
# Federal Register

4–23–04 Friday
Vol. 69 No. 79 Apr. 23, 2004

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

OFFICIAL BUSINESS
Penalty for Private Use, $300



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


# Federal Register

4–23–04 Friday
Vol. 69 No. 79 Apr. 23, 2004

Pages 21941–22376

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

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

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

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

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

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

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

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

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

**How To Cite This Publication:** Use the volume number and the page number. Example: 69 FR 12345.

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



## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

Paper or fiche **202–512–1800**

Assistance with public subscriptions **202–512–1806**

**General online information** **202–512–1530; 1–888–293–6498**

**Single copies/back copies:**

Paper or fiche **202–512–1800**

Assistance with public single copies **1–866–512–1800 (Toll-Free)**

**FEDERAL AGENCIES**

**Subscriptions:**

Paper or fiche **202–741–6005**

Assistance with Federal agency subscriptions **202–741–6005**

# Contents

Federal Register
Vol. 69, No. 79
Friday, April 23, 2004

**Administration on Aging**
*See* Aging Administration

**Agency for Healthcare Research and Quality**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22044–22045
Medicare:
Medicare, Medicaid, and State children health insurance programs; priority research recommendations request, 22045–22047

**Aging Administration**
NOTICES
Grants and cooperative agreements; availability, etc.:
Aging and Disability Resource Center programs, 22061–22064

**Agricultural Marketing Service**
RULES
Melons grown in—
Texas, 21947–21950
Milk marketing orders:
Northeast et al., 21950–21952
NOTICES
Beets, carrots, and white potatoes, canned; grade standards, 21999

**Agriculture Department**
*See* Agricultural Marketing Service
*See* Animal and Plant Health Inspection Service

**Animal and Plant Health Inspection Service**
RULES
Plant-related quarantine, foreign:
Potato brown rot prevention, 21941–21947
NOTICES
Environmental statements; availability, etc.:
Marek's Disease—Newcastle Disease Vaccine for use in chickens; field testing, 21999–22000

**Blind or Severely Disabled, Committee for Purchase From People Who Are**
*See* Committee for Purchase From People Who Are Blind or Severely Disabled

**Centers for Disease Control and Prevention**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22047–22055
Grants and cooperative agreements; availability, etc.:
Antimalarial drugs development and testing, 22055
Steps to a HealthierUS Initiative, 22055–22060

**Centers for Medicare & Medicaid Services**
RULES
Medicare and medicaid:
Claims filing procedures; elimination of written statement of intent, 21963–21966
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22060–22061
Grants and cooperative agreements; availability, etc.:
Aging and Disability Resource Center programs, 22061–22064
Medicare—
Voluntary Chronic Care Improvement Under Traditional Fee-for-Service Initiative, 22065–22079
Meetings:
Medicare—
Medicare Education Advisory Panel, 22080–22081
New durable medical equipment coding and payment determinations, 22079–22080
Quality of hospital care during April, May and June 2004; performance measures for public reporting; listening sessions, 22081–22083
Practicing Physicians Advisory Council, 22083–22084

**Children and Families Administration**
*See* Refugee Resettlement Office

**Coast Guard**
RULES
Drawbridge operations:
California, 21956–21958
PROPOSED RULES
Ports and waterways safety:
Lower Mississippi River, from mile marker 778.0 to 781.0, Osceola, AR; safety zone, 21981–21983
NOTICES
Committees; establishment, renewal, termination, etc.:
Merchant Marine Personnel Advisory Committee, 22084
Meetings:
Merchant Marine Personnel Advisory Committee, 22084–22085

**Commerce Department**
*See* Economic Development Administration
*See* Industry and Security Bureau
*See* International Trade Administration
*See* National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22000–22001

**Committee for Purchase From People Who Are Blind or Severely Disabled**
NOTICES
Procurement list; additions and deletions, 22000

**Committee for the Implementation of Textile Agreements**
NOTICES
Cotton, wool, and man-made textiles:
Nepal, E4–908
Textile and apparel categories:
Caribbean Basin Trade Partnership Act; short supply requests—
Certain fabrics used in womens' and girls' blouses, 22008–22010
Patented fusible interlining fabrics used in waistband construction, 22010–22011

**Comptroller of the Currency**
PROPOSED RULES
Lending limits:

Residential real estate and small business loans; pilot program, 21978–21981

**Customs and Border Protection Bureau**
NOTICES
Electronic cargo information; advance presentation requirement:
Rail carriers compliance dates; correction, C4–8199

**Defense Department**
*See* Navy Department
PROPOSED RULES
Acquisition regulations:
Small business specialist review threshold, 21997–21998
Small disadvantaged businesses and leader company contracting, 21996–21997
NOTICES
Acquisition regulations:
Machine tools and other capital assets produced within United States; use incentive program; establishment; comment request, 22011–22012
Agency information collection activities; proposals, submissions, and approvals, 22012–22013

**Economic Development Administration**
NOTICES
Grants and cooperative agreements; availability, etc.:
University Center Program, 22001

**Education Department**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22014
Privacy Act:
Systems of records, 22014–22016

**Employment Standards Administration**
*See* Wage and Hour Division
NOTICES
Minimum wages for Federal and federally-assisted construction; general wage determination decisions, 22095–22096

**Energy Department**
*See* Energy Information Administration
NOTICES
Electricity export and import authorizations, permits, etc.:
Dominion Energy Marketing, Inc., 22017
ENMAX Energy Marketing Inc., 22017–22018
Ontario Power Generation, Inc., 22018–22019

**Energy Information Administration**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22019–22025

**Environmental Protection Agency**
RULES
Hazardous waste program authorizations:
South Dakota, 21962–21963
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Dihydroazadirachtin, etc., 21959–21962
Water supply:
National primary and secondary drinking water regulations—
Simultaneous compliance and lead and copper rule, and LCR monitoring protocols; expert panel workshops, 21958
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
Kentucky, 21983–21988
NOTICES
Agency statements; comment availability, 22025
Agency statements; weekly receipts, 22025–22026
Grants and cooperative agreements; availability, etc.:
Great Lakes Integrated Atmospheric Deposition Network; management and operation; proposals request, 22026
Meetings:
Scientific Counselors Board Executive Committee, 22026–22028
Reports and guidance documents; availability, etc.:
Clean Water Act—
Off-site and out-of-kind compensatory mitigation use, 22028

**Export-Import Bank**
NOTICES
Meetings; Sunshine Act, 22028–22029

**Farm Credit Administration**
NOTICES
Meetings; Sunshine Act, 22029

**Federal Aviation Administration**
RULES
Air traffic operating and flight rules, etc.:
Iraq flights within territory and airspace—
Approval process for requests for authorization, 21953–21954
NOTICES
Aeronautical land-use assurance; waivers:
Strother Field Airport/Industrial Park, KS, 22114

**Federal Communications Commission**
NOTICES
Common carrier services:
Telecommunications carrier eligibility designation petitions—
Pending petitions and related proceedings; list; comment request, 22029–22031
Supplemented petitions; list; comment request, 22031–22032
Reports and guidance documents; availability, etc.:
Competitive market conditions with respect to commercial mobile services; annual report and analysis, 22032–22042

**Federal Deposit Insurance Corporation**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22043

**Federal Emergency Management Agency**
RULES
Flood elevation determinations:
Various States, 21966–21975
PROPOSED RULES
Flood elevation determinations:
Kentucky, 21992–21996
Virginia, 21988–21992
NOTICES
Disaster and emergency areas:
Maine, 22085
Micronesia, 22085–22086
North Dakota, 22086

**Federal Reserve System**
NOTICES
Banks and bank holding companies:
Formations, acquisitions, and mergers, 22043

**Fish and Wildlife Service**
NOTICES
Environmental statements; availability, etc.:
Trinity River Fishery Restoration Program, CA, 22091–22093
Meetings:
Sport Fishing and Boating Partnership Council, 22090

**Food and Drug Administration**
RULES
Animal drugs, feeds, and related products:
Moxidectin and praziquantel gel, 21956

**General Services Administration**
NOTICES
Environmental statements; notice of intent:
Los Angeles, CA; Federal building at 11000 Wilshire Blvd., 22043–22044

**Health and Human Services Department**
*See* Agency for Healthcare Research and Quality
*See* Aging Administration
*See* Centers for Disease Control and Prevention
*See* Centers for Medicare & Medicaid Services
*See* Food and Drug Administration
*See* Refugee Resettlement Office

**Homeland Security Department**
*See* Coast Guard
*See* Customs and Border Protection Bureau
*See* Federal Emergency Management Agency

**Housing and Urban Development Department**
NOTICES
Grants and cooperative agreements; availability, etc.:
Homeless assistance; excess and surplus Federal properties, 22086–22089
Rural Housing and Economic Development Program, 22319–22376

**Industry and Security Bureau**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22001–22002
Export transactions:
List of unverified persons in foreign countries, guidance to exporters as to "red flags" (Supplement No. 3 to 15 CFR part 732); update, 22002–22003
Meetings:
Materials Processing Equipment Technical Advisory Committee, 22003

**Interior Department**
*See* Fish and Wildlife Service
*See* Land Management Bureau
*See* Reclamation Bureau
NOTICES
Committees; establishment, renewal, termination, etc.:
Sport Fishing and Boating Partnership Council, 22089–22090

**Internal Revenue Service**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22117–22118

**International Trade Administration**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22003–22004
Antidumping:
Preserved mushrooms from—
China, 22004–22005
Small diameter circular seamless carbon and alloy steel standard, line and pressure pipe from—
Brazil, 22005–22006

**International Trade Commission**
NOTICES
Import investigations:
Color television receivers from—
Malaysia, 22093
Light-walled rectangular pipe and tube from—
Mexico and Turkey, 22093–22094
Signature capture transaction devices and component parts, and systems that employ such devices, 22094–22095

**Labor Department**
*See* Employment Standards Administration
*See* Occupational Safety and Health Administration
*See* Wage and Hour Division

**Land Management Bureau**
NOTICES
Meetings:
Canyons of the Ancients National Monument Advisory Committee, 22090

**Legal Services Corporation**
NOTICES
Meetings; Sunshine Act, 22097–22099

**National Highway Traffic Safety Administration**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22114–22115

**National Oceanic and Atmospheric Administration**
RULES
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone—
Gulf of Alaska groundfish, 21975–21977
NOTICES
Committees; establishment, renewal, termination, etc.:
Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council, 22006
Meetings:
New England Fishery Management Council, E4–907
Permits:
Scientific research, 22007–22008

**National Science Foundation**
NOTICES
Meetings:
Social, Behavioral, and Economic Sciences Advisory Committee, 22099
Meetings; Sunshine Act, 22099

**Navy Department**
NOTICES
Meetings:
Chief of Naval Operations Executive Panel, 22013
Naval Research Advisory Committee, 22014

**Nuclear Regulatory Commission**
PROPOSED RULES
Radioactive material; packaging and transportation:
Safe transportation regulations; proposed changes request, 21978
NOTICES
Environmental statements; availability, etc.:
Rio Algom Mining LLC, E4–910
University City Science Center, PA, E4–909
Meetings:
Surface and volumetric survey design and analysis using spatial analysis and decision assistance methods; workshop; correction, C4–8634
Senior Executive Service:
Performance Review Boards; membership, E4–911
Applications, hearings, determinations, etc.:
FirstEnergy Nuclear Operating Co., E4–913
Louisiana Energy Services, L.P., E4–912

**Occupational Safety and Health Administration**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22096–22097

**Overseas Private Investment Corporation**
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22102–22103

**Reclamation Bureau**
NOTICES
Environmental statements; availability, etc.:
Pajaro Valley Water Management Agency Revised Basin Management Plan Project, CA, 22091
Trinity River Fishery Restoration Program, CA, 22091–22093

**Refugee Resettlement Office**
NOTICES
Grants and cooperative agreements; availability, etc.:
Recently arrived refugees; support services, 22275–22298

**Research and Special Programs Administration**
RULES
Pipeline safety:
Hazardous liquid transportation—
Gas transmission pipelines; integrity management in high consequence areas; correction, 21975
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 22115
Pipeline safety:
Class location change waiver guidelines; development, 22115–22117

**Securities and Exchange Commission**
RULES
Electronic Data Gathering, Analysis, and Retrieval System (EDGAR):
Filer Manual; update, adoption, and incorporation by reference, 21954–21956
Securities and investment companies:
Market timing disclosure and selective disclosure of portfolio holdings, 22299–22317
NOTICES
Public Company Accounting Oversight Board:
Inspections of registered public accounting firms; proposed rules filed, 22103–22109
Self-regulatory organizations; proposed rule changes:
American Stock Exchange LLC, 22110
Chicago Board Options Exchange, Inc., 22110–22112
National Association of Securities Dealers, Inc., 22112–22114

**Small Business Administration**
RULES
Freedom of Information Act; implementation; correction, 21952

**Surface Transportation Board**
NOTICES
Railroad operation, acquisition, construction, etc.:
Canadian Pacific Railway, 22117

**Textile Agreements Implementation Committee**
*See* Committee for the Implementation of Textile Agreements

**Transportation Department**
*See* Federal Aviation Administration
*See* National Highway Traffic Safety Administration
*See* Research and Special Programs Administration
*See* Surface Transportation Board

**Treasury Department**
*See* Comptroller of the Currency
*See* Internal Revenue Service

**Wage and Hour Division**
RULES
Fair Labor Standards Act:
Minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees; defining and delimiting exemptions, 22121–22274

---

**Separate Parts In This Issue**

**Part II**
Labor Department, Wage and Hour Division, 22121–22274

**Part III**
Children and Families Administration, Refugee Resettlement Office, 22275–22298

**Part IV**
Securities and Exchange Commission, 22299–22317

**Part V**
Housing and Urban Development Department, 22319–22376

---

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

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

## CFR PARTS AFFECTED IN THIS ISSUE

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


**7 CFR**
319.....21941
979.....21947
1000.....21950
1001.....21950
1005.....21950
1006.....21950
1007.....21950
1030.....21950
1032.....21950
1033.....21950
1124.....21950
1126.....21950
1131.....21950

**10 CFR**
**Proposed Rules:**
71.....21978

**12 CFR**
**Proposed Rules:**
32.....21978

**13 CFR**
102.....21952

**14 CFR**
91.....21953

**17 CFR**
232.....21954
239.....22300
274.....22300

**21 CFR**
520.....21956

**29 CFR**
541.....22122

**33 CFR**
117.....21956
**Proposed Rules:**
165.....21981

**40 CFR**
141.....21958
142.....21958
143.....21958
180.....21959
271.....21962
**Proposed Rules:**
52.....21983

**42 CFR**
424.....21963

**44 CFR**
65 (2 documents).....21966, 21969
67.....21973
**Proposed Rules:**
67 (3 documents).....21988, 21989, 21992

**48 CFR**
**Proposed Rules:**
217.....21996
219 (2 documents).....21996, 21997

**49 CFR**
192.....21975

**50 CFR**
679.....21975

# Rules and Regulations

Federal Register
Vol. 69, No. 79
Friday, April 23, 2004



## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 319

**[Docket No. 03–019–2]**

### Certification Program for Imported Articles of *Pelargonium* spp. and *Solanum* spp. To Prevent Introduction of Potato Brown Rot

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the regulations to establish a certification program for articles of *Pelargonium* spp. and *Solanum* spp. imported from countries where the bacterium *Ralstonia solanacearum* race 3 biovar 2 is known to occur. The requirements of the certification program are designed to ensure that *Ralstonia solanacearum* race 3 biovar 2 will not be introduced into the United States through the importation of articles of *Pelargonium* spp. and *Solanum* spp. We have determined that the restrictions presently in place do not adequately mitigate the risk that imported articles of *Pelargonium* spp. and *Solanum* spp. could introduce this bacterial strain, which causes potato brown rot, into the United States. This action is necessary to prevent the introduction of this bacterial strain into the United States.

