decision as provided in § 423.1980 through § 423.1986.

(b) The filing of a request for reopening does not relieve the Part D plan sponsor of its obligation to make payment or provide benefits as specified in § 423.636 or § 423.638 of this chapter.

(c) Once an entity issues a revised determination or decision, the revisions made by the decision may be appealed.

(d) A decision not to reopen by the Part D plan sponsor or any other entity is not subject to review.

§ 423.1980 Reopenings of coverage determinations, redeterminations, reconsiderations, hearings and reviews.

(a) *General rules.* (1) A reopening is a remedial action taken to change a binding determination or decision, even though the binding determination or decision may have been correct at the time it was made based on the evidence of record. Consistent with § 423.1978(a), that action may be taken by—

(i) A Part D plan sponsor to revise the coverage determination or redetermination;

(ii) An IRE to revise the reconsideration;

(iii) An ALJ to revise the hearing decision; or

(iv) The MAC to revise the hearing or review decision.

(2) When an enrollee has filed a valid request for an appeal of a coverage determination, redetermination, reconsideration, hearing, or MAC review, no adjudicator has jurisdiction to reopen an issue that is under appeal until all appeal rights for that issue are exhausted. Once the appeal rights for the issue have been exhausted, the Part D plan sponsor, IRE, ALJ, or MAC may reopen as set forth in this section.

(3) Consistent with § 423.1978(b), the filing of a request for reopening does not relieve the Part D plan sponsor of its obligation to make payment or provide benefits as specified in § 423.636 or § 423.638.

(4) Consistent with § 423.1978(d), the Part D plan sponsor's, IRE's, ALJ's, or MAC's decision on whether to reopen is binding and not subject to appeal.

(5) A determination under the Medicare secondary payer provisions of section 1862(b) of the Act that Medicare has an MSP recovery claim for drug claims that were already reimbursed by the Part D plan sponsor is not a reopening.

(b) *Timeframes and requirements for reopening coverage determinations and redeterminations initiated by a Part D plan sponsor.* A Part D plan sponsor may reopen its coverage determination or redetermination on its own motion:

(1) Within 1 year from the date of the coverage determination or redetermination for any reason.

(2) Within 4 years from the date of the coverage determination or redetermination for good cause as defined in § 423.1986.

(3) At any time if there exists reliable evidence as defined in § 405.902 of this chapter that the coverage determination was procured by fraud or similar fault as defined in § 405.902.

(c) *Timeframe and requirements for reopening coverage determinations and redeterminations requested by an enrollee.* (1) An enrollee may request that a Part D plan sponsor reopen its coverage determination or redetermination within 1 year from the date of the coverage determination or redetermination for any reason.

(2) An enrollee may request that a Part D plan sponsor reopen its coverage determination or redetermination within 4 years from the date of the coverage determination or redetermination for good cause in accordance with § 423.1986.

(d) *Timeframes and requirements for reopening reconsiderations, hearing decisions and reviews initiated by an IRE, ALJ, or the MAC.* (1) An IRE may reopen its reconsideration on its own motion within 180 calendar days from the date of the reconsideration for good cause in accordance with § 423.1986. If the IRE's reconsideration was procured by fraud or similar fault, then the IRE may reopen at any time.

(2) An ALJ or the MAC may reopen a hearing decision on its own motion within 180 calendar days from the date of the decision for good cause in accordance with § 423.1986. If the hearing decision was procured by fraud or similar fault, then the ALJ or the MAC may reopen at any time.

(3) The MAC may reopen its review decision on its own motion within 180 calendar days from the date of the review decision for good cause in accordance with § 423.1986. If the MAC's decision was procured by fraud or similar fault, then the MAC may reopen at any time.

(e) *Timeframes and requirements for reopening reconsiderations, hearing decisions, and reviews requested by an enrollee or a Part D plan sponsor.* (1) An enrollee who received a reconsideration or a Part D plan sponsor may request that an IRE reopen its reconsideration decision within 180 calendar days from the date of the reconsideration for good cause in accordance with § 423.1986.

(2) An enrollee who received an ALJ hearing decision or a Part D plan sponsor may request that an ALJ or the MAC reopen the hearing decision within 180 calendar days from the date of the hearing decision for good cause in accordance with § 423.1986.

(3) An enrollee who received a MAC decision or a Part D plan sponsor may request that the MAC reopen its decision within 180 calendar days from the date of the review decision for good cause in accordance with § 423.1986.

§ 423.1982 Notice of a revised determination or decision.

(a) *When adjudicators initiate reopenings.* When any determination or decision is reopened and revised as provided in § 423.1980:

(1) The Part D plan sponsor, IRE, ALJ, or the MAC must mail its revised determination or decision to the enrollee at his or her last known address.

(2) The IRE, ALJ, or the MAC must mail its revised determination or decision to the Part D plan sponsor.

(3) An adverse revised determination or decision must state the rationale and basis for the reopening and revision and any right to appeal.

(b) *Reopenings initiated at the request of an enrollee or a Part D plan sponsor.* (1) The Part D plan sponsor, IRE, ALJ, or the MAC must mail its revised determination or decision to the enrollee at his or her last known address.

(2) The IRE, ALJ, or the MAC must mail its revised determination or decision to the Part D plan sponsor.

(3) An adverse revised determination or decision must state the rationale and basis for the reopening and revision and any right to appeal.

§ 423.1984 Effect of a revised determination or decision.

(a) *Coverage determinations.* The revision of a coverage determination is binding unless an enrollee submits a request for a redetermination that is accepted and processed in accordance with § 423.580 through § 423.590.

(b) *Redeterminations.* The revision of a redetermination is binding unless an enrollee submits a request for an IRE reconsideration that is accepted and processed in accordance with § 423.600 through § 423.604.

(c) *Reconsiderations.* The revision of a reconsideration is binding unless an enrollee submits a request for an ALJ hearing that is accepted and processed in accordance with § 423.1970 through § 423.1972 and § 423.2000 through § 423.2063.

(d) *ALJ hearing decisions.* The revision of a hearing decision is binding unless an enrollee submits a request for a MAC review that is accepted and processed as specified in § 423.1974 and § 423.2100 through § 423.2130.

(e) *MAC review.* The revision of a MAC determination or decision is binding unless an enrollee files a civil action in which a Federal District Court accepts jurisdiction and issues a decision.

(f) *Appeal of only the portion of the determination or decision revised by the reopening.* Only the portion of the coverage determination, redetermination, reconsideration, or hearing decision revised by the reopening may be subsequently appealed.

(g) *Effect of a revised determination or decision.* Consistent with § 423.1978(c), a revised determination or decision is binding unless it is appealed or otherwise reopened.

§ 423.1986 Good cause for reopening.

(a) *Establishing good cause.* Good cause may be established when—

(1) There is new and material evidence that—

(i) Was not available or known at the time of the determination or decision; and

(ii) May result in a different conclusion; or

(2) The evidence that was considered in making the determination or decision clearly shows on its face that an obvious error was made at the time of the determination or decision.

(b) *Change in substantive law or interpretative policy.* (1) *General rule.* A change of legal interpretation or policy by CMS in a regulation, CMS ruling, or CMS general instruction, whether made in response to judicial precedent or otherwise, is not a basis for reopening a determination or hearing decision regarding appeals under this section.

(2) An adjudicator may reopen a determination or decision to apply the current law or CMS or the Part D plan sponsor policy rather than the law or CMS or the Part D plan sponsor policy at the time the coverage determination is made in situations where the enrollee has not yet received the drug and the current law or CMS or the Part D plan sponsor policy may affect whether the drug should be received.

(c) *Third party payer error.* A request to reopen a claim based upon a third party payer's error in making a primary payment determination when Medicare processed the claim in accordance with the information in its system of records or on the claim form does not constitute good cause for reopening.

§ 423.1990 Expedited access to judicial review.

(a) *Process for expedited access to judicial review.*

(1) For purposes of this section, a "review entity" means an entity of up to three reviewers who are ALJs or members of the Departmental Appeals Board, as determined by the Secretary.

(2) In order to obtain expedited access to judicial review (EAJR), a review entity must certify that the MAC does not have the authority to decide the question of law or regulation relevant to the matters in dispute and that there is no material issue of fact in dispute.

(3) An enrollee may make a request for EAJR only once with respect to a question of law or regulation for a specific matter in dispute in an appeal.

(b) *Conditions for making the expedited appeals request.* (1) An enrollee may request EAJR in place of an ALJ hearing or MAC review if the following conditions are met:

(i) An IRE has made a reconsideration determination and the enrollee has filed a request for an ALJ hearing in accordance with § 423.2002 and a final decision, dismissal order, or remand order of the ALJ has not been issued; or

(ii) An ALJ has made a decision and the enrollee has filed a request for MAC review in accordance with § 423.2102 and a final decision, dismissal order, or remand order of the MAC has not been issued.

(2) The requestor is an enrollee.

(3) The amount remaining in controversy meets the threshold requirements established annually by the Secretary.

(4) If there is more than one enrollee to the hearing or MAC review, each enrollee concurs, in writing, with the request for the EAJR.

(5) There are no material issues of fact in dispute.

(c) *Content of the request for EAJR.* The request for EAJR must—

(1) Allege that there are no material issues of fact in dispute and identify the facts that the enrollee considers material and that are not disputed; and

(2) Assert that the only factor precluding a decision favorable to the enrollee is—

(i) A statutory provision that is unconstitutional, or a provision of a regulation that is invalid and specify the statutory provision that the enrollee considers unconstitutional or the provision of a regulation that the enrollee considers invalid; or

(ii) A CMS Ruling that the enrollee considers invalid.

(3) Include a copy of the IRE reconsideration and of any ALJ hearing decision that the enrollee has received;

(4) If the IRE reconsideration or ALJ hearing decision was based on facts that the enrollee is disputing, state why the enrollee considers those facts to be immaterial; and

(5) If the IRE reconsideration or ALJ hearing decision was based on a provision of a law, regulation, or CMS Ruling in addition to the one the enrollee considers unconstitutional or invalid, a statement as to why further administrative review of how that provision applies to the facts is not necessary.

(d) *Place and time for an EAJR request.* (1) Method and place for filing request. The enrollee may include an EAJR request in his or her request for an ALJ hearing or MAC review, or, if an appeal is already pending with an ALJ or the MAC, file a written EAJR request with the ALJ hearing office or MAC where the appeal is being considered. The ALJ hearing office or MAC forwards the request to the review entity within 5 calendar days of receipt.

(2) Time of filing request. The enrollee may file a request for EAJR—

(i) If the enrollee has requested a hearing, at any time before receipt of the notice of the ALJ's decision; or

(ii) If the enrollee has requested MAC review, at any time before receipt of notice of the MAC's decision.