**DATES:** This interim rule is effective May 24, 2004. We will consider all comments that we receive on or before June 22, 2004.

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

- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 03–019–2, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–019–2.
- E-mail: Address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–019–2" on the subject line.
- Agency Web site: Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

*Reading Room:* You may read any comments that we receive on this docket 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.

*Other Information:* You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

**FOR FURTHER INFORMATION CONTACT:** Mr. Wayne Burnett, Senior Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

**SUPPLEMENTARY INFORMATION:**

#### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction of plant pests. The regulations contained in "Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products," §§ 319.37 through 319.37–14 (referred to below as the regulations), restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for propagation.

In an interim rule effective May 16, 2003, and published in the **Federal Register** on May 23, 2003 (68 FR 28115–28119, Docket No. 03–019–1), we amended the regulations by requiring an additional declaration on the phytosanitary certificates that must accompany all articles of *Pelargonium* spp. and *Solanum* spp. imported into the United States. (Articles of *Pelargonium* spp. and *Solanum* spp. imported under the Canadian greenhouse-grown restricted plant program, which are not required to be accompanied by a phytosanitary certificate when they are offered for importation into the United States, are exempt from this requirement.) The interim rule was necessary because recent introductions of *Ralstonia solanacearum* race 3 biovar 2, the bacterium that causes potato brown rot, had shown that articles of *Pelargonium* spp. and *Solanum* spp. can serve as vectors for its transmission. The additional declaration required by the interim rule must state either that the articles of *Pelargonium* spp. and *Solanum* spp. were produced in a production site that has been tested and found to be free of *R. solanacearum* race 3 biovar 2 or that *R. solanacearum* race 3 biovar 2 is not known to occur in the region in which the articles were produced.

Comments on the interim rule were required to be received on or before July 22, 2003. We received four comments by that date, from representatives of industry associations and from a State government. All of the commenters supported the interim rule. Three of the commenters asked the Animal and Plant Health Inspection Service (APHIS) to take additional steps to ensure that imported articles of *Pelargonium* spp. and *Solanum* spp. do not introduce *R. solanacearum* race 3 biovar 2 into the United States.

Two of these commenters urged APHIS to develop a certification program for foreign production sites in countries where *R. solanacearum* race 3 biovar 2 is known to occur that wish to export articles of *Pelargonium* spp. and *Solanum* spp. to the United States. These commenters stated that such a program would greatly reduce the risk of introducing *R. solanacearum* race 3 biovar 2 into the United States via imported articles of *Pelargonium* spp. and *Solanum* spp. We agree with these

commenters. In addition, since our May 2003 interim rule became effective, we have encountered several difficulties that have demonstrated to us that we need to implement a certification program immediately.

As we discussed in the first interim rule, race 3 of the bacterium *R. solanacearum* affects the potato (*Solanum tuberosum L.*) and causes potato brown rot. This race of the bacterium is widely distributed in temperate areas of the world, including some parts of the United States. It causes potatoes to rot, making them unusable and seriously affecting potato yields. The bacterium is extremely difficult to eradicate both because of its many alternate hosts and because of its ability to survive in water. Letting an infected field lie fallow or using alternate, non-potato crops for a growing season is not effective, as the bacterium survives in various common weeds, including *Solanum* species such as nightshade. The bacterium can also be transmitted from infected fields to other fields by streams and runoff.

At least three biovars of *R. solanacearum* race 3 are distinguished on the basis of biochemical properties. Biovar 1, which is currently established in the United States, does not tolerate cold temperatures; its establishment is thus limited to the southern part of the United States. However, biovar 2, which is not present in the United States, is adapted to low temperatures and is found in temperate zones, meaning that it could thrive in the northern States where most U.S. potatoes are produced. If *R. solanacearum* race 3 biovar 2 were to become established in the United States, it would likely have a devastating impact on potato production.

Biovar 1 is currently established in the United States, and we have not established an official control program for it. Therefore, in accordance with international trade agreements, we do not place restrictions on the importation of articles that may be infected with biovar 1. Biovar 2, however, is not established in the United States and is considered a pest of quarantine significance. Therefore, under those same international agreements, we are free to place restrictions on the importation of articles that may be infected with biovar 2.

One approach to preventing the entry of *R. solanacearum* race 3 biovar 2 would be to test articles of *Pelargonium* spp. and *Solanum* spp. that are offered for importation into the United States at the port of entry. For such an approach to be effective, our tests would need to be able to distinguish between the biovars of the bacterium and to identify the presence of *R. solanacearum* race 3 biovar 2. However, there currently exists no standalone, specific test for *R. solanacearum* race 3 biovar 2 that is practical for testing articles of *Pelargonium* spp. and *Solanum* spp. at ports of entry. Therefore, our May 2003 interim rule required that the phytosanitary certificate accompanying imported articles of *Pelargonium* spp. and *Solanum* spp. contain an additional declaration either that the articles were produced in a production site that has been tested and found to be free of *R. solanacearum* race 3 biovar 2, which we believed would be effective due to the fact that production sites can be effectively tested for the bacterium, or that *R. solanacearum* race 3 biovar 2 is not known to occur in the region in which the articles were produced.

At the time our May 2003 interim rule became effective, an emergency program had been initiated to identify and destroy plants in the United States that tested positive for infection with *R. solanacearum* race 3 biovar 2. This program was initiated in February 2003 after *R. solanacearum* race 3 biovar 2 was detected at nursery facilities that had received geraniums from Kenya. The emergency program, which continued beyond the effective date of the interim rule, eradicated the bacterium within the United States. We believe that some of the plants we identified as infected during this effort entered the United States after the effective date of the interim rule, meaning that the additional declarations required by the interim rule do not provide adequate protection against the risk of introduction of *R. solanacearum* race 3 biovar 2 into the United States. It is clear that additional steps should be taken to prevent the introduction of this dangerous bacterium.

Therefore, in this interim rule, we are adding a certification program that must be implemented at production sites in countries where *R. solanacearum* race 3 biovar 2 is known to occur that produce articles of *Pelargonium* spp. and *Solanum* spp. to be offered for importation into the United States.

**Certification Program for Production Sites**

In this interim rule, we are amending the regulations to require that articles of *Pelargonium* spp. and *Solanum* spp. grown in countries where *R. solanacearum* race 3 biovar 2 is known to occur be produced in accordance with the requirements in § 319.37–5(r)(3), as revised by this interim rule, to be eligible for importation into the United States.

These requirements are designed to ensure that even if *R. solanacearum* race 3 biovar 2 is present in the environment surrounding the production site in which the articles of *Pelargonium* spp. or *Solanum* spp. are produced, the bacterium will not enter the production site. Registration and certification of production sites will allow us to determine the production site from which any imported articles of *Pelargonium* spp. and *Solanum* spp. originated. This will facilitate monitoring of the program and allow for quicker reactions to any problems we detect. Ongoing monitoring is also prescribed to ensure that the certification program is properly implemented and fully effective. The requirements of this certification program, contained in § 319.37–5(r)(3), are described below.

- The national plant protection organization of the country in which the articles are produced (the NPPO) must enter into a bilateral workplan with APHIS. This bilateral workplan must set out conditions for monitoring the production of articles of *Pelargonium* spp. and *Solanum* spp., for enforcement of the requirements in this interim rule, and for the establishment of a trust fund.
- The production site where the articles of *Pelargonium* spp. and *Solanum* spp. intended for export to the United States are produced must be registered with and certified by both APHIS and the NPPO. As part of the certification process, production sites must be initially approved and thereafter visited at least once a year by APHIS and the NPPO to verify compliance with the requirements of this interim rule.
- The production site must conduct ongoing testing for *R. solanacearum* race 3 biovar 2. Only those articles of *Pelargonium* spp. or *Solanum* spp. that have been tested with negative results for the presence of *R. solanacearum* race 3 biovar 2 may be used in production and export. Records of the testing must be kept for two growing seasons and made available to representatives of APHIS and of the NPPO. All testing procedures must be approved by APHIS.

We are currently aware of two acceptable methods for testing production facilities: An enzyme-linked immunosorbent assay (ELISA), which can confirm that no *Ralstonia* spp. bacteria are present, and a polymerase chain reaction (PCR) test that can confirm that no *R. solanacearum* race 3 biovar 2 bacteria are present. Domestic greenhouses tested for *R. solanacearum* race 3 biovar 2 during the recent eradication effort typically used ELISA

to screen potentially symptomatic material; if the material was infected with *Ralstonia* spp., the PCR test was used to determine whether *R. solanacearum* race 3 biovar 2 was present. Other testing methods may be used if APHIS determines that those methods are adequate to confirm that production facilities are free of *R. solanacearum* race 3 biovar 2.

- The production site must be constructed in a manner that ensures that outside water cannot enter the production site. The production site must be surrounded by a 1-meter buffer that is sloped so that water drains away from the production site.
- Dicotyledonous weeds must be controlled both within the production site and around it. The production site and the 1-meter buffer surrounding the production site must be free of dicotyledonous weeds.
- All equipment that comes in contact with articles of *Pelargonium* spp. or *Solanum* spp. within the production site must be adequately sanitized so that *R. solanacearum* race 3 biovar 2 cannot be transmitted between plants or enter from outside the production site via the equipment.
- Production site personnel must adequately sanitize their clothing and shoes and wash their hands before entering the production site to prevent the entry of *R. solanacearum* race 3 biovar 2 into the production site.
- Growing media for articles of *Pelargonium* spp. and *Solanum* spp. must be free of *R. solanacearum* race 3 biovar 2. Growing media and containers for articles of *Pelargonium* spp. and *Solanum* spp. must not come in contact with soil, and soil may not be used as a growing medium.
- Water used in maintenance of the plants at the production site must be free of *R. solanacearum* race 3 biovar 2. The production site must either derive the water from an APHIS-approved source or treat the water with an APHIS-approved treatment before use.
- Growing media at the production site must not come in direct contact with any water source, such as an emitter or a hose end. If a drip irrigation system is used, backflow devices must be installed to prevent any *R. solanacearum* race 3 biovar 2 that may be present from spreading to the rest of the production site through the irrigation system. Ebb and flow irrigation may not be used.
- Production site personnel must be educated regarding the various pathways through which *R. solanacearum* race 3 biovar 2 can be introduced into a production site and must be trained to recognize symptoms of *R. solanacearum* race 3 biovar 2 infection in articles of *Pelargonium* spp. or *Solanum* spp. in the production site.

Articles of *Pelargonium* spp. or *Solanum* spp. produced for export within an approved production site must be handled and packed in a manner adequate to prevent the presence of *R. solanacearum* race 3 biovar 2. The articles must be labeled with information indicating the production site from which the articles originated.

- If *R. solanacearum* race 3 biovar 2 is found in the production site or in consignments from the production site, the production site will be ineligible to export articles of *Pelargonium* spp. or *Solanum* spp. to the United States. A production site may be reinstated if a reinspection reveals that the site is free of *R. solanacearum* race 3 biovar 2 and all problems in the production site have been addressed and corrected to the satisfaction of APHIS.
- The phytosanitary certificate of inspection required by § 319.37–4 that accompanies these articles must contain an additional declaration that states "These articles have been produced in accordance with the requirements in 7 CFR 319.37–5(r)(3)."
- The government of the country in which the articles are produced must enter into a trust fund agreement with APHIS before each growing season. The government of the country in which the articles are produced or its designated representative is required to pay in advance all estimated costs that APHIS expects to incur through its involvement in overseeing the execution of the requirements of § 319.37–5(r)(3). These costs will include administrative expenses incurred in conducting the services enumerated in § 319.37–5(r)(3) and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the inspectors in performing these services. (Specific provisions for making payments to this trust fund may be found in the rule portion of this document.)

We believe the additional requirements in this certification program will prevent the introduction of *R. solanacearum* race 3 biovar 2 into the United States while allowing the continued importation of articles of *Pelargonium* spp. and *Solanum* spp.

**Other Comments**

One commenter suggested that we consider requiring importers of articles of *Pelargonium* spp. and *Solanum* spp. to post a bond, which would be used to reimburse domestic growers who may be adversely affected by the introduction of *R. solanacearum* race 3 biovar 2 via such articles. We believe that the certification program we are establishing in this interim rule is a more direct and more effective means of ensuring that articles of *Pelargonium* spp. and *Solanum* spp. that are offered for importation will not serve as a pathway for the introduction of *R. solanacearum* race 3 biovar 2.

Two commenters urged APHIS to continue with its review of the nursery stock regulations, to prevent introductions of both *R. solanacearum* race 3 biovar 2 and other plant pests. We agree that this review is essential to safeguarding plant health, and we will continue our work on it.

**Other Changes**

As discussed above, our May 2003 interim rule required that the phytosanitary certificate accompanying all articles of *Pelargonium* spp. and *Solanum* spp. from countries where *R. solanacearum* race 3 biovar 2 is not known to occur contain an additional declaration to that effect. In this interim rule, we are amending the regulations established by the May 2003 interim rule to exempt articles of *Solanum* spp. from Canada from this requirement. Canada is the only country in which *R. solanacearum* race 3 biovar 2 is not known to occur that is currently eligible to export articles of *Solanum* spp. to the United States; the importation of articles of *Solanum* spp. from all other countries where *R. solanacearum* race 3 biovar 2 is not known to occur is prohibited in § 319.37–2(a), due to risks posed by other plant pests. Therefore, the burden of the requirement for the additional declaration on the phytosanitary certificate accompanying articles of *Solanum* spp. from countries where *R. solanacearum* race 3 biovar 2 is not known to occur has fallen solely on Canadian exporters of these articles. We do not believe requiring the additional declaration for articles of *Solanum* spp. exported from Canada provides additional protection against the introduction of *R. solanacearum* race 3 biovar 2. Therefore, this interim rule provides an exemption from that requirement for those articles.

The regulations established by our May 2003 interim rule referred to "production facilities" where articles were produced for export to the United States. The term we typically use to refer to such entities is "production site," so we have amended the provisions established in our May 2003 interim rule so that they now refer to "production sites" rather than "production facilities." In addition, we

have added a definition of the term *production site* to § 319.37–1, *i.e.*: "A defined portion of a place of production utilized for the production of a commodity that is managed separately for phytosanitary purposes. This may include the entire place of production or portions of it. Examples of portions of places of production are a defined orchard, grove, field, greenhouse, screenhouse, or premises." This is the same definition we provide in § 319.56–1 of our fruits and vegetables regulations, except that we have added greenhouse and screenhouse to the list of examples. We believe this change will improve the clarity of the regulations.

In addition, we have made several editorial changes to the provisions established by our May 2003 interim rule:

- The original regulations referred to "regions" where *R. solanacearum* race 3 biovar 2 is not known to occur. The preferred term in this context is "country." We use the term "country" in revised § 319.37–5(r).
- The additional declaration required by the original § 319.37–5(r)(2) was required to read "*Ralstonia solanacearum* race 3 biovar 2 is not known to occur in the country of origin of the articles in this shipment." To be consistent with the phrasing of other, similar additional declarations in the regulations, we have shortened this to read "*Ralstonia solanacearum* race 3 biovar 2 is not known to occur in the country of origin" in this interim rule.
- We had referred in the original § 319.37–5(r)(2) and (r)(3) to *R. solanacearum* race 3 biovar 2 either being known or not known to occur in the country of origin "at the time of arrival at the port of first arrival in the United States." We do not believe this language is necessary to ensure phytosanitary security; if a consignment of articles was shipped to the United States from a country where *R. solanacearum* race 3 biovar 2 was not known to occur, but where the bacterium was found while the articles were in transit, we would use our authority under the Plant Protection Act to prevent the entry of the articles. Thus, we have omitted that language in revised § 319.37–5(r).
- We had used the term "plants" in the additional declaration required by the original § 319.37–5(r)(3), rather than the term "articles," which is the term we used elsewhere in the regulatory text. This interim rule corrects that error.

**Immediate Action**

Immediate action is necessary to prevent the importation of articles of *Pelargonium* spp. and *Solanum* spp. that come from countries where *R. solanacearum* race 3 biovar 2 is known to occur and that have been produced in production sites that may not be free of that bacterium. Because the importation of these articles may serve as a pathway for the introduction of *R. solanacearum* race 3 biovar 2 into the United States, and because the existing restrictions do not adequately mitigate the risk that imported articles of *Pelargonium* spp. and *Solanum* spp. that are infected with *R. solanacearum* race 3 biovar 2 could introduce this bacterial strain into the United States, allowing the importation of these articles to continue without further restrictions would pose an unacceptable risk of introducing *R. solanacearum* race 3 biovar 2 into the United States.

This rule is being made effective 30 days after publication because importers, exporters, NPPOs, and others will need 30 days to prepare for the changes in operations that will become necessary on the effective date of this rule. Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these circumstances, we find good cause under 5 U.S.C. 553 to make this rule effective 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

**Executive Order 12866 and Regulatory Flexibility Act**

This rule has been reviewed under Executive Order 12866. The 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.

In this interim rule, APHIS is amending the regulations to establish a certification program for articles of *Pelargonium* spp. and *Solanum* spp. imported from countries where the bacterium *Ralstonia solanacearum* race 3 biovar 2 is known to occur. The requirements of the certification program are designed to ensure that *Ralstonia solanacearum* race 3 biovar 2 will not be introduced into the United States through the importation of articles of *Pelargonium* spp. and *Solanum* spp. APHIS has determined that the restrictions presently in place do not adequately mitigate the risk that imported articles of *Pelargonium* spp. and *Solanum* spp. could introduce this bacterial strain, which causes potato brown rot, into the United States. This action is necessary to prevent the introduction of this bacterial strain into the United States.

The production site certification program will impact approximately 11 different nurseries. Two of these nurseries are located in Guatemala, three in Mexico, one in China, two in Kenya, and three in Costa Rica. The average cost of upgrading these 11 production sites to comply with the production site requirements in this interim rule has been estimated at approximately $70,000 per site.[1] However, many of these production sites have already upgraded their facilities due to the outbreak of *R. solanacearum* race 3 biovar 2 in early 2003. Thus, to the extent that these upgrades fulfill the production site requirements contained in this rule, compliance costs for some production sites would be lower than this estimate.

**Pelargonium (geranium) spp.**

Based on growers' receipts, U.S. floriculture and nursery crop sales totaled $14 billion in 2002. Total sales of U.S. geraniums were estimated at $204 million for 2002.[2] The United States imported $44 million worth of cuttings and slips of which geraniums comprised some unknown part.[3] Geraniums are the most popular bedding plant in North America; approximately 20,000 growers cultivate these plants.

APHIS has determined that the 2003 *R. solanacearum* race 3 biovar 2 outbreak occurred when geranium cuttings arrived from Kenya carrying the *R. solanacearum* race 3 biovar 2 bacterium. The *R. solanacearum* race 3 biovar 2 outbreak in 2003 led to the disposal of 1.9 million geraniums; the disposed plants had a total value of approximately $1.5 to $2 million.

**Solanum spp.**

The genus *Solanum* comprises a large group of both tender and hardy, herbaceous shrubby climbing plants. Several species can be found in North America either growing wild or as decorative plants, but two—potatoes and eggplants—are grown as vegetables. The *R. solanacearum* race 3 biovar 2 bacterium, which is widely distributed

[1] Society of American Florists.

[2] Electronic Outlook Report from the Economic Research Service, Floriculture and Nursery Crops Outlook, September 12, 2002, Alberto Jerardo.

[3] World Trade Atlas 2002, U.S. imports of unrooted cuttings and slips of plants, code # 0602100000.

in temperate regions, causes the disease potato brown rot. In 2002, 1.3 million acres of U.S. potatoes were harvested; the potato harvest was valued at $3.2 billion, and $123 million worth of U.S. potatoes were exported to the rest of the world.[4] The value of potato fields infected with *R. solanacearum* race 3 biovar 2 could be drastically reduced if not completely eliminated. The bacterium causes potatoes to have unsightly brown rings in the vegetable, making them worthless for human consumption. Most likely, U.S. producers with fields infected with this bacterium would be required to quarantine their fields and destroy the potatoes to prevent the spread of the disease.

The United Kingdom has experienced five outbreaks of potato brown rot that have caused minor impacts to overall potato production.[5] Certain areas in South America have seen potato losses from 5 percent to 100 percent due to potato brown rot. If potato brown rot were to become established in the United States, the potato industry could potentially lose hundreds of millions of dollars due to direct losses and indirect losses from quarantines and diminished export markets.

This interim rule will allow imports of articles of *Pelargonium* spp. and *Solanum* spp. to continue as long as the articles have been produced in accordance with the certification program requirements in § 319.37–5(r)(3) and are accompanied by a phytosanitary certificate stating that they have been produced in accordance with these requirements. This interim rule will help safeguard U.S. agriculture against the possible introduction of *R. solanacearum* race 3 biovar 2.

**Impact on Small Entities**

The Regulatory Flexibility Act requires that APHIS consider the economic impact of its rules on small entities. The Small Business Administration (SBA) classifies nursery and tree production businesses as small entities (North American Industry Classification System category 111421) if their annual sales receipts are $750,000 or less. In 2001, 1,691 floriculture operations out of a total of 10,965 operations had sales of $500,000 or more.[6] Therefore, at least 85 percent of all floriculture operations can be classified as small; it is likely that an even higher percentage can be classified as small due to the $250,000 discrepancy.

The costs of complying with the production site certification requirements are not expected to significantly affect costs or revenues of small-entity floriculture operators in the United States. Some portion of the cost of site certification may be passed onto U.S. buyers of geranium cuttings in the form of higher prices, but this effect is expected to be minor.

The rule will have a negative impact on offshore operations due to the costs involved in complying with the additional nursery site certification requirements. Experts in the industry have estimated that updating the 11 offshore nursery sites will cost approximately $770,000 total, or $70,000 per site. It is difficult to determine the impact without knowing average revenues generated at these 11 nursery sites.

While the costs for production sites to comply with the requirements will result in a negative impact on offshore production sites, the requirements will help ensure that future nursery shipments entering the United States are free of *R. solanacearum* race 3 biovar 2. The 2003 *R. solanacearum* race 3 biovar 2 outbreak alone cost the floriculture industry $1.5 to $2 million in geranium plant losses. The *R. solanacearum* race 3 biovar 2 outbreak could have jeopardized not only the entire U.S. geranium industry, which is estimated to be worth $204 million per year, but also the potato industry, which is estimated to be worth $3.2 billion per year, if it had not been contained and eradicated.[7] It is evident that the potential benefits of certifying offshore production sites that produce *Pelargonium* spp. and *Solanum* spp. outweigh the costs.

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 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0579–0246 to the information collection and recordkeeping requirements.

We plan to request continuation of that approval for 3 years. Please send written comments on the 3-year approval request to the following addresses: (1) Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503; and (2) Docket No. 03–019–2, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 03–019–2 and send your comments within 60 days of publication of this rule.

This interim rule establishes a certification program for articles of *Pelargonium* spp. and *Solanum* spp. imported from countries where the bacterium *Ralstonia solanacearum* race 3 biovar 2 is known to occur. In order to comply with the requirements of the certification program, exporting production sites and importers will need to obtain the necessary additional declaration on the phytosanitary certificate accompanying the imported articles of *Pelargonium* spp. and *Solanum* spp. and submit documentation for the compliance agreement and trust fund required by this interim rule. We are soliciting comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic,

[4] National Agricultural Statistical Service (NASS) data on U.S. potato production, 2002; Foreign Agricultural Service data on potato exports, 2002.

[5] British Department of Environment, Food and Rural Affairs, Service Delivery Unit, Plant Health Division.

[6] NASS, Agricultural Statistics Board, U.S. Department of Agriculture, 2001 Floriculture Crops.

[7] Electronic Outlook Report from the Economic Service, Floriculture and Nursery Crops Outlook, September 12th, 2002, Alberto Jerardo; and NASS data U.S. potato production, 2002, along with FAS data on potato exports 2002.

mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses).

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 0.5049 hours per response.

*Respondents:* Growers and State plant regulatory officials.

*Estimated annual number of respondents:* 15.

*Estimated annual number of responses per respondent:* 67.33.

*Estimated annual number of responses:* 1,010.

*Estimated total annual burden on respondents:* 510 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

**Government Paperwork Elimination Act Compliance**

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this interim rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

**List of Subjects in 7 CFR Part 319**

Bees, Coffee, Cotton, Fruits, Honey, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

## PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450 and 7701–7772; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 319.37–1, a new definition of *production site* is added in alphabetical order to read as follows:

**§ 319.37–1 Definitions.**

* * * * *

*Production site.* A defined portion of a place of production utilized for the production of a commodity that is managed separately for phytosanitary purposes. This may include the entire place of production or portions of it. Examples of portions of places of production are a defined orchard, grove, field, greenhouse, screenhouse, or premises.

* * * * *

■ 3. In § 319.37–5, paragraph (r) and the OMB control number citation at the end of the section are revised to read as follows:

**§ 319.37–5 Special foreign inspection and certification requirements.**

* * * * *

(r) Any restricted article of *Pelargonium* spp. or *Solanum* spp. presented for importation into the United States may not be imported unless it meets the following requirements:

(1) Any restricted article of *Pelargonium* spp. or *Solanum* spp. imported from Canada under the provisions of the greenhouse-grown restricted plant program as described in § 319.37–4(c) must be presented for importation at the port of first arrival in the United States with a certificate of inspection in the form of a label in accordance with § 319.37–4(c)(1)(iv).

(2) For any article of *Pelargonium* spp. or *Solanum* spp. that does not meet the requirements of paragraph (r)(1) of this section and is from a country where *Ralstonia solanacearum* race 3 biovar 2 is not known to occur, the phytosanitary certificate of inspection required by § 319.37–4 must contain an additional declaration that states "*Ralstonia solanacearum* race 3 biovar 2 is not known to occur in the country of origin"; *Provided,* that this additional declaration is not required on the phytosanitary certificate of inspection accompanying articles of *Solanum* spp. from Canada that do not meet the requirements of paragraph (r)(1) of this section.

(3) Any article of *Pelargonium* spp. or *Solanum* spp. that is from a country where *Ralstonia solanacearum* race 3 biovar 2 is known to occur must meet the following requirements:

(i) The national plant protection organization of the country in which the articles are produced (the NPPO) must have entered into a bilateral workplan with APHIS. This bilateral workplan must set out conditions for monitoring the production of articles of *Pelargonium* spp. and *Solanum* spp., for enforcement of the requirements of this paragraph (r)(3), and for the establishment of a trust fund as provided for in paragraph (r)(3)(xv) of this section.

(ii) The production site where the articles of *Pelargonium* spp. and *Solanum* spp. intended for export to the United States are produced must be registered with and certified by both APHIS and the NPPO. As part of the certification process, production sites must be initially approved and thereafter visited at least once a year by APHIS and the NPPO to verify compliance with the requirements of this paragraph (r)(3).

(iii) The production site must conduct ongoing testing for *R. solanacearum* race 3 biovar 2. Only those articles of *Pelargonium* spp. or *Solanum* spp. that have been tested with negative results for the presence of *R. solanacearum* race 3 biovar 2 may be used in production and export. Records of the testing must be kept for two growing seasons and made available to representatives of APHIS and of the NPPO. All testing procedures must be approved by APHIS.

(iv) The production site must be constructed in a manner that ensures that outside water cannot enter the production site. The production site must be surrounded by a 1-meter buffer that is sloped so that water drains away from the production site.

(v) Dicotyledonous weeds must be controlled both within the production site and around it. The production site and the 1-meter buffer surrounding the production site must be free of dicotyledonous weeds.

(vi) All equipment that comes in contact with articles of *Pelargonium* spp. or *Solanum* spp. within the production site must be adequately sanitized so that *R. solanacearum* race 3 biovar 2 cannot be transmitted between plants or enter from outside the production site via the equipment.

(vii) Production site personnel must adequately sanitize their clothing and shoes and wash their hands before entering the production site to prevent the entry of *R. solanacearum* race 3 biovar 2 into the production site.

(viii) Growing media for articles of *Pelargonium* spp. and *Solanum* spp. must be free of *R. solanacearum* race 3 biovar 2. Growing media and containers for articles of *Pelargonium* spp. and *Solanum* spp. must not come in contact with soil, and soil may not be used as a growing medium.