(e) *Determination on EAJR request.* (1) The review entity described in paragraph (a) of this section will determine whether the request for EAJR meets all of the requirements of paragraphs (b), (c), and (d) of this section.

(2) Within 60 calendar days after the date the review entity receives a request and accompanying documents and materials meeting the conditions in paragraphs (b), (c), and (d) of this section, the review entity will issue either a certification in accordance with paragraph (f) of this section or a denial of the request.

(3) A determination by the review entity either certifying that the requirements for EAJR are met pursuant to paragraph (f) of this section or denying the request is not subject to review by the Secretary.

(4) If the review entity fails to make a determination within the timeframe specified in paragraph (e)(2) of this section, then the enrollee may bring a civil action in Federal District Court within 60 calendar days of the end of the timeframe.

(f) *Certification by the review entity.* If an enrollee meets the requirements for the EAJR, the review entity certifies in writing that—

(1) The material facts involved in the appeal are not in dispute;

(2) Except as indicated in paragraph (f)(3) of this section, the Secretary's interpretation of the law is not in dispute;

(3) The sole issue(s) in dispute is the constitutionality of a statutory provision, or the validity of a provision of a regulation or CMS Ruling;

(4) But for the provision challenged, the enrollee would receive a favorable decision on the ultimate issue; and

(5) The certification by the review entity is the Secretary's final action for purposes of seeking expedited judicial review.

(g) *Effect of certification by the review entity.* If an EAJR request results in a certification described in paragraph (f) of this section:

(1) The enrollee that requested the EAJR is considered to have waived any right to completion of the remaining steps of the administrative appeals process regarding the matter certified.

(2) The enrollee has 60 calendar days, beginning on the date of the review entity's certification within which to bring a civil action in Federal District Court.

(3) The enrollee must satisfy the requirements for venue under section 205(g) of the Act, as well as the requirements for filing a civil action in a Federal District Court under § 423.2136.

(h) *Rejection of EAJR.* (1) If a request for EAJR does not meet all the conditions set out in paragraphs (b), (c), and (d) of this section, or if the review entity does not certify a request for EAJR, the review entity advises the enrollee in writing that the request has been denied, and returns the request to the ALJ hearing office or the MAC, which will treat it as a request for hearing or for MAC review, as appropriate.

(2) Whenever a review entity forwards a rejected EAJR request to an ALJ hearing office or the MAC, the appeal is considered timely filed and the 90 calendar day decision making timeframe begins on the day the request is received by the hearing office or the MAC.

§ 423.2000 Hearing before an ALJ: general rule.

(a) If an enrollee is dissatisfied with an IRE's reconsideration, the enrollee may request a hearing.

(b) A hearing may be conducted in-person, by video-teleconference, or by telephone. At the hearing, the enrollee may submit evidence subject to the restrictions in § 423.2018, examine the evidence used in making the determination under review, and present and/or question witnesses.

(c) In some circumstances, the Part D plan sponsor, or a representative of CMS, including the IRE, may participate in the hearing as specified in § 423.2010.

(d) The ALJ conducts a de novo review and issues a decision based on the hearing record.

(e) If an enrollee waives his or her right to appear at the hearing in person or by telephone or video-teleconference, the ALJ may make a decision based on the evidence that is in the file and any new evidence that is submitted for consideration.

(f) The ALJ may require the enrollee to participate in a hearing if it is necessary to decide the case. If the ALJ determines that it is necessary to obtain testimony from a person other than the enrollee, he or she may hold a hearing to obtain that testimony, even if the enrollee has waived the right to appear. In that event, however, the ALJ will give the enrollee the opportunity to appear when the testimony is given, but may hold the hearing even if the enrollee decides not to appear.

(g) An ALJ may also issue a decision on the record on his or her own initiative if the evidence in the hearing record supports a fully favorable finding.

§ 423.2002 Right to an ALJ hearing.

(a) Consistent with § 423.1970(a), an enrollee may request a hearing before an ALJ if—

(1) The enrollee files a written request for an ALJ hearing within 60 calendar days after receipt of the written notice of the IRE's reconsideration; and

(2) The enrollee meets the amount in controversy requirements of § 423.1970.

(b) An enrollee may request that the hearing before an ALJ be expedited if:

(1) The appeal involves an issue specified in § 423.566(b) but does not include solely a request for payment of Part D drugs already furnished.

(2) The enrollee submits a written or oral request for an expedited ALJ hearing within 60 calendar days of the date of the written notice of an IRE reconsideration determination. The request can only be submitted after the enrollee receives the written IRE reconsideration notice. The request should also explain why applying the standard timeframe may seriously jeopardize the life or health of the enrollee; and

(3) The enrollee meets the amount in controversy requirements of § 423.1970.

(c) The ALJ must document all oral requests for expedited hearings in writing and maintain the documentation in the case files.

(d) For purposes of this section, the date of receipt of the reconsideration is presumed to be 5 calendar days after the date of the written reconsideration, unless there is evidence to the contrary.

(e) For purposes of meeting the 60 calendar day filing deadline, the request is considered as filed on the date it is received by the entity specified in the IRE's reconsideration.

§ 423.2004 Right to ALJ review of IRE notice of dismissal.

(a) An enrollee has a right to have an IRE's dismissal of a request for reconsideration reviewed by an ALJ if:

(1) The enrollee files a request for an ALJ review within 60 calendar days after receipt of the written notice of the IRE's dismissal.

(2) The enrollee meets the amount in controversy requirements of § 423.1970.

(3) For purposes of this section, the date of receipt of the IRE's dismissal is presumed to be 5 calendar days after the date of the written dismissal notice, unless there is evidence to the contrary.

(4) For purposes of meeting the 60 calendar day filing deadline, the request is considered as filed on the date it is received by the entity specified in the IRE's dismissal.

(b) If the ALJ determines that the IRE's dismissal was in error, he or she vacates the dismissal and remands the case to the IRE for a reconsideration.

(c) An ALJ's decision regarding an IRE's dismissal of a reconsideration request is binding and not subject to further review. The dismissal of a request for ALJ review of an IRE's dismissal of a reconsideration request is binding and not subject to further review, unless vacated by the MAC under § 423.2108(b).

§ 423.2008 Parties to an ALJ hearing.

(a) *Who may request a hearing.* Only an enrollee (or an enrollee's representative) may request a hearing before an ALJ.

(b) *Who are parties to the ALJ hearing.* The enrollee (or the enrollee's representative) who filed the request for hearing is the only party to the ALJ hearing.

§ 423.2010 When CMS, the IRE, or Part D plan sponsors may participate in an ALJ hearing.

(a) An ALJ may request, but may not require, CMS, the IRE, and/or the Part D plan sponsor to participate in any proceedings before the ALJ, including the oral hearing, if any.

(b) CMS, the IRE, and/or the Part D plan sponsor may request to participate in the hearing process.

(1) For non-expedited hearings, any request by CMS, the IRE, and/or the Part D plan sponsor to participate must be made within 5 calendar days of receipt of the notice of hearing.

(2) Within 5 calendar days of receipt of a request to participate in a non-expedited hearing, the ALJ must notify the entity, the Part D plan sponsor, if applicable and the enrollee of his or her decision on the request to participate.

(3) For expedited hearings, any request by CMS, the IRE, and/or the Part D plan sponsor to participate must be made within 1 calendar day of receipt of the notice of hearing. Requests may be made orally or submitted by facsimile to the hearing office.

(4) Within 1 calendar day of receipt of a request to participate in an expedited hearing, the ALJ must notify the entity, the Part D plan sponsor, if applicable, and the enrollee of his or her decision on the request to participate.

(c) The ALJ has discretion not to allow CMS, the IRE, and/or the Part D plan sponsor to participate.

(d) Participation may include filing position papers or providing written testimony to clarify factual or policy issues in a case, but it does not include calling witnesses or cross-examining the witnesses of an enrollee to the hearing.

(e) When CMS, the IRE, and/or the Part D plan sponsor participates in an ALJ hearing, CMS, the IRE, and/or the Part D plan sponsor may not be called as a witness during the hearing.

(f) CMS, the IRE, and/or the Part D plan sponsor must submit any position papers within the timeframe designated by the ALJ.

(g) The ALJ cannot draw any adverse inferences if CMS, the IRE, and/or the Part D plan sponsor decide not to participate in any proceedings before an ALJ, including the hearing.

§ 423.2014 Request for an ALJ hearing.

(a) *Content of the request.* The request for an ALJ hearing must be made in writing, except as set forth in paragraph (b) of this section. The request, including any oral request, must include all of the following:

(1) The name, address, telephone number, and Medicare health insurance claim number of the enrollee.

(2) The name, address, and telephone number of the appointed representative, as defined at § 423.560, if any.

(3) The appeals case number assigned to the appeal by the IRE, if any.

(4) The prescription drug in dispute.

(5) The plan name.

(6) The reasons the enrollee disagrees with the IRE's reconsideration.

(7) A statement of any additional evidence to be submitted and the date it will be submitted.

(8) A statement that the enrollee is requesting an expedited hearing, if applicable.

(b) *Request for expedited hearing.* If an enrollee is requesting that the hearing be expedited, the enrollee may make the request for an ALJ hearing orally, but only after receipt of the written IRE reconsideration notice. The ALJ hearing office must document all oral requests in writing and maintain the documentation in the case files. A prescribing physician or other prescriber may provide oral or written support for an enrollee's request for expedited review.

(c) *When and where to file.* Consistent with §§ 423.1972(a) and (b), the request for an ALJ hearing after an IRE reconsideration must be submitted:

(1) Within 60 calendar days from the date the enrollee receives written notice of the IRE's reconsideration.

(2) With the entity specified in the IRE's reconsideration.

(i) If the request for hearing is timely filed with an entity other than the entity specified in the IRE's reconsideration, the deadline specified in § 423.2016 for deciding the appeal begins on the date the entity specified in the IRE's reconsideration receives the request for hearing.

(ii) If the request for hearing is filed with an entity, other than the entity specified in the IRE's reconsideration, the ALJ hearing office must notify the appellant of the date of receipt of the request and the commencement of the adjudication timeframe.

(d) *Extension of time to request a hearing.* (1) Consistent with § 423.1972(b), if the request for hearing is not filed within 60 calendar days of receipt of the written IRE's reconsideration, an enrollee may request an extension for good cause.

(2) Any request for an extension of time must be in writing or, for expedited reviews, in writing or oral. The ALJ hearing office must document all oral requests in writing and maintain the documentation in the case file.