(ix) Water used in maintenance of the plants at the production site must be free of *R. solanacearum* race 3 biovar 2. The production site must either derive the water from an APHIS-approved source or treat the water with an APHIS-approved treatment before use.

(x) Growing media at the production site must not come in direct contact with any water source, such as an

emitter or a hose end. If a drip irrigation system is used, backflow devices must be installed to prevent any *R. solanacearum* race 3 biovar 2 that may be present from spreading to the rest of the production site through the irrigation system. Ebb and flow irrigation may not be used.

(xi) Production site personnel must be educated regarding the various pathways through which *R. solanacearum* race 3 biovar 2 can be introduced into a production site and must be trained to recognize symptoms of *R. solanacearum* race 3 biovar 2 infection in articles of *Pelargonium* spp. or *Solanum* spp. in the production site.

(xii) Articles of *Pelargonium* spp. or *Solanum* spp. produced for export within an approved production site must be handled and packed in a manner adequate to prevent the presence of *R. solanacearum* race 3 biovar 2. The articles must be labeled with information indicating the production site from which the articles originated.

(xiii) If *R. solanacearum* race 3 biovar 2 is found in the production site or in consignments from the production site, the production site will be ineligible to export articles of *Pelargonium* spp. or *Solanum* spp. to the United States. A production site may be reinstated if a reinspection reveals that the production site is free of *R. solanacearum* race 3 biovar 2 and all problems in the production site have been addressed and corrected to the satisfaction of APHIS.

(xiv) The phytosanitary certificate of inspection required by § 319.37–4 that accompanies these articles must contain an additional declaration that states "These articles have been produced in accordance with the requirements in 7 CFR 319.37–5(r)(3)."

(xv) The government of the country in which the articles are produced must enter into a trust fund agreement with APHIS before each growing season. The government of the country in which the articles are produced or its designated representative is required to pay in advance all estimated costs that APHIS expects to incur through its involvement in overseeing the execution of paragraph (r)(3) of this section. These costs will include administrative expenses incurred in conducting the services enumerated in paragraph (r)(3) of this section and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the inspectors in performing these services. The government of the country in which the articles are produced or its designated representative is required to deposit a certified or cashier's check with APHIS for the amount of the costs estimated by APHIS. If the deposit is not sufficient to meet all costs incurred by APHIS, the agreement further requires the government of the country in which the articles are produced or its designated representative to deposit with APHIS a certified or cashier's check for the amount of the remaining costs, as determined by APHIS, before the services will be completed. After a final audit at the conclusion of each shipping season, any overpayment of funds would be returned to the government of the country in which the articles are produced or its designated representative or held on account until needed.

(Approved by the Office of Management and Budget under control numbers 0579–0049, 0579–0176, 0579–0221, and 0579–0246.)

Done in Washington, DC, this 20th day of April, 2004.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 04–9262 Filed 4–22–04; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 979

**[Docket No. FV04–979–1 FR]**

## Melons Grown in South Texas; Increased Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule increases the assessment rate established for the South Texas Melon Committee (Committee) for the 2003–04 and subsequent fiscal periods from $0.06 to $0.09 per carton of melons handled. The Committee locally administers the marketing order which regulates the handling of melons grown in South Texas. Authorization to assess melon handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began on October 1 and ends September 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** April 26, 2004.

**FOR FURTHER INFORMATION CONTACT:** Belinda G. Garza, Regional Manager, McAllen Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry, McAllen, TX 78501; telephone: (956) 682–2833, fax: (956) 682–5942; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938.

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

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing No. 156 and Order No. 979 (7 CFR part 979), regulating the handling of melons grown in South Texas, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, South Texas melon handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable melons beginning on October 1, 2003, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an

inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2003–04 and subsequent fiscal periods from $0.06 to $0.09 per carton of melons handled.

The South Texas melon marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are growers and handlers of South Texas melons. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2001–02 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on September 11, 2003, and unanimously recommended 2003–04 expenses of $89,859 for personnel, office, compliance, and partial market development expenses to be funded by the continuing assessment rate of $0.06 per carton. Specific funding for production research and market development projects were to be recommended at a later Committee meeting.

The Committee subsequently met on January 14, 2004, and recommended 2003–04 expenditures of $351,859 and an assessment rate of $0.09 per carton of melons handled. In comparison, last year's budgeted expenditures were $313,853. The assessment rate of $0.09 is $0.03 higher than the rate currently in effect. The Committee recommended the increased rate to fund a variety of market development and production research projects, without having to draw a large amount from reserves. Without the increase, the Committee's reserve fund would drop to $37,368, which is lower than what the Committee needs for operations. This amount is derived by taking the current reserve ($181,127), adding the $203,100 in assessment income based on the old rate (3,385,000 × $0.06 per carton) and anticipated interest totaling $5,000, and then subtracting the 2003–04 budget of $351,859. With the new rate, $304,650 in assessment income would be generated, and the reserve fund would only drop to $138,918.

The major expenditures recommended by the Committee for the 2003–04 fiscal period include $59,859 for administrative expenses, $20,000 for compliance, $160,000 for market development, and $112,000 for production research projects. Budgeted expenses for these items in 2002–03 were $59,859, $20,000, $137,000, and $100,800, respectively.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected shipments of South Texas melons, anticipated interest income, and the amount of funds in the Committee's operating reserve. As mentioned earlier, melon shipments for the fiscal period are estimated at 3,385,000, which should provide $304,650 in assessment income at the $0.09 per carton rate. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, should be adequate to cover budgeted expenses. Funds in the reserve (currently $181,127) will be kept within the maximum permitted by the order (approximately two fiscal periods' expenses; § 979.44).

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

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2003–04 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

**Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

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

There are approximately 33 growers of melons in the production area and approximately 25 handlers subject to regulation under the marketing order. Small agricultural growers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

Most of the handlers are vertically integrated corporations involved in growing, shipping, and marketing melons. For the 2002–03 marketing year, the industry's 25 handlers shipped melons produced on 5,945 acres with the average and median volume handled being 111,651 and 32,215 cartons, respectively. In terms of production value, total revenue for the 25 handlers was estimated to be $25.6 million, with the average and median revenues being $1.02 million and $296,000, respectively.

The South Texas melon industry is characterized by growers and handlers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of melons. Alternative crops provide an opportunity to utilize many of the same facilities and equipment not in use when the melon production season is complete. For this reason, typical melon growers and handlers either double-crop melons during other times of the year or produce alternate crops, like onions.

Based on the SBA's definition of small entities, the Committee estimates that 23 of the 25 handlers regulated by the order would be considered small entities if only their spring melon revenues are considered. However, revenues from other productive enterprises could likely push a large

number of these handlers above the $5,000,000 annual receipt threshold. Of the 33 growers within the production area, few have sufficient acreage to generate sales in excess of $750,000; therefore, the majority of growers may be classified as small entities.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2003–04 and subsequent fiscal periods from $0.06 to $0.09 per carton handled. The Committee recommended 2003–04 expenditures of $351,859 and an assessment rate of $0.09 per carton. The assessment rate of $0.09 is $0.03 higher than the current rate. At the rate of $0.09 per carton and an estimated 2003–04 melon production of 3,385,000 cartons, the projected income derived from handler assessments ($304,650), along with interest and funds from the Committee's authorized reserve, should be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2003–04 fiscal period include $59,859 for administrative expenses, $20,000 for compliance, $160,000 for market development, and $112,000 for production research projects. Budgeted expenses for these items in 2002–03 were $59,859, $20,000, $137,000, and $100,800, respectively.

The Committee recommended the increased rate to fund a variety of production and marketing research projects, without having to draw a large amount from reserves. Without the increase, the Committee's reserve fund would drop to $37,368, which is lower than what the Committee needs for operations. With the increased rate, the reserve fund would only drop to $138,918.

The Committee voted to increase its assessment rate because the current rate would reduce the Committee's reserve funds to an acceptable level. Assessment income, along with interest and funds from the Committee's authorized reserve, will provide the Committee with adequate funds to meet its 2003–04 fiscal period's expenses.

The Committee reviewed and unanimously recommended 2003–04 expenditures of $351,859, which included an increase in its market development and production research programs. Prior to arriving at this budget, the Committee considered information from various sources, including the Research and Market Development Subcommittee. Alternative expenditure levels were discussed by these groups, based upon the relative value of various production research and market development projects to the melon industry. The assessment rate of $0.09 per carton of assessable melons was then determined by considering the total recommended budget, the quantity of assessable melons estimated at 3,385,000 cartons for the 2003–04 fiscal period, anticipated interest income, and the funds in the Committee's operating reserve. The recommended rate will generate $304,650, which is $47,209 below the anticipated expenses. The Committee found this acceptable because interest and reserve funds will be used to make up the deficit.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2003–04 marketing season could range between $6.68 and $7.60 per carton of cantaloupes and between $5.40 and $6.33 per carton of honeydew melons. Therefore, the estimated assessment revenue for the 2003–04 fiscal period as a percentage of total grower revenue could range between 1.2 and 1.3 percent for cantaloupes and between 1.4 and 1.7 percent for honeydew melons.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to growers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meetings were widely publicized throughout the South Texas melon industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the September 11, 2003, and January 14, 2004, meetings were public meetings and all entities, both large and small, were able to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements on either small or large South Texas melon handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A proposed rule concerning this action was published in the **Federal Register** on March 22, 2004 (69 FR 13269). Copies of the proposed rule were also mailed or sent via facsimile to all melon handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending April 6, 2004, was provided for interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2003–04 fiscal period began on October 1, 2003, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable melons handled during such fiscal period; (2) shipments of 2004 crop melons are expected to begin in early May; (3) the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; and (4) handlers are aware of this action which was recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years. Also, a 15-day comment period was provided for in the proposed rule and no comments were received.

**List of Subjects in 7 CFR Part 979**

Marketing agreements, Melons, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 979 is amended as follows:

## PART 979—MELONS GROWN IN SOUTH TEXAS

■ 1. The authority citation for 7 CFR part 979 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 979.219 is revised to read as follows:

**§ 979.219 Assessment rate.**

On and after October 1, 2003, an assessment rate of $0.09 per carton is established for South Texas melons.

Dated: April 21, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04–9425 Filed 4–21–04; 1:03 pm]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131

**[Docket No. AO–14–A72, et al.; DA–03–08]**

### Milk in the Northeast and Other Marketing Areas; Interim Order Amending the Order

| 7 CFR part | Marketing area | AO Nos. |
|---|---|---|
| 1001 .. | Northeast | AO–14–A72 |
| 1005 .. | Appalachian | AO–388–A13 |
| 1006 .. | Florida | AO–356–A36 |
| 1007 .. | Southeast | AO–366–A42 |
| 1030 .. | Upper Midwest | AO–361–A37 |
| 1032 .. | Central | AO–313–A46 |
| 1033 .. | Mideast | AO–166–A70 |
| 1124 .. | Pacific Northwest | AO–368–A33 |
| 1126 .. | Southwest | AO–231–A66 |
| 1131 .. | Arizona-Las Vegas | AO–271–A38 |

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule.

**SUMMARY:** This order amends certain classification of milk provisions in all Federal milk marketing orders. Specifically, this interim order reclassifies milk used to produce evaporated milk in consumer-type packages or sweetened condensed milk in consumer-type packages from Class III to Class IV. More than the required number of producers in each Federal milk order have approved the issuance of the interim order as amended.

**EFFECTIVE DATE:** May 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Antoinette M. Carter, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–3465, e-mail address: *antoinette.carter@usda.gov.*

**SUPPLEMENTARY INFORMATION:** This administrative rule is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the District Court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During June 2003—the most recent representative period used to determine the number of small entities associated with Federal milk orders—there were a total of 60,096 dairy producers whose milk was pooled under Federal milk orders. Of the total, 56,818 dairy producers—or about 95 percent—were considered small businesses based on the above criteria. During this same period, there were about 1,622 plants associated with Federal milk orders. Specifically, there were approximately 387 fully regulated plants (of which 143 were small businesses), 92 partially regulated plants (of which 41 were small businesses), 44 producer-handlers (of which 23 were considered small businesses), and 108 exempt plants (of which 98 were considered small businesses). Consequently, 950 of the 1,622 plants meet the definition of a small business.

Total pounds of milk pooled under all Federal milk orders was 10.498 billion for June 2003 which represents 73.5 percent of the milk marketed in the United States. Of the 10.498 billion pounds of milk pooled under Federal milk orders during June 2003, 1.78 million pounds—or 1.7 percent—was used to produce evaporated milk and sweetened condensed milk products in consumer-type packages. Additionally, during this same period, total pounds of Class I milk pooled under Federal milk orders was 3.475 billion pounds, which represents 82.3 percent of the milk used in Class I products (mainly fluid milk products) that were sold in the United States.

This interim final rule will reclassify milk used to produce evaporated milk or sweetened condensed milk in consumer-type packages from Class III to Class IV in all Federal milk orders. This decision is consistent with the Agricultural Agreement Act of 1937 (Act), which authorizes Federal milk marketing orders. The Act specifies that Federal milk orders classify milk "in accordance with the form for which or purpose for which it is used."

Currently, the Federal milk order system provides for the uniform classification of milk in provisions that define four classes of use for milk (Class I, Class II, Class III, and Class IV). Each Federal milk order sets minimum prices that processors must pay for milk based on how it is used and computes weighted average or uniform prices that dairy producers receive.

Under the milk classification provisions of all Federal milk orders, Class I consists of those products that are used as beverages (whole milk, low fat milk, skim milk, flavored milk products like chocolate milk, etc.)[1] Class II includes soft or spoonable products such as cottage cheese, sour cream, ice cream, yogurt, and milk that is used in the manufacture of other food products. Class III includes all skim milk and butterfat used to make hard cheeses—types that may be grated, shredded, or crumbled; cream cheese; other spreadable cheeses; plastic cream; anhydrous milkfat; and butteroil. Class III also consists of evaporated milk and sweetened condensed milk in consumer-type packages. Class IV includes, among other things, butter and any milk product in dried form such as nonfat dry milk.

Evaporated milk and sweetened condensed milk in consumer-type packages should be classified as Class IV because of their product characteristics and because their product yields are tied directly to the raw milk used to make these products. Like other Class IV products, evaporated milk and sweetened condensed milk in consumer-type packages have a relatively long shelf-life (*i.e.*, the products can be stored for more than one year without refrigeration). These products also may be substituted for other Class IV products (*e.g.*, nonfat dry milk) and compete over a wide geographic area with products made from non-Federally regulated milk. Additionally, like other Class IV products, evaporated milk and sweetened condensed milk in consumer-type packages are competitive outlets for milk surplus to the Class I needs of the market.

The amendments should not have a significant economic impact on dairy producers or handlers associated with Federal milk orders. Since the reclassification of evaporated milk and sweetened condensed milk in consumer-type packages will be uniform in all Federal milk orders, dairy producers and handlers associated with the orders will be subject to the same provisions. The classification change should have only a minimal impact on the price dairy producers receive for their milk due to the small quantity of milk pooled under Federal milk orders that is used to produce evaporated milk or sweetened condensed milk in consumer-type packages. For example, using the Department's production data provided in the record for milk, skim milk, and cream used to produce evaporated milk and sweetened condensed milk in consumer-type packages by handlers regulated under Federal milk orders for the three years of 2000 through 2002, the reclassification of the milk used to produce these products from Class III to Class IV would have affected the statistical uniform price for all Federal milk orders combined by only $0.0117 per hundredweight.

Under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), these amendments will have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

The primary sources of data used to complete the current forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

*Prior documents in this proceeding:*

*Notice of Hearing:* Issued September 2, 2003; published September 8, 2003 (68 FR 52860).

*Correction of Notice of Hearing:* Issued October 9, 2003; published October 16, 2003 (68 FR 59554).

*Tentative Final Decision:* Issued February 27, 2004; published March 2, 2004 (69 FR 9763).

**Findings and Determinations**

The findings and determinations hereinafter set forth supplement those that were made when the Northeast and other orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to each of the aforesaid orders:

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof, for each of the aforesaid orders, it is found that:

(1) The said orders are hereby amended on an interim basis, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to Section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the respective marketing areas, and the minimum prices specified in the orders, as hereby amended on an interim basis, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders, as hereby amended on an interim basis, regulate the handling of milk in the same manner as, and are applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

(b) *Additional Findings.* It is necessary and in the public interest to make these interim amendments to the Northeast and other orders effective May 1, 2004. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing areas.

The interim amendments to these orders are known to handlers. The tentative final decision containing the proposed amendments to these orders was issued on February 27, 2004.

The changes that result from these interim amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these interim order amendments effective on May 1, 2004. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553, Administrative Procedure Act, 5 U.S.C. 551–559.)

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

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of

[1] Federal milk orders do not classify products but instead classify the milk (skim milk and butterfat) disposed of in the form of a product or used to produce a product. For simplification, this interim final rule references Class I products, Class II products, Class III products, and Class IV products.

more than 50 percent of the milk, which is marketed within the specified marketing areas, to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this interim order amending the Northeast and other orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the orders as hereby amended;

(3) The issuance of the interim order amending the Northeast and other orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the marketing area.

**List of Subjects in 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131**

Milk marketing orders.

**Order Relative to Handling**

■ *It is therefore ordered*, that on and after the effective date hereof, the handling of milk in the Northeast and other marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby further amended on an interim basis, as follows:

■ 1. The authority citation for 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131 reads as follows:

**Authority:** 7 U.S.C. 601–674.

## PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

■ 2. In § 1000.40, revise paragraph (c)(1)(ii), remove paragraph (c)(1)(iii), redesignate paragraph (d)(1)(ii) as paragraph (d)(1)(iii), and add new paragraph (d)(1)(ii) to read as follows:

**§ 1000.40 Classes of utilization.**

* * * * *

(c) * * *

(1) * * *

(ii) Plastic cream, anhydrous milkfat, and butteroil; and

* * * * *

(d) * * *

(1) * * *

(ii) Evaporated or sweetened condensed milk in a consumer-type package; and

* * * * *

Dated: April 19, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04–9261 Filed 4–22–04; 8:45 am]

**BILLING CODE 3410–02–P**

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 102

**RIN 3245–AE94**

### Disclosure of Information Regulations; Correction

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Correcting amendments.

**SUMMARY:** This document contains corrections to the final regulations which were published in the **Federal Register** on October 14, 2003, amending the Small Business Administration's Disclosure of Information regulations.

**DATES:** This correction is effective April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Kitty Higgins, Paralegal Specialist, Freedom of Information/Privacy Acts Office by telephone at (202) 401–8203 or by e-mail at *foia@sba.gov*. Individuals with disabilities may obtain this document in an alternate format (*e.g.*, Braille, large print, audiotape, or computer diskette) upon request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:**

**Background**

On October 14, 2003, at 68 FR 59091 the Small Business Administration (SBA) published final amendments to its Disclosure of Information regulations, contained Subpart A of 13 CFR Part 102, implementing the Electronic Freedom of Information Act Amendments of 1996 and setting out the current information disclosure practices and procedures of the agency.

**Need for Correction**

Since publication of these amendments SBA has discovered that former § 102.12 of Subpart A, which related to the procedures for responding to subpoenas for records or testimony, was inadvertently omitted from the published document. If this section is not reinstated, there will be a critical gap in the regulations containing the procedure for responding to requests for information. The agency is proposing to reinsert former § 102.12 unrevised, as part of Subpart A. The only change required is that the section must be renumbered.

**List of Subjects in 13 CFR Part 102**

Freedom of Information, Privacy.

■ Accordingly 13 CFR Part 102, Subpart A is corrected by making the following correcting amendments:

## PART 102—RECORD DISCLOSURE AND PRIVACY

■ 1. The authority citation for Part 102 continues to read as follows:

**Authority:** 5 U.S.C. 552 and 552a; 31 U.S.C. 1 *et seq.* and 67 *et seq.*; 44 U.S.C. 3501 *et seq.*; E.O. 12600, 3 CFR, 1987 Comp., p.235.

■ 2. Add § 102.10 to Subpart A to read as follows:

**§ 102.10 What happens if I subpoena records or testimony of employees in connection with a civil lawsuit, criminal proceeding or administrative proceeding to which SBA is not a party?**

(a) The person to whom the subpoena is directed must consult with SBA counsel in the relevant SBA office, who will seek approval for compliance from the Associate General Counsel for Litigation. Except where the subpoena requires the testimony of an employee of the Inspector General's office, or records within the possession of the Inspector General, the Associate General Counsel may delegate the authorization for appropriate production of documents or testimony to local SBA counsel.

(b) If SBA counsel approves compliance with the subpoena, SBA will comply.

(c) If SBA counsel disapproves compliance with the subpoena, SBA will not comply, and will base such noncompliance on an appropriate legal basis such as privilege or a statute.

(d) SBA counsel must provide a copy of any subpoena relating to a criminal matter to SBA's Inspector General prior to its return date.

Dated: April 16, 2004.

**Delorice Price Ford,**

*Assistant Administrator for Hearing and Appeals.*

[FR Doc. 04–9223 Filed 4–22–04; 8:45 am]

**BILLING CODE 8025–01–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 91**

**[Docket No. FAA–2003–14766; SFAR 77]**

## Prohibition Against Certain Flights Within the Territory and Airspace of Iraq; Approval Process for Requests for Authorization to Operate in Iraqi Airspace

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; interpretation.

**SUMMARY:** This document explains how the FAA will process requests for authorization to operate in Iraqi airspace under paragraph 3 of Special Federal Aviation Regulation (SFAR) No. 77. Consistent with paragraph three of SFAR No.77, this document further specifies the available FAA approval process for any covered person to engage in permitted operations within the territory of Iraq.

**DATES:** April 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** David Catey, Flight Standards Service, Air Transportation Division (AFS–200), Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–3732.

**SUPPLEMENTARY INFORMATION:** This document explains how the FAA will process requests for authorization to operate in Iraqi airspace under paragraph 3 of Special Federal Aviation Regulation (SFAR) No. 77. Special Federal Aviation Regulation No.77 was first issued on October 16, 1996, and was amended on April 11, 2003, and November 19, 2003. Consistent with the amendment set forth in paragraph three of SFAR No.77, this document is to further specify the available Federal Aviation Administration (FAA) approval process for any covered person to engage in permitted operations within the territory of Iraq.

As amended, SFAR No. 77 provides:

*Special Federal Aviation Regulation No. 77—Prohibition Against Certain Flights Within the Territory and Airspace of Iraq*

1. *Applicability.* This rule applies to the following persons:

(a) All U.S. air carriers or commercial operators;

(b) All persons exercising the privileges of an airman certificate issued by the FAA except such persons operating U.S.-registered aircraft for a foreign air carrier; or

(c) All operators of aircraft registered in the United States except where the operator of such aircraft is a foreign air carrier.

2. *Flight prohibition.* No person may conduct flight operations over or within the territory of Iraq except as provided in paragraphs 3 and 4 of this SFAR or except as follows:

(a) Overflights of Iraq may be conducted above flight level (FL) 200 subject to the approval of, and in accordance with the conditions established by, the appropriate authorities of Iraq.

(b) Flights departing from countries adjacent to Iraq whose climb performance will not permit operation above FL 200 prior to Iraqi airspace may operate at altitudes below FL 200 within Iraq to the extent necessary to permit a climb above FL 200, subject to the approval of, and in accordance with the conditions established by, the appropriate authorities of Iraq.

(c) [Reserved]

3. *Permitted operations.* This SFAR does not prohibit persons described in paragraph 1 from conducting flight operations within the territory and airspace of Iraq when such operations are authorized either by another agency of the United States Government with the approval of the FAA or by an exemption issued by the Administrator.

4. *Emergency situations.* In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from this SFAR to the extent required by that emergency. Except for U.S. air carriers or commercial operators that are subject to the requirements of 14 CFR parts 119, 121, or 135, each person who deviates from this rule shall, within ten (10) days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the nearest FAA Flight Standards District Office a complete report of the operations of the aircraft involved in the deviation including a description of the deviation and the reasons therefore.

5. *Expiration.* This Special Federal Aviation Regulation will remain in effect until further notice.

SFAR No. 77 was originally issued in response to concerns for the safety and security of U.S. civil flights within the territory and airspace of Iraq.[1] At that time, Iraq's dictator had threatened to attack any air target of the United States, and the threat appeared to include civilian as well as military aircraft.

In April 2003, the FAA anticipated that when hostilities ended in Iraq, humanitarian efforts would be needed to assist the people of Iraq. To facilitate those efforts, the FAA amended paragraph 3 of the SFAR to clarify the FAA approval process and to clarify a technical oversight that operations could not be authorized by another agency without the approval of the FAA.

More recently, in November 2003, the United States Government determined that certain limited overflights of Iraq might be conducted safely, but that significant safety concerns otherwise continued to exist.

[1] In SFAR No.61–2, the FAA had previously restricted certain flight operations to and from Iraq.

Accordingly, the FAA is now clarifying the process by which the persons covered in paragraph 1 of SFAR No. 77 may seek to obtain FAA approval or exemption under paragraph 3 of SFAR No. 77. These processes are described as follows:

### Approval Based on Authorization Request of an Agency of the United States Government

If a Department or agency of the U.S. Government determines that it has a critical need to engage any person covered under paragraph 1 of this SFAR, including a U.S. air carrier or a commercial operator in a charter for transportation of civilian or military passengers or cargo where the total capacity of the aircraft is used solely for that charter while the aircraft operates within Iraq, the U.S. Government agency may request FAA approval of the operation on behalf of the person covered under paragraph 1 of the SFAR. That request for approval shall be made in writing, in the form of a letter under the signature of a senior official of that Department or agency, and sent to the FAA Associate Administrator for Regulation and Certification (AVR). That request for approval must include:

1. A written contract between the other U.S. Government agency and persons covered under paragraph 1 of this SFAR for specific flight operations, which includes terms and conditions detailing how the operations are to be conducted;

2. A plan approved by the U.S. Government agency describing how, in light of the need for and risk of the proposed operation, the threats to the operation will be mitigated, including the threats associated with man-portable air defense systems (MANPADS). FAA review of the plan shall not constitute FAA acceptance or approval of the plan; and

3. Any other information requested by the FAA.

The FAA will review the request for approval submitted by the U.S. Government agency to determine whether that agency has addressed the threats to the proposed operations, including the threats associated with MANPADS. If the FAA determines that the U.S. Government agency has addressed those issues, an approval may be issued as described under the "Approval Conditions" discussion that follows.[2] FAA approval of the operation

[2] The process set forth above outlines the conditions under which the FAA anticipates that approvals of flight operations into Iraq may be granted at this time. Any requests for exemption under 14 CFR part 11 will require exceptional

Continued

under paragraph 3 of SFAR 77 does not relieve the operator of the responsibility of ensuring compliance with all rules and regulations of other U.S. Government agencies that may apply to the operation, including, but not limited to, the Transportation Security Regulations issued by the Transportation Security Administration, Department of Homeland Security.

**Approval Conditions**

If the FAA approves the requested operation, then AVR will issue an approval directly to the carrier through the use of Operations Specifications (large air carriers) or a letter of authorization (general aviation operations). AVR will send a letter to the authorizing agency that stipulates the specific conditions under which the FAA approves the air carrier or other covered persons for the requested operations in Iraq. Specifically:

1. Any approval will stipulate those procedures and conditions that limit to the greatest degree possible the risk to the operator while still allowing the operator to achieve its operational objectives;

2. Any approval shall specify that the operation is not eligible for coverage through a premium insurance policy issued by the FAA under section 44302 of chapter 443 of title 49 of the United States Code. The operator shall not request such coverage, and the FAA shall not issue a policy providing insurance; and

3. If the operator already is covered by a premium insurance policy issued by the FAA,[3] the applicant shall be required to request the FAA to issue an endorsement to its premium insurance policy that specifically excludes coverage for any operations into, from, or within the territory or airspace of Iraq pursuant to a flight plan that contemplates landing or taking off from Iraqi territory, and the operator shall expressly waive any claims against the U.S. Government in the event of injury, death or loss resulting from any such operation as a condition for an approval or an exemption issued in accordance with Paragraph 3 of SFAR 77. If approved by the FAA, such an endorsement to the premium insurance policy must be issued and effective prior to the effective date of the approval. Additionally, the operator must notify the FAA in writing of its agreement to release the U.S. Government from all claims and liabilities, as well as its agreement to indemnify the U.S. Government with respect to any third party claims and liabilities relating to any and all events arising from or related to any such operation. If the operation includes the carriage of passengers, the operator shall obtain signed statements from each passenger that—(1) contain a statement that the passenger knowingly accepts the risk of the operation and consents to that risk, and (2) releases the U.S. Government from all claims and liabilities relating to any and all events arising from or related to any such operation.

Issued in Washington, DC, on April 19, 2004.

**Marion C. Blakey,**

*Administrator.*

[FR Doc. 04–9209 Filed 4–20–04; 11:19 am]

BILLING CODE 4910–13–P

circumstances beyond those presently contemplated by this approval process.

[3] Coverage under FAA premium insurance policies is suspended, as a condition of the premium policy, if an operation is covered by non-premium insurance through a contract with an agency of the U.S. Government under section 44305 of chapter 443 of title 49 of the U.S. Code.