(3) The request must give the reasons why the request for a hearing was not filed within the stated time period, and must be filed with the entity specified in the notice of reconsideration.

(4) If the ALJ finds there is good cause for missing the deadline, the time period for filing the hearing request will be extended. To determine whether good cause for late filing exists, the ALJ uses the standards set forth in §§ 405.942(b)(2) and (b)(3) of this chapter.

(5) If a request for hearing is not timely filed, the adjudication period in § 423.2016 begins the date the ALJ grants the request to extend the filing deadline.

§ 423.2016 Timeframes for deciding an Appeal before an ALJ.

(a) *Hearings.* (1) When a request for an ALJ hearing is filed after an IRE has issued a written reconsideration, the ALJ must issue a decision, dismissal order, or remand, as appropriate, no later than the end of the 90 calendar day period beginning on the date the request for hearing is received by the entity specified in the IRE's notice of reconsideration, unless the 90 calendar day period has been extended as provided in this subpart.

(2) The adjudication period specified in paragraph (a) of this section begins on the date that a timely filed request for hearing is received by the entity specified in the IRE's reconsideration, or, if it is not timely filed, the date that the ALJ grants any extension to the filing deadline.

(b) *Expedited hearings.* (1) Standard for expedited hearing. The ALJ must provide an expedited hearing decision if the appeal involves an issue specified in § 423.566(b), but is not solely a request for payment of Part D drugs already furnished, and the enrollee's prescribing physician or other prescriber indicates, or the ALJ determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life, health or ability to regain maximum function. The ALJ may consider this standard as met if a lower level adjudicator has granted a request for an expedited hearing.

(2) Grant of a request. If the ALJ grants a request for expedited hearing, the ALJ must—

(i) Make the decision to grant an expedited hearing within 5 calendar days of receipt of the request for expedited hearing;

(ii) Give the enrollee prompt oral notice of this decision; and

(iii) Subsequently send to the enrollee at his or her last known address and to the Part D plan sponsor written notice of the decision. This notice may be provided within the written notice of hearing.

(3) Denial of a request. If the ALJ denies a request for expedited hearing, the ALJ must—

(i) Make this decision within 5 calendar days of receipt of the request for expedited hearing;

(ii) Give the enrollee prompt oral notice of the denial that informs the enrollee of the denial and explains that the ALJ will process the enrollee's request using the 90 calendar day timeframe for non-expedited ALJ hearings; and

(iii) Subsequently send to the enrollee at his or her last known address and to the Part D plan sponsor an equivalent written notice of the decision within 3 calendar days after the oral notice.

(4) A decision on a request for expedited hearing may not be appealed.

(5) Timeframe for adjudication. (i) If the ALJ accepts a request for expedited hearing, the ALJ must issue a written decision, dismissal order or remand, as expeditiously as the enrollee's health condition requires, but no later than the end of the 10 calendar day period beginning on the date the request for hearing is received by the entity specified in the IRE's written notice of reconsideration, unless the 10 calendar day period has been extended as provided in this subpart.

(ii) The adjudication period specified in paragraph (b)(5)(i) of this section begins on the date that a timely

provided request for hearing is received by the entity specified in the IRE's reconsideration, or, if it is not timely provided, the date that the ALJ grants any extension to the filing deadline.

§ 423.2018 Submitting evidence before the ALJ hearing.

(a) *All hearings.* An enrollee may submit any written evidence that he or she wishes to have considered at the hearing.

(1) An ALJ will not consider any evidence submitted regarding a change in condition of an enrollee after the appealed coverage determination was made.

(2) An ALJ will remand a case to the Part D IRE where an enrollee wishes evidence on his or her change in condition after the coverage determination to be considered.

(b) *Non-expedited hearings.* (1) Except as provided in this paragraph, a represented enrollee must submit all written evidence he or she wishes to have considered at the hearing with the request for hearing or within 10 calendar days of receiving the notice of hearing.

(2) If a represented enrollee submits written evidence later than 10 calendar days after receiving the notice of hearing, the period between the time the evidence was required to have been submitted and the time it is received is not counted toward the adjudication deadline specified in § 423.2016.

(3) The requirements of this subsection do not apply to unrepresented enrollees.

(c) *Expedited hearings.* (1) Except as provided in this section, an enrollee must submit all written evidence he or she wishes to have considered at the hearing with the request for hearing or within 2 calendar days of receiving the notice of hearing.

(2) If an enrollee submits written evidence later than 2 calendar days after receiving the notice of hearing, the period between the time the evidence was required to have been submitted and the time it is received is not counted toward the adjudication deadline specified in § 423.2016.

(d) The requirements of paragraphs (b) and (c) of this section do not apply to oral testimony given at a hearing.

§ 423.2020 Time and place for a hearing before an ALJ.

(a) *General.* Consistent with § 423.1972(b), the ALJ sets the time and place for the hearing, and may change the time and place, if necessary.

(b) *Determining how appearances are made.* (1) The ALJ will direct that the appearance of an individual be conducted by video-teleconferencing if the ALJ finds that video-teleconferencing technology is available to conduct the appearance.

(2) The ALJ may also offer to conduct a hearing by telephone if the request for hearing or administrative record suggests that a telephone hearing may be more convenient for the enrollee.

(3) The ALJ, with the concurrence of the Managing Field Office ALJ, may determine that an in-person hearing should be conducted if—

(i) The video-teleconferencing technology is not available; or

(ii) Special or extraordinary circumstances exist.

(c) *Notice of hearing.* (1) The ALJ sends a notice of hearing to the enrollee, the Part D plan sponsor that issued the coverage determination, and the IRE that issued the reconsideration, advising them of the proposed time and place of the hearing.

(2) The notice of hearing will require the enrollee (and any potential participant from CMS, the IRE, and/or the Part D plan who has requested to participate in the hearing consistent with § 423.2010) to reply to the notice by:

(i) Acknowledging whether they plan to attend the hearing at the time and place proposed in the notice of hearing; or

(ii) Objecting to the proposed time and/or place of the hearing.

(d) *An enrollee's right to waive a hearing.* An enrollee may also waive the right to a hearing and request that the ALJ issue a decision based on the written evidence in the record.

(1) As specified in § 423.2000, the ALJ may require the enrollee to attend a hearing if it is necessary to decide the case.

(2) If the ALJ determines that it is necessary to obtain testimony from a person other than the enrollee, he or she may still hold a hearing to obtain that testimony, even if the enrollee has waived the right to appear. In those cases, the ALJ would give the enrollee the opportunity to appear when the testimony is given but may hold the hearing even if the enrollee decides not to appear.

(e) *An enrollee's objection to time and place of hearing.* (1) If an enrollee objects to the time and place of the hearing, the enrollee must notify the ALJ at the earliest possible opportunity before the time set for the hearing.

(2) The enrollee must state the reason for the objection and state the time and place he or she wants the hearing to be held.

(3) The objection must be in writing except for an expedited hearing when the objection may be provided orally. The ALJ must document all oral objections to the time and place of an expedited hearing in writing and maintain the documentation in the case files.

(4) The ALJ may change the time or place of the hearing if the enrollee has good cause. (Section 423.2052(a)(2) provides the procedures the ALJ follows when an enrollee does not respond to a notice of hearing and fails to appear at the time and place of the hearing.)

(f) *Good cause for changing the time or place.* The ALJ can find good cause for changing the time or place of the scheduled hearing and reschedule the hearing if the information available to the ALJ supports the enrollee's contention that—

(1) The enrollee or his or her representative is unable to attend or to travel to the scheduled hearing because of a serious physical or mental condition, incapacitating injury, or death in the family; or

(2) Severe weather conditions make it impossible to travel to the hearing; or

(3) Good cause exists as set forth in paragraph (g) of this section.

(g) *Good cause in other circumstances.* (1) In determining whether good cause exists in circumstances other than those set forth in paragraph (f) of this section, the ALJ considers the enrollee's reason for requesting the change, the facts supporting the request, and the impact of the change on the efficient administration of the hearing process.

(2) Factors evaluated to determine the impact of the change include, but are not limited to, the effect on processing other scheduled hearings, potential delays in rescheduling the hearing, and whether any prior changes were granted the enrollee.

(3) Examples of other circumstances an enrollee might give for requesting a change in the time or place of the hearing include, but are not limited to, the following:

(i) The enrollee has attempted to obtain a representative but needs additional time.

(ii) The enrollee's representative was appointed within 10 calendar days of the scheduled hearing for non-expedited hearings (or 2 calendar days for expedited hearings) and needs additional time to prepare for the hearing.

(iii) The enrollee's representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing.

(iv) A witness who will testify to facts material to an enrollee's case is unavailable to attend the scheduled

hearing and the evidence cannot be otherwise obtained.

(v) Transportation is not readily available for an enrollee to travel to the hearing.

(vi) The enrollee is unrepresented, and is unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language).

(h) *Effect of rescheduling hearing.* If a hearing is postponed at the request of the enrollee for any of the above reasons, the time between the originally scheduled hearing date and the new hearing date is not counted toward the adjudication deadline as specified in § 423.2016.

(i) *An enrollee's request for an in-person hearing.* (1) If an enrollee objects to a video-teleconferencing hearing or to the ALJ's offer to conduct a hearing by telephone, the enrollee must notify the ALJ at the earliest possible opportunity before the time set for the hearing and request an in-person hearing.

(2) The enrollee must state the reason for the objection and state the time or place he or she wants the hearing to be held.

(3) The request must be in writing except for an expedited hearing for which the request may be provided orally. The ALJ must document all oral objections to an expedited video-teleconferencing or telephone hearing in writing and maintain the documentation in the case files.

(4) When an enrollee's request for an in-person hearing is granted, the ALJ must issue a decision within the adjudicatory timeframe as specified in § 423.2016 (including any applicable extensions provided in this subpart), unless the enrollee requesting the hearing agrees to waive such adjudication timeframe in writing.

(5) The ALJ may grant the request, with the concurrence of the Managing Field Office ALJ, upon a finding of good cause and will reschedule the hearing for a time and place when the enrollee may appear in person before the ALJ.

§ 423.2022 Notice of a hearing before an ALJ.

(a) *Issuing the notice.* (1) After the ALJ sets the time and place of the hearing, the notice of the hearing will be mailed or otherwise transmitted to the enrollee and other potential participants, as provided in § 423.2020(c) at their last known addresses, or given by personal service, unless the enrollee or other potential participant indicates in writing that he or she does not wish to receive this notice.

(2) The notice is mailed or served at least 20 calendar days before the hearing, except for expedited hearings where written notice is mailed or served at least 3 calendar days before the hearing. For expedited hearings, the ALJ may orally provide notice of the hearing to the enrollee and other potential participants but oral notice must be followed by an equivalent written notice within 1 calendar day of the oral notice.