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 232

**[Release Nos. 33–8409; 34–49580; 35–27836; 39–2419; IC–26420]**

**RIN 3235–AG96**

### Adoption of Updated EDGAR Filer Manual

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to support the mandatory electronic filing of Form ID, the application for access codes to file on EDGAR, via a new EDGAR Filer Management Web site and to support the initial period of our proposal to expand the information that we require certain open-end management investment companies and insurance company separate accounts to submit to us electronically through EDGAR regarding their series and classes (or contracts, in the case of separate accounts).

The revisions to the Filer Manual reflect changes within Volumes I, II and III, entitled "EDGAR Release 8.7 EDGARLink Filer Manual," "EDGAR Release 8.7 N–SAR Supplement Filer Manual," and "EDGAR Release 8.7 OnlineForms Filer Manual" respectively. The updated manual will be incorporated by reference into the Code of Federal Regulations.

**EFFECTIVE DATE:** April 26, 2004. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of April 26, 2004.

**FOR FURTHER INFORMATION CONTACT:** In the Office of Information Technology, Rick Heroux, at (202) 942–8800; for questions concerning the Division of Investment Management filings, in the Division of Investment Management, Ruth Armfield Sanders, Senior Special Counsel, at (202) 942–0978; and for questions concerning the Division of Corporation Finance filings, in the Division of Corporation Finance, Herbert Scholl, Office Chief, EDGAR and Information Analysis, at (202) 942–2940; in the Office of Filings and Information Services, Margaret A. Favor, (202) 942–8900.

**SUPPLEMENTARY INFORMATION:** Today we are adopting an updated EDGAR Filer Manual (Filer Manual). The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using modernized EDGARLink.[2]

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

[1] We originally adopted the Filer Manual on July 1, 1993, with an effective date of July 26, 1993. Release No. 33–6986 (Apr. 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on July 31, 2003. *See* Release Nos. 33–8255 (July 22, 2003) [68 FR 44876] and 33–8255A (Sept. 10, 2003) [68 FR 53289].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[4] *See* Release Nos. 33–6977 (Feb. 23, 1993) [58 FR 14628], IC–19284 (Feb. 23, 1993) [58 FR 14848], 35–25746 (Feb. 23, 1993) [58 FR 14999], and 33–6980 (Feb. 23, 1993) [58 FR 15009] in which we comprehensively discuss the rules we adopted to govern mandated electronic filing. *See also* Release No. 33–7122 (Dec. 19, 1994) [59 FR 67752], in which we made the EDGAR rules final and applicable to all domestic registrants; Release No. 33–7427 (July 1, 1997) [62 FR 36450], in which we adopted minor amendments to the EDGAR rules; Release No. 33–7472 (Oct. 24, 1997) [62 FR 58647], in which we announced that, as of January 1, 1998,

We will implement EDGAR Release 8.7 on April 26, 2004, to support the mandatory electronic filing of Form ID[5], via the new EDGAR Filer Management Web site, and to support the initial period of our proposal to expand the information that we require certain open-end management investment companies and insurance company separate accounts to submit to us electronically through EDGAR regarding their series and classes (or contracts, in the case of separate accounts).[6] The initial period being supported in this revision will allow these investment companies, which we refer to as "S/C Funds," to enter series and class (contract) information using the new Series and Classes (Contracts) Information page on the EDGAR Filer Web site (*https://www.edgarfiling.sec.gov*) to obtain series and class (contract) identifiers.

In addition, the new release will include EDGAR company naming convention updates. It will increase the company name length from 60 characters to 150 characters and support the use of additional ASCII characters in the company name and the ability to store and disseminate mixed-case company names[7] instead of in all upper case (as was done in the past). It will also add new paper Form types 40–17GCS and 40–17GCS/A; a new field on the EDGAR Filer Web site's Company Information screen that will allow accelerated Form 10-K filers to identify themselves as such;[8] a serial company name tag to Form 424 to allow for the entry of serial company names; a new tag for a filer supplied file number to Form 15–15D and Form 15–15D/A; and "EX–99.CERT" to the EDGARLink drop-down menu for Form types N–Q and N–Q/A.

EDGAR 8.7 supports backward compatibility of the 8.6.m templates as long as the reporting requirements for specific form types have not changed. EDGAR 8.7 server software supports all of the field identifiers that were valid in the 8.6.m version of the PureEdge templates. Notice of the update has previously been provided on the EDGAR filing Web site and on the Commission's public Web site. The discrete updates are reflected on the filing Web site and in the updated draft Filer Manual Volumes.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549–0102. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is *<http://www.sec.gov/info/edgar.shtml>*. You may also obtain copies from Thomson Financial Inc, the paper and microfiche contractor for the Commission, at (800) 638–8241.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[9] It follows that the requirements of the Regulatory Flexibility Act[10] do not apply.

The effective date for the updated Filer Manual and the rule amendments is April 26, 2004. In accordance with the APA,[11] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 8.7 is scheduled to become available on April 26, 2004. The Commission believes that it is necessary to coordinate the effectiveness of the updated Filer Manual with the scheduled system upgrade.

**Statutory Basis**

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act,[12] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[13] Section 20 of the Public Utility Holding Company Act of 1935,[14] Section 319 of the Trust Indenture Act of 1939,[15] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[16]

**List of Subjects in 17 CFR Part 232**

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

**Text of the Amendment**

■ In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

## PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for Part 232 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30 and 80a–37.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

### § 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for filers using modernized EDGARLink are set forth in the EDGAR Release 8.7 EDGARLink Filer Manual Volume I, dated April 2004. Additional provisions applicable to Form N–SAR filers and Online Forms filers are set forth in the EDGAR Release 8.7 N–SAR Supplement Filer Manual Volume II, dated April 2004, and the EDGAR Release 8.7 OnlineForms Filer Manual Volume III, dated April 2004. All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in

---

we would not accept in paper filings that we require filers to submit electronically; Release No. 34–40934 (Jan. 12, 1999) [64 FR 2843], in which we made mandatory the electronic filing of Form 13F; Release No. 33–7684 (May 17, 1999) [64 FR 27888], in which we adopted amendments to implement the first stage of EDGAR modernization; Release No. 33–7855 (July 24, 2000) [65 FR 24788], in which we implemented EDGAR Release 7.0; Release No. 33–7999 (August 7, 2001) [66 FR 42941], in which we implemented EDGAR Release 7.5; Release No. 33–8007 (September 24, 2001) [66 FR 42829], in which we implemented EDGAR Release 8.0; Release No. 33–8224 (May 7, 2003) [66 FR 24345], in which we implemented EDGAR Release 8.5 and Release Nos. 33–8255 (July 22, 2003) [68 FR 44876] and 33–8255A (Sept. 10, 2003) [68 FR 53289] in which we implemented EDGAR Release 8.6.

[5] *See* Release Nos. 33–8399 (Mar. 15, 2004) [69 FR 13426], "Mandated Electronic Filing for Form ID."

[6] *See* Release No. 33–8401 (Mar. 16, 2004) [69 FR 13690], "Rulemaking for EDGAR System."

[7] Additional ASCII characters accepted are: exclamation point (ASCII 33), pound/number sign (ASCII 35), dollar sign (ASCII 36), left parenthesis (ASCII 40), right parenthesis (ASCII 41), comma (ASCII 44), period (ASCII 46), colon (ASCII 58), semicolon (ASCII 59), equals sign (ASCII 61), at sign (ASCII 64), back quote (ASCII 96), left brace (ASCII 123), vertical bar (ASCII 124), right brace (ASCII 125).

[8] Applicable EDGAR filers can do this by selecting the Information Exchange—Retrieve/Edit Data option from the EDGAR filer Web site.

[9] 5 U.S.C. 553(b).

[10] 5 U.S.C. 601–612.

[11] 5 U.S.C. 553(d)(3).

[12] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[13] 15 U.S.C. 78c, 78*l*, 78m, 78n, 78o, 78w, and 78*ll*.

[14] 15 U.S.C. 79t.

[15] 15 U.S.C. 77sss.

[16] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0102 or by calling Thomson Financial Inc at (800) 638–8241. Electronic format copies are available on the Commission's Web site. The address for the Filer Manual is <*http://www.sec.gov/info/edgar.shtml*>. You can also photocopy the document at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

Dated: April 19, 2004.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–9273 Filed 4–20–04; 2:01 pm]

BILLING CODE 8010–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 520

### Oral Dosage Form New Animal Drugs; Moxidectin and Praziquantel Gel

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Fort Dodge Animal Health, Division of Wyeth. The supplemental NADA provides for oral use of a moxidectin and praziquantel gel in horses and ponies for the treatment and control of an additional species of small strongyles.

**DATES:** This rule is effective April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7543, e-mail: *mberson@cvm.fda.gov*.

**SUPPLEMENTARY INFORMATION:** Fort Dodge Animal Health, Division of Wyeth, 800 Fifth St. NW, Fort Dodge, IA 50501, filed a supplement to NADA 141–216 for QUEST PLUS (moxidectin 2.0%/praziquantel 12.5%) Gel, used for the treatment and control of various species of internal parasites in horses and ponies. The supplement provides for the speciation of adult small strongyles in product labeling. The supplemental NADA is approved as of March 17, 2004, and 21 CFR 520.1453 is amended to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects in 21 CFR Part 520**

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

## PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. Section 520.1453 is amended by revising paragraph (d)(2) to read as follows:

**§ 520.1453 Moxidectin and praziquantel gel.**

* * * * *

(d) * * *

(2) *Indications for use.* For the treatment and control of large strongyles: *Strongylus vulgaris* (adults and L4/L5 arterial stages), *S. edentatus* (adult and tissue stages), *Triodontophorus brevicauda* (adults), and *T. serratus* (adults); small strongyles (adults): (*Cyathostomum* spp., including *C. catinatum* and *C. pateratum*; *Cylicocyclus* spp., including *C. insigne*, *C. leptostomum*, and *C. nassatus*; *Cylicostephanus* spp., including *C. calicatus*, *C. goldi*, *C. longibursatus*, and *C. minutus*; *Coronocyclus* spp., including *C. coronatus*, *C. labiatus*, and *C. labratus*; and *Gyalocephalus capitatus*; small strongyles: undifferentiated lumenal larvae; encysted cyathostomes (late L3 and L4 mucosal cyathostome larvae); ascarids: *Parascaris equorum* (adults and L4 larval stages); pinworms: *Oxyuris equi* (adults and L4 larval stages); hairworms: *Trichostrongylus axei* (adults); large-mouth stomach worms: *Habronema muscae* (adults); horse stomach bots: *Gasterophilus intestinalis* (2nd and 3rd instars) and *G. nasalis* (3rd instars); and tapeworms: *Anoplocephala perfoliata* (adults). One dose also suppresses strongyle egg production for 84 days.

* * * * *

Dated: April 2, 2004.

**Steven D. Vaughn,**

*Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 04–9182 Filed 4–22–04; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[CGD11–03–006]**

**RIN 1625–AA09**

### Drawbridge Operation Regulation; Mare Island Strait, Napa River, Vallejo, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is changing the regulation governing the operation of the Mare Island Drawbridge, spanning the Napa River between the City of Vallejo and Mare Island, CA, by eliminating the rush hour closure periods when the drawspan need not open for vessels, and by increasing the hours when vessels provide advance notice for drawspan operation. The action is to reduce bridge operating costs without reducing the ability of vessels to transit the drawbridge, thereby continuing to meet the reasonable needs of waterway traffic.

**DATES:** This rule is effective May 24, 2004.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD11–03–006 and are available for inspection or copying at Commander

(oan), Eleventh Coast Guard District, Bridge Section, Building 50–3, Coast Guard Island, Alameda, CA 94501–5100 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The Bridge Section, Eleventh Coast Guard District, maintains the public docket for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

**SUPPLEMENTARY INFORMATION:**

**Regulatory History**

On November 25, 2003, the notice of proposed rulemaking (NPRM), entitled Drawbridge Operation Regulations; Mare Island Strait, Napa River, Vallejo, CA, was published in the **Federal Register**. We received one letter and one telephone call commenting on the proposed rule. No public meeting was requested, and none was held.

**Background and Purpose**

To reduce drawbridge operating costs, The City of Vallejo requested an increase in rush hour closure periods. However, reduced traffic, following Navy closure of the Mare Island Naval Shipyard in the 1990's, no longer justifies rush hour closure periods. The City of Vallejo also requested an increase in hours when vessels provide advance notice for drawspan operation. Drawbridge operation logs justify the increased advance notice hours, as these hours coincide with periods when vessels have not historically requested an opening. The changes made by this rule are expected to reduce bridge operating costs while continuing to meet the reasonable needs of waterway traffic.

**Discussion of Comments and Changes**

The single letter received during the comment period indicated misinterpretation of the word "normal," when referring to operational periods of the drawspan. The expressed concern was the possibility for navigational delays to slower vessels, enroute between the Napa River and Sacramento and San Joaquin Delta destinations, eight to ten hours away. The desire was not to have to wait until 9 a.m. for a bridge opening, so as not to make an already long trip longer, and necessitate completing the voyage during hours of darkness. The use of the word normal, concerning drawbridge operating times, has been removed from the regulation.

Since the two-hour advance notice requirement presently does not affect vessel transit times, no change is expected to result from the adjusted advance notice times. The two-hour advance notice request period does not preclude the ability of the drawbridge to open promptly and fully for the passage of vessels when they arrive at the drawbridge for a pre-arranged opening, and no delays in arrival at a destination should result from the rulemaking.

The telephone conversation with the City of Vallejo provided a 24–hour telephone number for communicating bridge opening requirements to the bridge. The city preferred to not direct mariners to contact the Police Department Dispatcher, due to possible conflicts with established dispatcher duties, and the reference has been removed from the regulation. During the time when a drawbridge operator is present, the phone rings at the bridge. During advance notice periods, the phone rings at the appropriate City of Vallejo office to arrange for drawspan operation. The regulatory text has been amended to include the 24–hour telephone number provided by the City of Vallejo.

Since all drawbridges are subject to emergency operation in compliance with 33 CFR 117.31, including public vessels of the United States, the individual emergency operation text has been removed from the regulation.

The City of Vallejo requested consideration for future review of rush hour closure periods at this drawbridge. Nothing in this rule prevents future review of drawbridge operating regulations at this drawbridge.

There are no drawbridges under Coast Guard jurisdiction on the tributaries to Napa River and Mare Island Strait. Therefore, the reference to "tributaries" has been removed from the regulation.

The Mare Island Drawbridge is no longer owned or operated by the U.S. Navy, and the drawbridge structure does not meet the definition of a "causeway." Therefore, references to the U.S. Navy and Mare Island Causeway have been removed from the regulation.

**Regulatory Evaluation**

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. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The rulemaking will not result in significant negative impacts to the waterway users, while reducing drawbridge operating costs for the City of Vallejo.