(b) *Notice information.* (1) The notice of hearing contains a statement of the specific issues to be decided and will inform the enrollee that he or she may designate a person to represent him or her during the proceedings.

(2) The notice must include an explanation of the procedures for requesting a change in the time or place of the hearing, a reminder that, if the enrollee fails to appear at the scheduled hearing without good cause, the ALJ may dismiss the hearing request, and other information about the scheduling and conduct of the hearing.

(3) The enrollee will also be told if his or her appearance or that of any other witness is scheduled by video-teleconferencing, telephone, or in person. If the ALJ has scheduled the enrollee to appear at the hearing by video-teleconferencing, the notice of hearing will advise that the scheduled place for the hearing is a video-teleconferencing site and explain what it means to appear at the hearing by video-teleconferencing.

(4) The notice advises the enrollee that if he or she objects to appearing by video-teleconferencing or telephone, and wishes instead to have his or her hearing at a time and place where he or she may appear in person before the ALJ, he or she must follow the procedures set forth at § 423.2020(i) for notifying the ALJ of his or her objections and for requesting an in-person hearing.

(c) *Acknowledging the notice of hearing.* (1) If the enrollee or his or her representative does not acknowledge receipt of the notice of hearing, the ALJ hearing office attempts to contact the enrollee for an explanation.

(2) If the enrollee states that he or she did not receive the notice of hearing, an amended notice is sent to him or her by certified mail or, if available, fax or e-mail. See § 423.2052 for the procedures the ALJ follows in deciding if the time or place of a scheduled hearing will be changed if an enrollee does not respond to the notice of hearing).

§ 423.2024 Objections to the issues.

(a) If an enrollee objects to the issues described in the notice of hearing, he or she must notify the ALJ in writing at the earliest possible opportunity before the time set for the hearing, and no later than 5 calendar days before the hearing, except for expedited hearings in which the enrollee must submit written or oral notice of objection no later than 2 calendar days before the hearing. The ALJ hearing office must document all oral objections in writing and maintain the documentation in the case files.

(b) The enrollee must provide the reasons for his or her objections.

(c) The ALJ makes a decision on the objections either in writing or at the hearing.

§ 423.2026 Disqualification of the ALJ.

(a) An ALJ may not conduct a hearing if he or she is prejudiced or partial to the enrollee or has any interest in the matter pending for decision.

(b) If an enrollee objects to the ALJ who will conduct the hearing, the enrollee must notify the ALJ within 10 calendar days of the date of the notice of hearing, except for expedited hearings in which the enrollee must submit written or oral notice no later than 2 calendar days after the date of the notice of hearing. The ALJ must document all oral objections in writing and maintain the documentation in the case files. The ALJ considers the enrollee's objections and decides whether to proceed with the hearing or withdraw.

(c) If the ALJ withdraws, another ALJ will be appointed to conduct the hearing. If the ALJ does not withdraw, the enrollee may, after the ALJ has issued an action in the case, present his or her objections to the MAC in accordance with § 423.2100 through § 423.2130. The MAC would then consider whether the hearing decision should be revised or a new hearing held before another ALJ.

§ 423.2030 ALJ hearing procedures.

(a) *General rule.* A hearing is open to the enrollee and to other persons the ALJ considers necessary and proper.

(b) *At the hearing.* The ALJ fully examines the issues, questions the enrollee and other witnesses, and may accept documents that are material to the issues consistent with § 423.2018.

(c) *Missing evidence.* The ALJ may also stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing.

(d) *Reopen the hearing.* The ALJ may reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence pursuant to § 423.1986. The ALJ may decide when the evidence is presented and when the issues are discussed.

§ 423.2032 Issues before an ALJ.

(a) *General rule.* The issues before the ALJ include all the issues brought out in the coverage determination, redetermination, or reconsideration that were not decided entirely in an enrollee's favor. However, if evidence presented before the hearing causes the ALJ to question a favorable portion of the determination, he or she notifies the enrollee before the hearing and may consider it an issue at the hearing.

(b) *New issues*—(1) *General.* The ALJ may consider a new issue at the hearing if he or she notifies the enrollee about the new issue any time before the start of the hearing.

(2) *Content of the new issues.* The new issue may include issues resulting from the participation of CMS, the IRE, and/or the Part D plan sponsor at the ALJ level of adjudication and from any evidence and position papers submitted by CMS, the IRE, and/or the Part D plan sponsor for the first time to the ALJ.

(3) *Consideration of new issues.* The ALJ or the enrollee may raise a new issue; however, the ALJ may only consider a new issue if its resolution—

(i) Could have a material impact on the issue or issues that are the subject of the request for hearing; and

(ii) Is permissible under the rules governing reopening of determinations and decisions as specified in § 423.1980.

(c) *Adding issues to a pending appeal.* An ALJ may not add any issue, including one that is related to an issue that is appropriately before an ALJ, to a pending appeal unless it has been adjudicated at the lower appeals levels and the enrollee is notified of the new issue(s) before the start of the hearing.

§ 423.2034 When an ALJ may remand a case.

(a) *General.* (1) If an ALJ believes that the written record is missing information that is essential to resolving the issues on appeal and that information can be provided only by CMS, the IRE, and/or the Part D plan sponsor, then the ALJ may either:

(i) Remand the case to the IRE that issued the reconsideration or

(ii) Retain jurisdiction of the case and request that the CMS, the IRE, and/or the Part D plan sponsor forward the missing information to the appropriate hearing office.

(2) If the information is not information that can be provided only by CMS, the IRE, and or the Part D plan sponsor, the ALJ must retain jurisdiction of the case and obtain the information on his or her own, or directly from the enrollee.

(3) "Can be provided only by CMS, the IRE, and/or the Part D plan sponsor" means the information is not publicly available, is not in the possession of the enrollee, and cannot be requested and obtained by the enrollee. Information that is publicly available is information that is available to the general public via the Internet or in a printed publication. It includes, but is not limited to, information available on a CMS, IRE or Part D Plan sponsor website or information in an official CMS or HHS publication.

(b) *ALJ remands a case to an IRE.*

(1) Consistent with § 423.2004(b), the ALJ will remand a case to the appropriate IRE if the ALJ determines that an IRE's dismissal of a request for reconsideration was in error.

(2) The ALJ will remand a case to the appropriate Part D IRE if the ALJ determines that the enrollee wishes evidence on his or her change in condition after the coverage determination to be considered in the appeal.

§ 423.2036 Description of an ALJ hearing process.

(a) *The right to appear and present evidence.* (1) An enrollee has the right to appear at the hearing before the ALJ to present evidence and to state his or her position. An enrollee may appear by video-teleconferencing, telephone, or in person as determined under § 423.2020.

(2) An enrollee may also make his or her appearance by means of a representative, who may make his or her appearance by video-teleconferencing, telephone, or in person, as determined under § 423.2020.

(3) Witness testimony may be given and CMS, IRE, and Part D plan sponsor participation may also be accomplished by video-teleconferencing, telephone, or in person, as determined under § 423.2020.

(b) *Waiver of the right to appear.* (1) An enrollee may send the ALJ a written statement indicating that he or she does not wish to appear at the hearing.

(i) For expedited hearings, an enrollee may indicate in writing or orally that he or she does not wish to appear at the hearing.

(ii) The ALJ hearing office must document all oral waivers in writing and maintain the documentation in the case files.

(2) The enrollee may subsequently withdraw his or her waiver in writing at any time before the notice of the hearing decision is issued; however, by withdrawing the waiver the enrollee agrees to an extension of the adjudication period as specified in § 423.2016, that may be necessary to schedule and hold the hearing.

(3) Even if the enrollee waives his or her right to appear at a hearing, the ALJ may require him or her to attend an oral hearing if the ALJ believes that a personal appearance and testimony by the enrollee is necessary to decide the case.

(c) *Presenting written statements and oral arguments.* An enrollee or an enrollee's appointed representative, as defined at § 423.560, may appear before the ALJ to state the enrollee's case, to present a written summary of the case, or to enter written statements about the facts and law material to the case in the record.

(d) *Waiver of adjudication period.* At any time during the hearing process, the enrollee may waive the adjudication deadline specified in § 423.2016 for issuing a hearing decision. The waiver may be for a specific period of time agreed upon by the ALJ and the enrollee.

(e) *What evidence is admissible at a hearing.* The ALJ may receive evidence at the hearing even though the evidence is not admissible in court under the rules of evidence used by the court. However, the ALJ may not consider evidence on any change in condition of an enrollee after a coverage determination. If the enrollee wishes for the evidence to be considered, the ALJ must remand the case to the Part D IRE as set forth in § 423.2034(b)(2).

(f)(1) *Subpoenas.* When it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative, issue subpoenas for the appearance and testimony of witnesses and for the enrollee and/or the Part D plan sponsor to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. An ALJ may not issue a subpoena to CMS, or the IRE to compel an appearance, testimony, or the production of evidence, or to the Part D plan sponsor to compel an appearance or testimony.

(2) *Reviewability of an ALJ Subpoena.* A subpoena issued by an ALJ is not subject to immediate review by the MAC. The subpoena may be reviewed solely during the MAC's review specified in § 423.2102 and § 423.2110.

(3) *Exception.* To the extent a subpoena compels disclosure of a matter which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before an ALJ, the MAC may review immediately the ruling of the ALJ on the objections to the

subpoena or that portion of the subpoena as applicable.

(i) Upon notice to the ALJ that the enrollee or a non-party, as applicable, intends to seek MAC review of the ALJ's ruling on the subpoena, the ALJ must stay all proceedings affected by the subpoena.

(ii) The proceedings are stayed for 15 calendar days or until the MAC issues a written decision that affirms, reverses, or modifies the ALJ's subpoena, whichever comes first.

(iii) If the MAC does not take action within the 15 calendar days, then the stay is lifted and the enrollee or non-party must comply with the ALJ's subpoena.

(4) *Enforcement.* (i) If the ALJ determines that an enrollee or person other than the enrollee subject to a subpoena issued under this section has refused to comply with the subpoena, the ALJ may request that the Secretary seek enforcement of the subpoena in accordance with section 205(e) of the Act, 42 U.S.C. 405(e).

(ii) After submitting the enforcement request, the time period for the ALJ to issue a decision, dismissal or remand a case in response to a request for hearing is stayed for 15 calendar days or until the Secretary makes a decision with respect to the enforcement request, whichever occurs first.

(iii) Any enforcement request by an ALJ must consist of a written notice to the Secretary describing in detail the ALJ's findings of noncompliance and his or her specific request for enforcement, and providing a copy of the subpoena and evidence of its receipt by certified mail by the enrollee or person other than the enrollee subject to the subpoena.

(iv) The ALJ must promptly mail a copy of the notice and related documents to the individual or entity subject to the subpoena, to the enrollee, and to any other affected person.

(g) *Witnesses at a hearing.* Witnesses may appear at a hearing. They testify under oath or affirmation, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation. The ALJ may ask the witnesses any questions relevant to the issues and allow the enrollee or his or her appointed representative, as defined at § 423.560.

§ 423.2038 Deciding a case without a hearing before an ALJ.

(a) *Decision wholly favorable.* If the evidence in the hearing record supports a finding in favor of the enrollee(s) on every issue, the ALJ may issue a hearing decision without giving the enrollee(s) prior notice and without holding a hearing. The notice of the decision informs the enrollee(s) that he or she has the right to a hearing and a right to examine the evidence on which the decision is based.

(b) *Enrollee does not wish to appear.* (1) The ALJ may decide a case on the record and not conduct a hearing if—

(i) The enrollee indicates in writing or, for expedited hearings orally or in writing, that he or she does not wish to appear before the ALJ at a hearing, including a hearing conducted by telephone or video teleconferencing, if available. The ALJ hearing office must document all oral requests not to appear at a hearing in writing and maintain the documentation in the case files; or

(ii) The enrollee lives outside the United States and does not inform the ALJ that he or she wants to appear.

(2) When a hearing is not held, the decision of the ALJ must refer to the evidence in the record on which the decision was based.

§ 423.2040 Prehearing and posthearing conferences.

(a) The ALJ may decide on his or her own, or at the request of the enrollee to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision.

(b) For non-expedited hearings, the ALJ informs the enrollee of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless the enrollee indicates in writing that he or she does not wish to receive a written notice of the conference.

(c) For expedited hearings, the ALJ informs the enrollee of the time, place, and purpose of the conference at least 2 calendar days before the conference date, unless the enrollee indicates orally or in writing that he or she does not wish to receive a written notice of the conference.

(d) The ALJ hearing office must document all oral requests not to receive written notice of the conference in writing and maintain the documentation in the case files.

(e) At the conference, the ALJ may consider matters in addition to those stated in the notice of hearing, if the enrollee consents in writing. A record of the conference is made.

(f) The ALJ issues an order stating all agreements and actions resulting from the conference. If the enrollee does not object, the agreements and actions become part of the hearing record and are binding.

§ 423.2042 The administrative record.

(a) *Creating the record.* (1) The ALJ makes a complete record of the evidence, including the hearing proceedings, if any.

(2) The record will include marked as exhibits, the documents used in making the decision under review, including, but not limited to, medical records, written statements, certificates, reports, affidavits, and any other evidence the ALJ admits.

(3) An enrollee may review the record at the hearing, or, if a hearing is not held, at any time before the ALJ's notice of decision is issued.

(4) If a request for review is filed, the complete record, including any recording of the hearing, is forwarded to the MAC.

(5) A typed transcription of the hearing is prepared if an enrollee seeks judicial review of the case in a Federal district court within the stated time period and all other jurisdictional criteria are met, unless, upon the Secretary's motion prior to the filing of an answer, the court remands the case.

(b) *Requesting and receiving copies of the record.* (1) An enrollee may request and receive a copy of all or part of the record, including the exhibits list, documentary evidence, and a copy of the tape of the oral proceedings. The enrollee may be asked to pay the costs of providing these items.

(2) If an enrollee requests all or part of the record from the ALJ and an opportunity to comment on the record, the time beginning with the ALJ's receipt of the request through the expiration of the time granted for the enrollee's response does not count toward the adjudication deadline.

§ 423.2044 Consolidated hearing before an ALJ.

(a) A consolidated hearing may be held if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ.

(b) It is within the discretion of the ALJ to grant or deny an enrollee's request for consolidation. In considering an enrollee's request, the ALJ may consider factors such as whether the issue(s) may be more efficiently decided if the requests for hearing are combined. In considering the enrollee's request for consolidation, the ALJ must take into account the adjudication deadlines for each case and may require an enrollee to waive the adjudication deadline associated with one or more cases if consolidation otherwise prevents the ALJ from deciding all of the appeals at issue within their respective deadlines.

(c) The ALJ may also propose on his or her own motion to consolidate two or more cases in one hearing for

administrative efficiency, but may not require an enrollee to waive the adjudication deadline for any of the consolidated cases.

(d) Before consolidating a hearing, the ALJ must notify CMS of his or her intention to do so, and CMS may then elect to participate in the consolidated hearing by sending written notice to the ALJ.

(1) For non-expedited hearings, any request by CMS to participate must be made within 5 calendar days of receipt of the ALJ's notice of the consolidation.

(2) For expedited hearings, any request by CMS to participate must be made within 1 calendar day of receipt of the ALJ's notice of the consolidation. Requests may be made orally or submitted by facsimile to the hearing office.

(e) If the ALJ decides to hold a consolidated hearing, he or she may make either a consolidated decision and record or a separate decision and record on each issue. The ALJ ensures that any evidence that is common to all appeals and material to the common issue to be decided is included in the consolidated record or each individual record, as applicable.

§ 423.2046 Notice of an ALJ decision.

(a) *General rule.* Unless the ALJ dismisses the hearing, the ALJ will issue a written decision that gives the findings of fact, conclusions of law, and the reasons for the decision.

(1) For expedited hearings, the ALJ issues a written decision within the 10 calendar day adjudication timeframe under § 423.2016(b)(5).

(2) The decision must be based on evidence offered at the hearing or otherwise admitted into the record.

(3) A copy of the decision should be mailed to the enrollee at his or her last known address.

(4) A copy of the written decision should also be provided to the IRE that issued the reconsideration determination, and to the Part D plan sponsor that issued the coverage determination.

(b) *Content of the notice.* The decision must be provided in a manner calculated to be understood by an enrollee and must include—

(1) The specific reasons for the determination, including, to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination;

(2) The procedures for obtaining additional information concerning the decision; and

(3) Notification of the right to appeal the decision to the MAC, including instructions on how to initiate an appeal under this section.

(c) *Limitation on decision.* When the amount of payment for the Part D drug is an issue before the ALJ, the ALJ may make a finding as to the amount of payment due. If the ALJ makes a finding concerning payment when the amount of payment was not an issue before the ALJ, the Part D plan sponsor may independently determine the payment amount. In either of the aforementioned situations, an ALJ's decision is not binding on the Part D plan sponsor for purposes of determining the amount of payment due. The amount of payment determined by the Part D plan sponsor in effectuating the ALJ's decision is a new coverage determination under § 423.566.

(d) *Timing of decision.* For non-expedited hearings, the ALJ issues a decision no later than the end of the 90 calendar day period beginning on the date the request for hearing is received by the entity specified in the IRE's reconsideration, unless the 90 calendar day period is extended as provided in § 423.2016. For expedited hearings, the ALJ issues a decision as expeditiously as the enrollee's health condition requires, but no later than the end of the 10 calendar day period beginning on the date the request for hearing is received by the entity specified in the IRE's reconsideration, unless the 10 calendar day period is extended as provided in § 423.2016.

(e) *Recommended decision.* An ALJ issues a recommended decision if he or she is directed to do so in a MAC remand order. An ALJ may not issue a recommended decision on his or her own motion. The ALJ mails a copy of the recommended decision to the enrollee at his or her last known address.

§ 423.2048 The effect of an ALJ's decision.

The decision of the ALJ is binding unless—

(a) An enrollee requests a review of the decision by the MAC within the stated time period or the MAC reviews the decision issued by an ALJ under the procedures set forth in § 423.2110, and the MAC issues a final decision or remand order;

(b) The decision is reopened and revised by an ALJ or the MAC under the procedures explained in § 423.1980;

(c) The expedited access to judicial review process at § 423.1990 is used;

(d) The ALJ's decision is a recommended decision directed to the MAC and the MAC issues a decision; or

(e) In a case remanded by a Federal District Court, the MAC assumes jurisdiction under the procedures in § 423.2138 and the MAC issues a decision.

§ 423.2050 Removal of a hearing request from an ALJ to the MAC.

If a request for hearing is pending before an ALJ, the MAC may assume responsibility for holding a hearing by requesting that the ALJ send the hearing request. If the MAC holds a hearing, it conducts the hearing according to the rules for hearings before an ALJ. Notice is mailed to the enrollee at his or her last known address informing him or her that the MAC has assumed responsibility for the case.

§ 423.2052 Dismissal of a request for a hearing before an ALJ.

Dismissal of a request for a hearing is in accordance with the following:

(a) *Dismissal of a request for a hearing.* An ALJ dismisses a request for a hearing under any of the following conditions:

(1) At any time before notice of the hearing decision is mailed, if the enrollee asks to withdraw the request. This request may be submitted in writing to the ALJ or be made orally at the hearing. The request for withdrawal must include a clear statement that the enrollee is withdrawing the request for hearing and does not intend to further proceed with the appeal. If an attorney or other legal professional on behalf of an enrollee files the request for withdrawal, the ALJ may presume that the representative has advised the enrollee of the consequences of the withdrawal and dismissal.

(2) Neither the enrollee that requested the hearing nor the enrollee's representative appears at the time and place set for the hearing, if—

(i) The enrollee was notified before the time set for the hearing that the request for hearing might be dismissed without further notice for failure to appear; or

(ii) The enrollee did not appear at the time and place of hearing and does not contact the ALJ hearing office within 10 calendar days for non-expedited hearings and 2 calendar days for expedited hearings and provide good cause for not appearing; or

(iii) The ALJ sends a notice to the enrollee asking why the enrollee did not appear; and the enrollee does not respond within 10 calendar days for non-expedited hearings; the ALJ does not receive the enrollee's response within 2 calendar days for expedited hearings or the enrollee does not provide good cause for the failure to appear. For expedited hearings, an enrollee may submit his or her response orally to the ALJ.

(iv) In determining whether good cause exists under paragraph (a)(2) of this section, the ALJ considers any

physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the enrollee may have.

(3) The person requesting a hearing has no right to it under § 423.2002.

(4) The enrollee did not request a hearing within the stated time period and the ALJ has not found good cause for extending the deadline, as provided in § 423.2014(d).

(5) The enrollee died while the request for hearing is pending and the request for hearing was filed by the enrollee or the enrollee's representative, and the enrollee's surviving spouse or estate has no remaining financial interest in the case and the enrollee's representative, if any, does not want to continue the appeal.