**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.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), 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.

**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 affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This 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 would not create an environmental risk to health or risk to safety that might 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. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Environment**

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

■ 2. In § 117.169a revise the section heading and paragraph to read as follows:

**§ 117.169 Mare Island Strait and The Napa River.**

(a) The draw of the Mare Island Drawbridge, mile 2.8, at Vallejo shall open on signal between the hours of 9 a.m. and 7 p.m. daily, and upon two hours advance notice all other times. When the drawbridge operator is present, mariners may contact the drawbridge via marine radio or telephone at (707) 648–4313 for drawspan operation. When the drawbridge operator is not present, mariners may contact the City of Vallejo via the same telephone number to schedule drawspan operation.

* * * * *

Dated: April 12, 2004.

**Kevin J. Eldridge**

*Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.*

[FR Doc. 04–9196 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–15–P

## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Parts 141, 142 and 143**

**[FRL–7652–8]**

### Lead and Copper Rule; Expert Panel Workshops on Simultaneous Compliance and Monitoring Protocols

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of public meetings.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is convening two expert panel workshops to discuss issues associated with the Lead and Copper Rule (LCR). The first of these workshops, Simultaneous Compliance and the Lead and Copper Rule, will discuss how utilities manage treatment decisions to ensure simultaneous compliance with the LCR and National Primary Drinking Water Regulations. The second workshop, LCR Monitoring Protocols, will examine and discuss potential issues associated with the current LCR sampling and monitoring requirements for lead, copper, and water quality parameters.

**DATES:** The first workshop, Simultaneous Compliance and the Lead and Copper Rule, will be held on Tuesday, May 11, 2004, 8 a.m. to 5 p.m. (CDT) and Wednesday, May 12, 2004, 8 a.m. to 12 p.m. (CDT). The second workshop, LCR Monitoring Protocols, will be held Wednesday, May 12, 2004, 1 p.m. to 5 p.m. (CDT) and Thursday, May 13, 2004, 8 a.m. to 5 p.m. (CDT).

**ADDRESSES:** The workshops will be held at the St. Louis Airport Marriott, I–70 at Lambert Airport, St. Louis, MO 63134.

**FOR FURTHER INFORMATION CONTACT:** To attend this workshop as an observer, please contact the Safe Drinking Water Hotline at 1–800–426–4791 or 703–285–1093 between 9 a.m. and 5:30 p.m. (EDT) or by e-mail: *hotline-sdwa@epa.gov*. There is no charge for attending this workshop as an observer, but seats are limited, so register as soon as possible. Any person needing special accommodations at any of these meetings, including wheelchair access, should make this known at the time of registration. For administrative meeting information, call Brian Murphy, Economic and Engineering Services, Inc., at 425–452–8100 or by e-mail *Murphy@ees-1.com*. For technical information, contact Patricia Moe, Office of Water, Office of Ground Water and Drinking Water, U.S. EPA, 1200 Pennsylvania Ave., NW., (MC 4607M), Washington, D.C., 20460 at 202–564–1436 or by e-mail at *moe.patricia@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Members of the public may attend as observers at the workshop and provide comments during 30-minute periods each on Tuesday, Wednesday, and Thursday. Individual comments should be limited to no more than 5 minutes.

Dated: April 19, 2004.

**Cynthia C. Dougherty,**

*Director, Office of Ground Water and Drinking Water.*

[FR Doc. 04–9265 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Part 180**

**[OPP–2003–0416;FRL–7353–5]**

## Revocation of Tolerance Exemptions for Certain Biopesticides

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This document revokes exemptions from the requirement of a tolerance, as expressed in 40 CFR part 180, for residues of the following pesticide active ingredients because of non-payment of maintenance fees and because there are no active FIFRA product registrations applicable to these exemptions: Dihydroazadirachtin; Kontrol HV; *Metarhizium anisopliae* strain ESF1 in attractant stations; polyhedral occlusion bodies of *Autographa californica* NPV; *Pseudomonas fluorescens* EG-1053; *Pseudomonas fluorescens* NCIB 12089; and *Puccinia canaliculata* (ATCC 40199). In addition, this document revokes the tolerance exemption for *Bacillus thuringiensis* CryIA(b) delta-endotoxin and the genetic material necessary for its production in corn because that tolerance exemption has been replaced by a tolerance exemption that applies to all plants. The regulatory actions in this document contribute toward the Agency's tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. By law, EPA is required by August 2006 to reassess tolerances in existence on August 2, 1996. For counting purposes, the revocations in this document count as nine (9) FQPA tolerance/exemption reassessments.

**DATES:** This regulation is effective July 22, 2004. Objections and requests for hearings must be received on or before June 22, 2004.

**ADDRESSES:** To submit a written objection or hearing request following the detailed instructions as provided in Unit IV. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket ID number OPP–2003–0416. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., 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 electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Barbara Mandula, Biopesticides and Pollution Prevention Division (MC 7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–7378; e-mail address: *mandula.barbara@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 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532).

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

*B . How Can I Access Electronic Copies of this Document and Other Related Information?*

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.* A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/.*

### II. Background

*A. What Action is the Agency Taking?*

In the **Federal Register** of November 26, 2003 (68 FR 66390) (FRL–7332–4), EPA issued a proposed rule to revoke exemptions from the requirement of a tolerance, as expressed in 40 CFR part 180, for residues of the following pesticide active ingredients because of non-payment of maintenance fees and because there are no active FIFRA product registrations applicable to these exemptions: Dihydroazadirachtin; Kontrol HV; *Metarhizium anisopliae* strain ESF1 in attractant stations; polyhedral occlusion bodies of *Autographa californica* NPV; *Pseudomonas fluorescens* EG-1053; *Pseudomonas fluorescens* NCIB 12089; and *Puccinia canaliculata* (ATCC 40199). In addition, the November 26, 2003 FR notice proposed to revoke the tolerance exemption for *Bacillus thuringiensis* CryIA(b) delta-endotoxin and the genetic material necessary for its production in corn because that tolerance exemption has been replaced by a tolerance exemption that applies to all plants. Also, the November 26, 2003 proposal provided a 60-day comment period which invited public comment for consideration and for support of tolerance retention under FFDCA standards.

This final rule revokes all FFDCA tolerance exemptions for residues of: Polyhedral occlusion bodies of *Autographa californica* NPV in 40 CFR 180.1125; Dihydroazadirachtin in 40 CFR 180.1169; Kontrol H.V. in 40 CFR 180.1063; *Metarhizium anisopliae* strain ESF1 in attractant stations in 40 CFR 180.1116; *Pseudomonas fluorescens* EG-1053 in 40 CFR 180.1088; *Pseudomonas fluorescens* NCIB 12089 in 40 CFR 180.1129; and *Puccinia canaliculata* (ATCC 40199) in 40 CFR 180.1123. The tolerance exemptions revoked by this final rule are no longer necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States.

This final rule also revokes the tolerance exemption in 40 CFR 180.1152 for *Bacillus thuringiensis* CryIA(b) delta-endotoxin and the genetic material necessary for its production in corn because that tolerance exemption has been replaced by a tolerance exemption in 40 CFR 180.1173 that applies to all plants.

*B. What is the Agency's Authority for Taking this Action?*

Under section 408(e) of the FFDCA, it is EPA's general practice to propose

revocation of tolerances/tolerance exemptions for residues of pesticide active ingredients on crop uses for which FIFRA registrations no longer exist. EPA has historically been concerned that retention of tolerances/tolerance exemptions that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances/tolerance exemptions even when corresponding domestic uses are canceled if the tolerances/tolerance exemptions are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances/tolerance exemptions, the Agency believes it is appropriate to revoke tolerances/tolerance exemptions for unregistered pesticides in order to prevent potential misuse. Thus, it is EPA's policy to issue a final rule revoking tolerances/tolerance exemptions for residues of pesticide chemicals for which there are no active registrations under FIFRA, unless any person commenting on the proposal demonstrates a need for the tolerance/tolerance exemption to cover residues in or on imported commodities or domestic commodities legally treated.

In response to the proposed revocations of tolerance exemptions published in the **Federal Register** of November 26, 2003 (68 FR 66390), EPA did not receive any comments regarding a need to retain any of the tolerance exemptions proposed for revocation. Therefore, the Agency is revoking the tolerance exemptions as proposed in the November 26, 2003 FR notice.

*C. When Do These Actions Become Effective?*

These actions become effective 90 days following publication of this final rule in the **Federal Register**. EPA has delayed the effectiveness of these revocations for 90 days following publication of this final rule to ensure that all affected parties receive notice of EPA's actions. Consequently, the effective date is July 22, 2004. For this final rule, tolerance exemptions are being revoked for products and uses that have been canceled for more than two years. No other registered pesticide products exist for these uses. The Agency believes that sufficient time has passed for stocks to have been exhausted and for treated commodities to have cleared channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to section 408(l)(5) of FFDCA, as established by the FQPA. Under this section, any residue of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of FDA that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from a tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

*D. What is the Contribution to Tolerance Reassessment?*

By law, EPA is required by August 2006 to reassess the tolerances in existence on August 2, 1996. As of March 15, 2003, EPA has reassessed over 6,630 tolerances. The tolerance exemptions being revoked in this final rule contribute nine (9) tolerance reassessments towards the total due in August 2006.

## III. Are There Any International Trade Issues Raised by this Final Action?

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them. MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex Alimentarius Commission, an international organization formed to promote the coordination of international food standards. When possible, EPA seeks to harmonize U.S. tolerances with Codex MRLs. EPA may establish a tolerance that is different from a Codex MRL; however, section 408(b)(4) of FFDCA requires that EPA explain in a **Federal Register** document the reasons for departing from the Codex level. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs. The U.S. EPA has developed guidance concerning submissions for import tolerance support (65 FR 35069, June 1, 2000) (FRL–6559–3). This guidance will be made available to interested persons. Electronic copies are available on the internet at *http://www.epa.gov/*. On the Home Page select "Laws and Regulations," then select "Regulations and Proposed Rules" and then look up the entry for this document under "**Federal Register**—Environmental Documents." You can also go directly to the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

## IV. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

*A. What Do I Need to Do to File an Objection or Request a Hearing?*

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–0416 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 22, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked

confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C). Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm.104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it "Tolerance Objection Fees."

EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit IV.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–0416, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

*B. When Will the Agency Grant a Request for a Hearing?*

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

## V. Statutory and Executive Order Reviews

This final rule revokes tolerance exemptions established under section 408 of FFDCA. The Office of Management and Budget (OMB) has exempted this type of action (i.e., a tolerance exemption revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, 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). 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.*, or 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). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). 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). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether revocations of tolerances might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. This analysis was published on December 17, 1997 (62 FR 66020), and was provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this rule, I certify that this action will not have a significant economic impact on a substantial number of small entities. Specifically, as per the 1997 notice, EPA has reviewed its available data on imports and foreign pesticide usage and concludes that there is a reasonable international supply of food not treated with canceled pesticides. Furthermore, the Agency knows of no extraordinary circumstances that exist as to the present revocations that would change EPA's previous analysis. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). 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." This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption

provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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." "Policies that have tribal implications" is defined in the Executive order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." This rule 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

**VI. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of 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: April 8, 2004.

**James Jones,**

*Director, Office of Pesticide Programs.*

■ Therefore, 40 CFR part 180 is amended as follows:

**PART 180—[AMENDED]**

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

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

**§ 180.1063 [Removed]**

■ 2. Section 180.1063 is removed.

**§ 180.1088 [Removed]**

■ 3. Section 180.1088 is removed.

**§ 180.1116 [Removed]**

■ 4. Section 180.1116 is removed.

**§ 180.1123 [Removed]**

■ 5. Section 180.1123 is removed.

**§ 180.1125 [Removed]**

■ 6. Section 180.1125 is removed.

**§ 180.1129 [Removed]**

■ 7. Section 180.1129 is removed.

**§ 180.1152 [Removed]**

■ 8. Section 180.1152 is removed.

**§ 180.1169 [Removed]**

■ 9. Section 180.1169 is removed.

[FR Doc. 04–9136 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Part 271**

**[FRL–7653–2]**

## South Dakota: Final Authorization of State Hazardous Waste Management Program Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule and response to comments.

**SUMMARY:** The EPA is granting final authorization to the hazardous waste program revisions submitted by South Dakota. The Agency published a Proposed Rule on November 3, 2003, and provided for public comment. The public comment period ended on December 3, 2003. No comments were received regarding Resource Conservation and Recovery Act (RCRA) program issues. There was one comment from the South Dakota State Attorney General regarding Indian country language. No further opportunity for comment will be provided.

**DATES:** This authorization will be effective on May 24, 2004.

**ADDRESSES:** You can view and copy South Dakota's applications at the following addresses: SDDENR, from 9 a.m. to 5 p.m., Joe Foss Building, 523 E. Capitol, Pierre, South Dakota 57501–3181, contact: Carrie Jacobson, phone number (605) 773–3153 and EPA Region VIII, from 8 a.m. to 3 p.m., 999 18th Street, Suite 300, Denver, Colorado 80202–2466, contact: Kris Shurr, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

**FOR FURTHER INFORMATION CONTACT:** Kris Shurr, EPA Region VIII, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

**SUPPLEMENTARY INFORMATION:** On August 16, 2002, and February 14, 2003, South Dakota submitted final complete program revision applications seeking authorization of their changes in accordance with 40 CFR 271.21. We now make a Final decision that South Dakota's hazardous waste program revisions satisfy all of the requirements necessary to qualify for Final authorization. For a list of rules that become effective with this Final Rule, please see the Proposed Rule published in the November 3, 2003 **Federal Register** at 68 FR 62264.

*Response to Comments:* EPA proposed to authorize South Dakota's State Hazardous Waste Management Program Revisions on November 3, 2003 (68 FR 62264). EPA received only one comment, from the State of South Dakota, objecting to EPA's definition of Indian country, where the State is not authorized to administer its program. Specifically, the State disagreed that all "trust land" in South Dakota is Indian country. However, through a letter dated March 12, 2004, the State of South Dakota conveyed to EPA that "while we [the State] continue to object and disagree on this issue, the state will accept EPA's authorization of the hazardous waste program revisions as described in EPA's November 3, 2003, notice in the **Federal Register**."

EPA maintains the interpretation of Indian country in South Dakota as described in the November 3, 2003 **Federal Register** notice of proposed rulemaking. Further explanation of this interpretation of Indian country can be found at 67 FR 45684–45686 (July 10, 2002).

*Administrative Requirements:* The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this

action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action 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 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. 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.

Under RCRA section 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document 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 in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This action will be effective May 24, 2004.

**List of Subjects in 40 CFR Part 271**

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Incorporation-by-reference, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: April 14, 2004.