(6) The ALJ dismisses a hearing request entirely or refuses to consider any one or more of the issues because an IRE, an ALJ or the MAC has made a previous determination or decision under this subpart about the enrollee's rights on the same facts and on the same issue(s), and this previous determination or decision has become binding by either administrative or judicial action.

(7) The enrollee abandons the request for hearing. An ALJ may conclude that an enrollee has abandoned a request for hearing when the ALJ hearing office attempts to schedule a hearing and is unable to contact the enrollee after making reasonable efforts to do so.

(8) Consistent with § 423.1972(c)(1), the ALJ dismisses a hearing request if a request clearly shows that the amount in controversy is less than that required under § 423.1970.

(b) *Notice of dismissal.* The ALJ mails a written notice of the dismissal of the hearing request to the enrollee at his or her last known address. The written notice provides that there is a right to request that the MAC vacate the dismissal action.

(c) *Discontinuation of a hearing.* Consistent with § 423.1972(c)(2), the ALJ discontinues a hearing and does not rule on the substantive issues raised in the appeal if, after a hearing is initiated, the ALJ finds that the amount in controversy is less than the amount required under § 423.1970.

§ 423.2054 Effect of dismissal of a request for a hearing before an ALJ.

The dismissal of a request for a hearing is binding, unless it is vacated by the MAC under § 423.2108(b).

§ 423.2062 Applicability of policies not binding on the ALJ and MAC.

(a) ALJs and the MAC are not bound by CMS program guidance, such as program memoranda and manual instructions, but will give substantial deference to these policies if they are applicable to a particular case.

(b) If an ALJ or MAC declines to follow a policy in a particular case, the ALJ or MAC decision must explain the reasons why the policy was not followed. An ALJ or MAC decision to disregard a policy applies only to the specific coverage determination being considered and does not have precedential effect.

§ 423.2063 Applicability of laws, regulations and CMS Rulings.

(a) All laws and regulations pertaining to the Medicare programs, including, but not limited to Titles XI, XVIII, and XIX of the Social Security Act and applicable implementing regulations, are binding on ALJs and the MAC.

(b) CMS Rulings are published under the authority of the CMS Administrator. Consistent with § 401.108 of this chapter, rulings are binding on all CMS components, and on all HHS components that adjudicate matters under the jurisdiction of CMS.

§ 423.2100 Medicare appeals council review: general.

(a) Consistent with § 423.1974, the enrollee may request that the MAC review an ALJ's decision or dismissal.

(b) When the MAC reviews an ALJ's written decision, it undertakes a de novo review.

(c) The MAC issues a final decision, dismissal order, or remands a case no later than the end of the 90 calendar. period beginning on the date the request for review is received (by the entity specified in the ALJ's written notice of decision), unless the 90 calendar day period is extended as provided in this subpart or the enrollee requests expedited MAC review.

(d) If an enrollee requests expedited MAC review, the MAC issues a final decision, dismissal order or remand as expeditiously as the enrollee's health condition requires, but no later than the end of the 10 calendar day period beginning on the date the request for review is received (by the entity specified in the ALJ's written notice of decision), unless the 10 calendar day period is extended as provided in this subpart.

§ 423.2102 Request for MAC review when ALJ issues decision or dismissal.

(a)(1) An enrollee to the ALJ hearing may request a MAC review if the enrollee files a written request for a MAC review within 60 calendar days after receipt of the ALJ's written decision or dismissal.

(2) An enrollee may request that MAC review be expedited if the appeal involves an issue specified in § 423.566(b) but does not include solely a request for payment of Part D drugs already furnished.

(i) If an enrollee is requesting that the MAC review be expedited, the enrollee submits an oral or written request within 60 calendar days after the receipt of the ALJ's written decision or dismissal. A prescribing physician or other prescriber may provide oral or written support for an enrollee's request for expedited review.

(ii) The MAC must document all oral requests for expedited review in writing and maintain the documentation in the case files.

(3) For purposes of this section, the date of receipt of the ALJ's written decision or dismissal is presumed to be 5 calendar days after the date of the notice of the decision or dismissal, unless there is evidence to the contrary.

(4) The request is considered as filed on the date it is received by the entity specified in the notice of the ALJ's action.

(b) An enrollee requesting a review may ask that the time for filing a request for MAC review be extended if—

(1) The request for an extension of time is in writing or, for expedited reviews, in writing or oral. The MAC must document all oral requests in writing and maintain the documentation in the case file.

(2) The request explains why the request for review was not filed within the stated time period. If the MAC finds that there is good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, the MAC uses the standards outlined at § 405.942(b)(2) and § 405.942(b)(3).

(c) An enrollee does not have the right to seek MAC review of an ALJ's remand or an ALJ's affirmation of an IRE's dismissal of a request for reconsideration.

§ 423.2106 Where a request for review may be filed.

When a request for a MAC review is filed after an ALJ has issued a written decision or dismissal, the request for review must be submitted to the entity specified in the notice of the ALJ's action. If the request for review is timely filed with an entity other than the entity specified in the notice of the ALJ's action, the MAC's adjudication period to conduct a review begins on the date the request for review is received by the entity specified in the notice of the ALJ's action. Upon receipt of a request for review from an entity other than the

entity specified in the notice of the ALJ's action, the MAC sends written notice to the enrollee of the date of receipt of the request and commencement of the adjudication timeframe.

§ 423.2108 MAC Actions when request for review is filed.

(a) *General.* Except as specified in paragraph (c) of this section, when an enrollee requests that the MAC review an ALJ's decision, the MAC will review the ALJ's decision de novo. The enrollee requesting review does not have a right to a hearing before the MAC. The MAC will consider all of the evidence admitted into the administrative record. Upon completion of its review, the MAC may adopt, modify, or reverse the ALJ's decision or remand the case to the ALJ for further proceedings. Unless the MAC's review is expedited as provided in paragraph (d) of this section, the MAC must issue its action no later than 90 calendar days after receiving the request for review, unless the 90 calendar day period has been extended as provided in this subpart.

(b) *Review of ALJ's dismissal.* When an enrollee requests that the MAC review an ALJ's dismissal, the MAC may deny review or vacate the dismissal and remand the case to the ALJ for further proceedings.

(c) *MAC dismissal of request for review.* The MAC will dismiss a request for review when the individual or entity requesting review does not have a right to a review by the MAC, or will dismiss the request for a hearing for any reason that the ALJ could have dismissed the request for hearing.

(d) *Expedited reviews.* (1) *Standard for expedited reviews.* The MAC must provide an expedited review if the appeal involves an issue specified in § 423.566(b), but does not include solely a request for payment of Part D drugs already furnished, enrollee's prescribing physician or other prescriber indicates, or the MAC determines that applying the standard timeframe for making a decision may seriously jeopardize the enrollee's life or health or ability to regain maximum function. The MAC may consider this standard as met if a lower level adjudicator has granted a request for an expedited appeal.

(2) *Grant of a request.* If the MAC grants a request for expedited review, the MAC must:

(i) Make this decision within 5 calendar days of receipt of the request for expedited review;

(ii) Give the enrollee prompt oral notice of this decision; and

(iii) Issue a decision, dismissal order or remand, as expeditiously as the enrollee's health condition requires, but no later than the end of the 10 calendar day period beginning on the date the request for review is received by the entity specified in the ALJ's written notice of decision.

(3) *Denial of a request.* If the MAC denies a request for expedited review, the MAC must:

(i) Make this decision within 5 calendar days of receipt of the request for expedited review;

(ii) Give the enrollee and Part D plan sponsor within 5 calendar days of receiving the request written notice of the denial. The written notice must inform the enrollee of the denial and explain that the MAC will process the enrollee's request using the 90 calendar day timeframe for non-expedited reviews.

(4) *Decision on a request.* A decision on a request for expedited review may not be appealed.

§ 423.2110 MAC reviews on its own motion.

(a) *General rule.* The MAC may decide on its own motion to review a decision or dismissal issued by an ALJ. CMS or the IRE may refer a case to the MAC for it to consider reviewing under this authority any time within 60 calendar days after the ALJ's written decision or dismissal is issued.

(b) *Referral of cases.* (1) CMS or the IRE may refer a case to the MAC if, in the view of CMS or the IRE, the decision or dismissal contains an error of law material to the outcome of the claim or presents a broad policy or procedural issue that may affect the public interest. CMS or the IRE may also request that the MAC take own motion review of a case if—

(i) CMS or the IRE participated or requested to participate in the appeal at the ALJ level; and

(ii) In CMS' or the IRE's view, the ALJ's decision or dismissal is not supported by the preponderance of evidence in the record or the ALJ abused his or her discretion.

(2) CMS' or the IRE's referral to the MAC is made in writing and must be filed with the MAC no later than 60 calendar days after the ALJ's written decision or dismissal is issued.

(i) The written referral will state the reasons why CMS or the IRE believes that the MAC should review the case on its own motion.

(ii) CMS or the IRE will send a copy of its referral to the enrollee and to the ALJ.

(iii) The enrollee may file exceptions to the referral by submitting written comments to the MAC within 20 calendar days of the referral notice.

(iv) An enrollee submitting comments to the MAC must send the comments to CMS or the IRE.

(c) *Standard of review.* (1) *Referral by CMS or the IRE when CMS or the IRE participated or requested to participate in the ALJ level.* If CMS or the IRE participated or requested to participate in an appeal at the ALJ level, the MAC exercises its own motion authority if there is an error of law material to the outcome of the case, an abuse of discretion by the ALJ, the decision is not consistent with the preponderance of the evidence of record, or there is a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review under this standard, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS or the IRE.

(2) *Referral by CMS or the IRE when CMS or the IRE did not participate or request to participate in the ALJ proceedings.* The MAC will accept review if the decision or dismissal contains an error of law material to the outcome of the case or presents a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review, the MAC will limit its consideration of the ALJ's action to those exceptions raised by CMS or the IRE.

(d) *MAC's action.* (1) If the MAC decides to review a decision or dismissal on its own motion, it will mail the results of its action to the enrollee and to CMS or the IRE, as appropriate.

(2) The MAC may adopt, modify, or reverse the decision or dismissal, may remand the case to an ALJ for further proceedings or may dismiss a hearing request.

(3) The MAC must issue its action no later than 90 calendar days after receipt of the CMS or the IRE referral, unless the 90 calendar day period has been extended as provided in this subpart.

(4) The MAC may not issue its action before the 20 calendar day comment period has expired, unless it determines that the agency's referral does not provide a basis for reviewing the case.

(5) If the MAC declines to review a decision or dismissal on its own motion, the ALJ's decision or dismissal is binding.

§ 423.2112 Content of request for review.

(a)(1) The request for MAC review must be filed with the entity specified in the notice of the ALJ's action.

(2) The request for review must be in writing and may be made on a standard form, except for requests for expedited reviews which may be made orally.

(3) The MAC must document all oral requests in writing and maintain the documentation in the case file.

(4) A written request that is not made on a standard form or, for expedited requests, an oral request, is accepted if it includes the enrollee's name and telephone number, the plan name; Medicare health insurance claim number; the ALJ appeal number; the specific Part D drug(s) for which the review is requested; a statement that the enrollee is requesting an expedited review, if applicable; and the name and signature of the enrollee or the representative of the enrollee.

(b) The request for review must identify the parts of the ALJ action with which the enrollee requesting review disagrees and explain why he or she disagrees with the ALJ's decision, dismissal, or other determination being appealed.

(c) The MAC will limit its review of an ALJ's actions to those exceptions raised by the enrollee in the request for review, unless the enrollee is unrepresented. For purposes of this section only, a representative is either anyone with a valid appointment as the enrollee's representative or is a member of the enrollee's family, a legal guardian or an individual who routinely acts on behalf of the enrollee, such as a family member or friend who has a power of attorney.

§ 423.2114 Dismissal of request for review.

The MAC dismisses a request for review if the enrollee requesting review did not file the request within the stated period of time and the time for filing has not been extended. The MAC also dismisses the request for review if—

(a) The enrollee asks to withdraw the request for review;

(b) The individual or entity does not have a right to request MAC review; or

(c) The enrollee died while the request for review is pending and the enrollee's estate or representative, if any, either has no remaining financial interest in the case or does not want to continue the appeal.

§ 423.2116 Effect of dismissal of request for MAC review or request for hearing.

The dismissal of a request for MAC review or denial of a request for review of a dismissal issued by an ALJ is binding and not subject to further review unless reopened and vacated by the MAC. The MAC's dismissal of a request for hearing is also binding and not subject to judicial review.

§ 423.2118 Obtaining evidence from the MAC.

An enrollee may request and receive a copy of all or part of the record of the ALJ hearing, including the exhibits list, documentary evidence, and a copy of the CD of the oral proceedings. However, the enrollee may be asked to pay the costs of providing these items. If an enrollee requests evidence from the MAC and an opportunity to comment on that evidence, the time beginning with the MAC's receipt of the request for evidence through the expiration of the time granted for the enrollee's response will not be counted toward the adjudication deadline.

§ 423.2120 Filing briefs with the MAC.

Upon request, the MAC will give the enrollee requesting review a reasonable opportunity to file a brief or other written statement about the facts and law relevant to the case. Unless the enrollee requesting review files the brief or other statement with the request for review, the time beginning with the date of receipt of the request to submit the brief and ending with the date the brief is received by the MAC will not be counted toward the adjudication timeframe set forth in § 423.2100. The MAC may also request, but not require, CMS, the IRE, and/or the Part D plan sponsor to file a brief or position paper if the MAC determines that it is necessary to resolve the issues in the case. The MAC cannot draw any adverse inference if CMS, the IRE, and/or the Part D plan sponsor either participates, or decides not to participate in MAC review.

§ 423.2122 What evidence may be submitted to the MAC.

(a) *Appeal before the MAC on request for review of ALJ's decision.* (1) If the MAC is reviewing an ALJ's decision, the MAC will consider the evidence contained in the record of the proceedings before the ALJ, and any new evidence that relates to the period before the coverage determination. If the hearing decision decides a new issue that the enrollee was not afforded an opportunity to address at the ALJ level, the MAC considers any evidence related to that issue that is submitted with the request for review.

(2) If the MAC determines that additional evidence is needed to resolve the issues in the case and the hearing record indicates that the previous decision-makers have not attempted to obtain the evidence, the MAC may remand the case to an ALJ to obtain the evidence and issue a new decision.

(3) The MAC will not consider any new evidence submitted regarding a change in condition of an enrollee after a coverage determination is made. The MAC will remand a case to the Part D IRE if the MAC determines that the enrollee wishes to have evidence on his or her change in condition after the coverage determination considered.

(b) *Subpoenas.* When it is reasonably necessary for the full presentation of a case, the MAC may, on its own initiative, issue subpoenas requiring an enrollee or Part D plan sponsor to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. The MAC may not issue a subpoena to CMS, or the IRE to compel the production of evidence.

(1) To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality or undue burden, was made before the MAC, the Secretary may review immediately that subpoena or a portion of the subpoena.

(2) Upon notice to the MAC that an enrollee or Part D plan sponsor intends to seek the Secretary review of the subpoena, the MAC must stay all proceedings affected by the subpoena, tolling the time period for the MAC to issue a final action or remand a case in response to a request for review for 15 calendar days or until the Secretary makes a decision with respect to the review request, whichever occurs first.

(3) If the Secretary does not grant review within the time allotted for the stay, the stay is lifted and the subpoena stands.

(c) *Enforcement.* (1) If the MAC determines that an enrollee or other person or entity subject to a subpoena issued under this section has refused to comply with the subpoena, the MAC may request the Secretary to seek enforcement of the subpoena in accordance with section 205(e) of the Act, 42 U.S.C. 405(e).

(2) After submitting the enforcement request, the time period for the MAC to issue a final action or remand a case in response to a request for review is stayed for 15 calendar days or until the Secretary makes a decision with respect to the enforcement request, whichever occurs first.

(3) Any enforcement request by the MAC must consist of a written notice to the Secretary describing in detail the MAC's findings of noncompliance and its specific request for enforcement, and providing a copy of the subpoena and evidence of its receipt by certified mail by the enrollee or other person or entity subject to the subpoena.

(4) The MAC must promptly mail a copy of the notice and related documents to the enrollee or other person or entity subject to the subpoena, and to any other affected person.

§ 423.2124 Oral argument.

An enrollee may request to appear before the MAC to present oral argument.

(a) The MAC grants a request for oral argument if it decides that the case raises an important question of law, policy, or fact that cannot be readily decided based on written submissions alone.

(b) The MAC may decide on its own that oral argument is necessary to decide the issues in the case. If the MAC decides to hear oral argument, it informs the enrollee of the time and place of the oral argument at least 10 calendar days before the scheduled date or, in the case of an expedited review, at least 2 calendar days before the scheduled date.

(c) In case of a previously unrepresented enrollee, a newly hired representative may request an extension of time for preparation of the oral argument and the MAC must consider whether the extension is reasonable.

(d) The MAC may also request, but not require, CMS, the IRE, and/or the Part D plan sponsor to appear before it if the MAC determines that it may be helpful in resolving the issues in the case.

(e) The MAC cannot draw any adverse inference if CMS, the IRE, and/or the Part D plan sponsor decide not to participate in the oral argument.

§ 423.2126 Case remanded by the MAC.

(a) *When the MAC may remand a case to the ALJ.* (1) The MAC may remand a case in which additional evidence is needed or additional action by the ALJ is required. The MAC will designate in its remand order whether the ALJ will issue a decision or a recommended decision on remand.

(2) *Action by ALJ on remand.* The ALJ will take any action that is ordered by the MAC and may take any additional action that is not inconsistent with the MAC's remand order.

(3) *Notice when case is returned with a recommended decision.* When the ALJ sends a case to the MAC with a recommended decision, a notice is mailed to the enrollee at his or her last known address. The notice tells the enrollee that the case was sent to the MAC, explains the rules for filing briefs or other written statements with the MAC, and includes a copy of the recommended decision.

(4) *Filing briefs with the MAC when ALJ issues recommended decision.* (i) An enrollee may file with the MAC briefs or other written statements about the facts and law relevant to the case within 20 calendar days of the date on the recommended decision or with the request for review for expedited appeals. An enrollee may ask the MAC for additional time to file a brief or written statement. The MAC will extend this period, as appropriate, if the enrollee shows that he or she has good cause for requesting the extension.

(ii) All other rules for filing briefs with and obtaining evidence from the MAC follow the procedures explained in this subpart.

(5) *Procedures before the MAC.* (i) The MAC, after receiving a recommended decision, will conduct proceedings and issue its decision or dismissal according to the procedures explained in this subpart.

(ii) If the MAC determines that more evidence is required, it may again remand the case to an ALJ for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the MAC decides that it can get the additional evidence more quickly, it will take appropriate action.

(b) *When the MAC must remand a case to the Part D IRE.* The MAC will remand a case to the appropriate Part D IRE if the MAC determines that the enrollee wishes evidence on his or her change in condition after the coverage determination to be considered in the appeal.

§ 423.2128 Action of the MAC.

(a) After it has reviewed all the evidence in the administrative record and any additional evidence received, subject to the limitations on MAC consideration of additional evidence in § 423.2122, the MAC will make a decision or remand the case to an ALJ.

(b) The MAC may adopt, modify, or reverse the ALJ hearing decision or recommended decision.

(c) The MAC mails a copy of its decision to the enrollee at his or her last known address, to CMS, to the IRE, and to the Part D plan sponsor.

§ 423.2130 Effect of the MAC's decision.

The MAC's decision is final and binding unless a Federal District Court issues a decision modifying the MAC's decision or the decision is revised as the result of a reopening in accordance with § 423.1980. An enrollee may file an action in a Federal District Court within 60 calendar days after the date the enrollee receives written notice of the MAC's decision.

§ 423.2134 Extension of time to file action in Federal District Court.

(a) An enrollee may request that the time for filing an action in a Federal District Court be extended.

(b) The request must:

(1) Be in writing.

(2) Give the reasons why the action was not filed within the stated time period.

(3) Be filed with the MAC.

(c) If the enrollee shows that he or she had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, the MAC uses the standards specified in §§ 405.942(b)(2) or (b)(3) of this chapter.

§ 423.2136 Judicial review.

(a) *General rule.* To the extent authorized by sections 1876(c)(5)(B) and 1860D–4(h) of the Act and consistent with § 423.1976, an enrollee may obtain a court review of a MAC decision if the amount in controversy meets the threshold requirement estimated annually by the Secretary.

(b) *Court in which to file civil action.* (1) Consistent with § 423.1976(c), any civil action described in paragraph (a) of this section must be filed in the District Court of the United States for the judicial district in which the enrollee resides.

(2) If the enrollee does not reside within any judicial district, the civil action must be filed in the District Court of the United States for the District of Columbia.

(c) *Time for filing civil action.* (1) Any civil action described in paragraph (a) of this section must be filed within the time periods specified in § 423.2130 or § 423.2134, as applicable.

(2) For purposes of this section, the date of receipt of the notice of the MAC's decision shall be presumed to be 5 calendar days after the date of the notice, unless there is a reasonable showing to the contrary.

(3) Where a case is certified for judicial review in accordance with the expedited access to judicial review process in § 423.1990, the civil action must be filed within 60 calendar days after receipt of the review entity's certification, except where the time is extended by the ALJ or MAC, as applicable, upon a showing of good cause.

(d) *Proper defendant.* (1) In any civil action described in paragraph (a) of this section, the Secretary of HHS, in his or her official capacity, is the proper defendant. Any civil action properly filed shall survive notwithstanding any change of the person holding the Office of the Secretary of HHS or any vacancy in such office.

(2) If the complaint is erroneously filed against the United States or against any agency, officer, or employee of the United States other than the Secretary, the plaintiff enrollee will be notified that he or she has named an incorrect

defendant and is granted 60 calendar days from the date of receipt of the notice in which to commence the action against the correct defendant, the Secretary.

(e) *Standard of review.* (1) Under section 205(g) of the Act, the findings of the Secretary of HHS as to any fact, if supported by substantial evidence, are conclusive.

(2) When the Secretary's decision is adverse to an enrollee due to an enrollee's failure to submit proof in conformity with a regulation prescribed under section 205(a) of the Act pertaining to the type of proof an enrollee must offer to establish entitlement to payment, the court will review only whether the proof conforms with the regulation and the validity of the regulation.

§ 423.2138 Case remanded by a Federal District Court.

When a Federal District Court remands a case to the Secretary for further consideration, unless the court order specifies otherwise, the MAC, acting on behalf of the Secretary, may make a decision, or it may remand the case to an ALJ with instructions to take action and either issue a decision, take other action, or return the case to the MAC with a recommended decision. If the MAC remands a case, the procedures specified in § 423.2140 will be followed.

§ 423.2140 MAC Review of ALJ decision in a case remanded by a Federal District Court.

(a) *General rules.* (1) In accordance with § 423.2138, when a case is remanded by a Federal District Court for further consideration and the MAC remands the case to an ALJ, a decision subsequently issued by the ALJ becomes the final decision of the Secretary unless the MAC assumes jurisdiction.

(2) The MAC may assume jurisdiction based on written exceptions to the decision of the ALJ that an enrollee files with the MAC or based on its authority under paragraph (c) of this section.

(3) The MAC either makes a new, independent decision based on the entire record that will be the final decision of the Secretary after remand, or remands the case to an ALJ for further proceedings.

(b) *An enrollee files exceptions disagreeing with the decision of the ALJ.* (1) If an enrollee disagrees with an ALJ decision described in paragraph (a) of this section, in whole or in part, he or she may file exceptions to the decision with the MAC.

(2) Exceptions may be filed by submitting a written statement to the MAC setting forth the reasons for disagreeing with the decision of the ALJ.

(i) The enrollee must file exceptions within 30 calendar days of the date the enrollee receives the decision of the ALJ or submit a written request for an extension within the 30 calendar day period.

(ii) The MAC will grant a timely request for a 30 calendar day extension. A request for an extension of more than 30 calendar days must include a statement of reasons as to why the enrollee needs the additional time and may be granted if the MAC finds good cause under the standard established in §§ 405.942(b)(2) or (b)(3) of this chapter.

(3) If written exceptions are timely filed, the MAC considers the enrollee's reasons for disagreeing with the decision of the ALJ. If the MAC concludes that there is no reason to change the decision of the ALJ, it will issue a notice addressing the exceptions and explaining why no change in the decision of the ALJ is warranted. In this instance, the decision of the ALJ is the final decision of the Secretary after remand.

(4) When an enrollee files written exceptions to the decision of the ALJ, the MAC may assume jurisdiction at any time. If the MAC assumes jurisdiction, it makes a new, independent decision based on its consideration of the entire record adopting, modifying, or reversing the decision of the ALJ or remanding the case to an ALJ for further proceedings, including a new decision. The new decision of the MAC is the final decision of the Secretary after remand.

(c) *MAC assumes jurisdiction without exceptions being filed.* (1) Any time within 60 calendar days after the date of the written decision of the ALJ, the MAC may decide to assume jurisdiction of the case even though no written exceptions have been filed.

(2) Notice of this action is mailed to the enrollee at his or her last known address.

(3) The enrollee will be provided with the opportunity to file a brief or other written statement with the MAC about the facts and law relevant to the case.

(4) After the brief or other written statement is received or the time allowed (usually 30 calendar days) for submitting them has expired, the MAC will either issue a final decision of the Secretary affirming, modifying, or reversing the decision of the ALJ, or remand the case to an ALJ for further proceedings, including a new decision.

(d) *Exceptions are not filed and the MAC does not otherwise assume jurisdiction.* If no exceptions are filed and the MAC does not assume jurisdiction over the case within 60 calendar days after the date of the ALJ's written decision, the decision of the ALJ becomes the final decision of the Secretary after remand.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: *July 30, 2009.*

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: *November 24, 2009.*

Constance B. Tobias,

Chair, The Departmental Appeals Board.

Dated: *November 24, 2009.*

Irwin Schroeder,

Acting Chief Administrative Law Judge, Office of Medicare Hearings and Appeals.

Approved: *September 1, 2009.*

Kathleen Sebelius,

Secretary.

[FR Doc. E9–28710 Filed 12–8–09; 8:45 am]

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Federal Register

Wednesday,
December 9, 2009

Part V

The President

Proclamation 8463—National Pearl Harbor Remembrance Day, 2009

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Presidential Documents

Title 3—

The President

Proclamation 8463 of December 4, 2009

National Pearl Harbor Remembrance Day, 2009

By the President of the United States of America

A Proclamation

President Franklin D. Roosevelt declared December 7, 1941, a "date which will live in infamy." With over 3,500 Americans killed or wounded, the surprise attack by the Imperial Japanese on Pearl Harbor was an attempt to break the American will and destroy our Pacific Fleet. They succeeded in doing neither. On National Pearl Harbor Remembrance Day, we pay tribute to the brave men and women who made the ultimate sacrifice for our country, and we honor all those who selflessly served our Nation at home and abroad during World War II.

On a tranquil Sunday morning, as war raged around the globe, the attack on Pearl Harbor effectively ended American isolation—thrusting our Nation into action. Japanese airplanes had launched an unprovoked assault on our military with immense firepower, and our service members valiantly answered the call. They defended their positions, fought back against the attackers, and cared for the wounded. In that darkest hour, men and women who had considered themselves ordinary found within themselves the ability to do something extraordinary. And in the months and years that followed, Americans all across the country would respond to Pearl Harbor with firm resolve, many joining our Armed Forces to defend our shores and our freedom.

This courage is not uncommon in the story of America—a story of heroes whose sacrifice and valor speak to their love of comrades and country; and whose goodness guides our quest for lasting peace. Today, and every day, we draw strength from the moment when the best among us defended an island and a Nation from the onslaught of tyranny, and forever altered the course of our history.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as "National Pearl Harbor Remembrance Day."

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim Monday, December 7, 2009, as National Pearl Harbor Remembrance Day. I encourage all Americans to observe this solemn day of remembrance with appropriate ceremonies and activities. I urge all Federal agencies and interested organizations, groups, and individuals to fly the flag of the United States at half-staff this December 7 in honor of those American patriots who died as a result of their service at Pearl Harbor.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of December, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html.*

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H.R. 955/P.L. 111–99

To designate the facility of the United States Postal Service located at 10355 Northeast Valley Road in Rollingbay, Washington, as the "John 'Bud' Hawk Post Office". (Nov. 30, 2009; 123 Stat. 3011)

H.R. 1516/P.L. 111–100

To designate the facility of the United States Postal Service located at 37926 Church Street in Dade City, Florida, as the "Sergeant Marcus Mathes Post Office". (Nov. 30, 2009; 123 Stat. 3012)

H.R. 1713/P.L. 111–101

To name the South Central Agricultural Research Laboratory of the Department of Agriculture in Lane, Oklahoma, and the facility of the United States Postal Service located at 310 North Perry Street in Bennington, Oklahoma, in honor of former Congressman Wesley "Wes" Watkins. (Nov. 30, 2009; 123 Stat. 3013)

H.R. 2004/P.L. 111–102

To designate the facility of the United States Postal Service located at 4282 Beach Street in Akron, Michigan, as the "Akron Veterans Memorial Post Office". (Nov. 30, 2009; 123 Stat. 3014)

H.R. 2215/P.L. 111–103

To designate the facility of the United States Postal Service located at 140 Merriman Road in Garden City, Michigan, as the "John J. Shivnen Post Office Building". (Nov. 30, 2009; 123 Stat. 3015)

H.R. 2760/P.L. 111–104

To designate the facility of the United States Postal Service located at 1615 North Wilcox Avenue in Los Angeles, California, as the "Johnny Grant Hollywood Post Office Building". (Nov. 30, 2009; 123 Stat. 3016)

H.R. 2972/P.L. 111–105

To designate the facility of the United States Postal Service located at 115 West Edward Street in Erath, Louisiana, as the "Conrad DeRouen, Jr. Post Office". (Nov. 30, 2009; 123 Stat. 3017)

H.R. 3119/P.L. 111–106

To designate the facility of the United States Postal Service located at 867 Stockton Street in San Francisco, California, as the "Lim Poon Lee Post Office". (Nov. 30, 2009; 123 Stat. 3018)

H.R. 3386/P.L. 111–107

To designate the facility of the United States Postal Service located at 1165 2nd Avenue in Des Moines, Iowa, as the "Iraq and Afghanistan Veterans Memorial Post Office". (Nov. 30, 2009; 123 Stat. 3019)

H.R. 3547/P.L. 111–108

To designate the facility of the United States Postal Service located at 936 South 250 East in Provo, Utah, as the "Rex E. Lee Post Office Building". (Nov. 30, 2009; 123 Stat. 3020)

S. 748/P.L. 111–109

To redesignate the facility of the United States Postal Service located at 2777 Logan Avenue in San Diego, California, as the "Cesar E. Chavez Post Office". (Nov. 30, 2009; 123 Stat. 3021)

S. 1211/P.L. 111–110

To designate the facility of the United States Postal Service located at 60 School Street, Orchard Park, New York, as the "Jack F. Kemp Post Office Building". (Nov. 30, 2009; 123 Stat. 3022)

S. 1314/P.L. 111–111

To designate the facility of the United States Postal Service located at 630 Northeast Killingsworth Avenue in Portland, Oregon, as the "Dr. Martin Luther King, Jr. Post Office". (Nov. 30, 2009; 123 Stat. 3023)

S. 1825/P.L. 111–112

To extend the authority for relocation expenses test programs for Federal employees, and for other purposes. (Nov. 30, 2009; 123 Stat. 3024)

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