**Robert E. Roberts,**

*Regional Administrator, Region VIII.*

[FR Doc. 04–9284 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

### 42 CFR Part 424

**[CMS–1185–F]**

**RIN 0938–AK79**

## Medicare Program; Elimination of Statement of Intent Procedures for Filing Medicare Claims

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes the written statement of intent (SOI) procedures, set forth in 42 CFR 424.45, used to extend the time for filing Medicare claims. In the absence of an SOI, providers and suppliers (and, where applicable, beneficiaries) have from 15 to 27 months (depending on the date of service) to file claims with Medicare contractors.

**EFFECTIVE DATE:** This final rule is effective on May 24, 2004.

**FOR FURTHER INFORMATION CONTACT:** David Walczak, (410) 786–4475.

### I. Background

The purpose of the statement of intent (SOI) procedures is to extend the timely filing period for the submission of an initial Medicare claim. An SOI, by itself, does not constitute a claim, but rather is a means of extending the deadline for filing a timely and valid claim. Our regulations at § 424.32, "Basic requirements for all claims," and § 424.44, "Time limits for filing claims," require that Medicare claims be filed on Medicare-designated claims forms by providers, suppliers, and beneficiaries according to Medicare instructions. These claims must be filed by the end of the year following the year in which the services were furnished. Services furnished in the last 3 months of a calendar year are deemed to be furnished in the subsequent calendar year; therefore, a provider, supplier, or beneficiary has until December 31 of the second year following the year in which the services were furnished to file claims. Where an SOI has been filed with the appropriate Medicare contractor and the contractor notifies the submitter of the SOI that the SOI is valid (that is, the SOI sufficiently identifies the beneficiary and the items or services rendered), the period in which to file a claim may be extended an additional 6 months after the month of the contractor's notice.

The original regulation on extending the time to file claims for Medicare benefits at 20 CFR 405.1693, was based on 20 CFR 404.613, which pertained to applications for Social Security benefits. Section 404.613 reflected the Social Security program's interest in allowing virtually any type of writing to be a placeholder for filing a claim for Social Security benefits, provided that a perfected claim was submitted shortly thereafter. We instituted the SOI procedures because we believed that Medicare beneficiaries might sometimes need extra time to file a Part B claim due to extenuating circumstances such as poor health or unfamiliarity with the claims filing process.

However, experience has shown that beneficiaries rarely submit SOIs directly. Medicare contractors that we surveyed reported no SOIs were directly submitted by beneficiaries for the claims filing period ending December 31, 2001, the latest year for which we have complete data. One reason for the lack of beneficiary-initiated SOIs is the fact that beneficiaries rarely need to file claims. The percentage of Part B claims taken on assignment is about 98 percent today, compared to about 52 percent in 1975. ("Assignment" is the process by which the physician or other supplier agrees to accept Medicare payment in full for a Part B covered item or service and files the claim for the payment.) Even for Part B claims not taken on assignment, the statute now requires the physician or supplier to file the claim and provides for sanctions for failure to do so. (See section 1848(g)(4) of the Social Security Act (the Act)). The number of Part A claims filed by beneficiaries has always been minimal because the statute requires that payment for Part A services generally be made only to providers of services, with very limited exceptions. (See section 1814(a) of the Act). Therefore, we believe that the SOI procedures are no longer necessary because they are not serving their intended purpose.

Further, we believe retention of the SOI procedures is counterproductive because of the amount of resources needed to process SOIs submitted by States and because the SOI procedures may encourage or facilitate inappropriate behavior on the part of some States and some providers.

Each year, our contractors receive an enormous number of SOIs that are submitted by States that, having first made Medicaid payments to dually-eligible (that is, Medicare and Medicaid) beneficiaries, subsequently believe that Medicare should be the proper payor. Subsequent to several court decisions in the early 1990s, we permitted States to "stand in the shoes" of a dually-eligible beneficiary for claims filing and appeals. For example, States are not required to obtain a beneficiary's signature to request providers to file a Part A claim or to file an appeal. We also have permitted States and their contractors to file SOIs on the States' behalf or as appointed representatives of the beneficiaries.

The great majority of SOIs are filed on paper and therefore, must be manually processed to determine whether they are valid. According to our requirements, SOIs must contain detailed and specific information to ensure that a subsequently filed claim was in fact protected by an SOI. (See Program Memorandum AB–03–61)). Also, these SOIs are typically filed in large batches near the end of the timely filing period. All of these factors contribute to the amount of resources and consequent cost incurred in processing the SOIs.

We also believe that the SOI procedures may contribute to States "paying and chasing" instead of following the required cost-avoidance procedures and to the incorrect submission of claims to Medicaid by providers. Our regulations at § 433.139(b) provide that, unless a waiver is granted under § 433.139(e), a State Medicaid agency that has established the probable existence of third party liability (including Medicare liability) at the time a claim for Medicaid payment is presented to it, must reject the claim and return it to the provider for a determination of liability. This process is known as cost avoidance. Some States, however, have been paying thousands of Medicaid claims, despite the knowledge that the beneficiaries involved are entitled to Medicare. These States subsequently identify a significant portion of the claims that they have paid as ones for which Medicare is the proper payor, and use the SOI procedures to extend the time for providers to file claims.

The fact that large numbers of claims are paid first by Medicaid and then identified as payable by Medicare raises the inference that providers are not as careful as they should be as to which payor they initially submit claims, and that States, by initially paying these claims, are not fully practicing cost avoidance. We are concerned that the availability of the SOI procedures to extend the time for filing claims is contributing to inappropriate behavior. We also note that many of the claims filed with Medicare subsequent to the SOIs are "demand bills," which require full medical review, thus increasing the claims processing cost for our contractors. (Where a provider believes that a service is not covered by Medicare but the beneficiary (or the State as the beneficiary's representative) requests the provider to bill Medicare regardless, the provider's Medicare provider agreement requires it to bill Medicare. This bill is known as a "demand bill." It requires full medical review because the fact that the provider initially believed that the service was not covered by Medicare raises the question of whether Medicare must pay it.)

Moreover, we are aware that providers and suppliers sometimes file SOIs. However, we believe, that the filing periods in § 424.44 (15 to 27 months, depending on the date the service was furnished) are more than an adequate amount of time to submit claims.

The percentage of claims processed and paid compared to the total number of SOI claim requests received was 4.4 percent, based on a survey of SOI requests filed with Medicare contractors for the claims filing period that ended December 31, 2001 (the latest year for which data were available).

The entire SOI claims process is performed manually. The steps in this process are the following:

- Determining if an SOI request is valid or invalid;
- Examining a later-submitted claim to determine whether the claim was protected by the SOI that was submitted earlier; and
- Adjudicating the claim (which, in many cases, involves full medical review).

Based on the survey of SOI claim requests submitted to Medicare contractors for 2001, we have estimated the manual processing of SOI claim requests to cost approximately $12,000,000. (It is noted that this cost estimate may vary from year to year because of the following: (1) The number of SOI claim requests submitted by providers, suppliers and States is not a constant number and varies from year to year; (2) the manual processing costs may vary for each SOI claim request, depending on the size and complexity of the SOI claim request; and, (3) changes in State billing practices may result in fewer submissions of SOI claim requests, if a State chooses to "cost avoid" rather than "pay and chase.")

It is also noted that the above cost estimate does not include overtime costs and is not inclusive of all SOI claim requests submitted to all Medicare contractors for the claims filing period that ended December 31, 2001. In addition, this cost estimate does not include hearing costs, for example, in the case of a provider or supplier who disagrees with the final claim

determination and files an appeal. As stated, only 4.4 percent of SOI claim requests submitted were actually processed and paid. Therefore, based on the above information, we have concluded that the SOI process is a resource burden on Medicare contractors, providers, and suppliers, with little return or benefit to the States.

This final rule will have little financial impact on entities that currently submit SOI requests. The requirements for submitting a claim are similar to the requirements for submitting a valid SOI claim request. Since an SOI must be filed within the timely filing period, we anticipate no additional burden for these entities to submit claims timely. Therefore, for the above reasons, we are removing § 424.45 from the regulations.

## II. Provisions of the Proposed Regulation

On July 25, 2003 we published a proposal in the **Federal Register** (68 FR 44000) to remove § 424.45. In the absence of § 424.45, providers, suppliers and beneficiaries will still have from 15 to 27 months to submit claims to Medicare.

## III. Analysis of and Responses to Public Comments

We received two timely public comments on the July 25, 2003 proposed rule concerning the removal of the SOI procedures. A summary of the comments and responses follow:

*Comment:* A commenter wrote that the SOI process benefits some physician groups that experience physician turnover. The commenter stated that the physician turnover results in extended delays in obtaining needed documents to complete the CMS–855 enrollment forms. The SOI process has enabled this entity to bill the Medicare program after the timely filing period has expired, for services furnished by physicians who had not completed these forms.

*Response:* We believe that the timely filing period of 15 to 27 months (depending on the date of service) is sufficient time for a physician group to submit the necessary enrollment paperwork and have it processed by Medicare prior to filing a claim. A physician group must have all the necessary provider/supplier enrollment paperwork completed for all of its physicians before the physicians furnish services to Medicare beneficiaries. In any case where this is not feasible, the paperwork must be completed and signed in a reasonable time following the delivery of services. This will allow the physician group to submit the enrollment forms and have them processed prior to the expiration of the timely filing period.

*Comment:* One commenter believes that elimination of the SOI process will simply shift a burden from Medicare contractors to dually-eligible beneficiaries and their providers. The commenter believes that providers will experience cash flow problems if States deny Medicaid payment until after a Medicare demand bill is processed and provided two suggestions to address the concerns. Finally, the commenter asserts that changing the timeframe in which demand bills must be submitted will not reduce the burden on Medicare contractors, because contractors will still need to process demand bills.

The commenter suggested that if the current SOI process is eliminated, then the Medicare regulation on the time limits for filing claims be modified to extend the timely filing period in two instances. First, the time limit for claims that are submitted within the timely filing period but are rejected by Medicare's claims processing system during the last three months of the filing period should automatically be extended for at least an additional three months. Second, if we experience systems problems that prevent claims processing, the timely filing period should be extended for a period equal to the number of days within the timely filing period that we are unable to process a provider's claims (because of the systems problems).

*Response:* We disagree that eliminating the SOI procedures will shift a burden to providers. Instead, we expect that there will be improved efficiencies for States and providers, as well as Medicare contractors, because there will be incentives to bill and pay correctly the first time. One reason for our proposal to eliminate the SOI process is our belief that it may contribute to the inappropriate billing and payment practices of some providers and States concerning claims for dually-eligible beneficiaries. By removing what amounts to an automatic extension of time for States to decide whether a claim that it has paid must be submitted to Medicare, we hope to focus States' and providers' attention on whether a claim must be paid by Medicaid or Medicare in the first instance. We believe that providers will wish to avoid the possibility of having to file a claim with Medicare on short notice because they submitted it to Medicaid inappropriately, and that States will wish to avoid having to notify their Medicaid providers on short notice that they have to submit claims to Medicare. We note that processing written SOIs is a separate process from processing demand bills. Therefore, eliminating the SOI process will, in fact, reduce a resource burden on Medicare contractors.

The timely filing period is 15 to 27 months, depending on the date of service. We believe this already provides sufficient time for providers to submit claims and to correct any problems that cause a rejection of a claim. Providers and suppliers must file claims promptly to allow enough time to correct any claims that may be rejected for technical reasons.

Additionally, current rules already protect providers in potential instances of our systems problems that prevent claims processing. If a claim is submitted timely and there is a delay in our processing of a claim, there is no need for an extension of the timely filing period. If a claim cannot be accepted by us because of a CMS systems problem (and not a systems problem of the provider), then the administrative error provision specified at § 424.44(b) may be applied to extend the timely filing period.

## IV. Provisions of this Final Rule

This final rule incorporates the provisions of the proposed rule by removing the SOI procedures found at § 424.45.

## V. Collection of Information Requirements

This document does not impose new information collection and recordkeeping requirements but does remove an old one.

Removing § 424.45 will reduce costs and workload burdens on providers and suppliers. Specifically, by removing the written SOI procedures, we hope to: (1) Reduce provider, supplier and Medicare contractor resource burdens; (2) reduce the burden placed on providers and suppliers from having to resubmit claims, and also from having to reimburse States for claims that were incorrectly paid for by the States; (3) reduce Medicare contractor administrative costs; (4) eliminate changes to existing intermediary/carrier claims payment systems; (5) encourage States to pursue cost-avoidance procedures to ensure that Medicaid is truly the payor of last resort, and thus reduce the need to use "pay and chase" procedures; (6) reduce the necessity for medical review at the contractor level; (7) strengthen Medicare and Medicaid program integrity efforts to ensure correct payment the first time; and (8) improve coordination efforts between the Medicare and Medicaid programs.

### VI. Regulatory Impact Statement

We have examined the impacts of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) 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 annually). This is not a major rule. This final rule will have no substantial economic impact on either costs or savings to the Medicare or Medicaid programs.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million annually (see 65 FR 69432). Individuals and States are not included in the definition of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis 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 located outside of a Metropolitan Statistical Area with fewer than 100 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant impact on a substantial number of small entities or rural hospitals because providers and suppliers will still have 15 to 27 months to file claims. Although some providers and suppliers may be small entities or rural hospitals, they are not filing a significant number of SOIs and the information required to file a valid SOI is essentially the same information that providers and suppliers are required to provide when filing a valid claim. We are aware that some States rely on the SOI process at the end of the period for Medicare timely claims filing, to pay and recover expenditures for some of their claims that could have been paid by Medicare. Elimination of the SOI process will require that these States revert to the standard recovery process in the Medicaid regulations to assure that claims are filed within the Medicare timely filing requirements (15 to 27 months). While the elimination of the SOI process will not completely eliminate the issue of "pay and chase," we believe it will encourage States to pursue cost-avoidance procedures to ensure that Medicaid is truly the payer of last resort, reducing the need to use "pay and chase" procedures.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This rule would not have such an effect on State, local, or tribal governments, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a final rule that would impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications.

While this rule will not have a substantial effect on State and local governments, States need to preserve their ability to appropriately recover expenditures for Medicaid benefits that should have been paid by Medicare. We are aware that some States rely on the SOI process, at the end of the period for Medicare timely claims filing, to recover expenditures for some of their claims that could have been paid by Medicare. Elimination of the SOI process will require that these States revert to the standard recovery process in the Medicaid regulations to assure that claims are filed within the Medicare timely filing requirements (15 to 27 months).

For the reasons discussed earlier in this regulation, we believe this timeframe is adequate to address the States' need for recovering claims from Medicare. We will continue to address the States' concerns on these payment and recoupment issues, through the efforts of the State Technical Advisory Group on Third Party Liability, and will continue to consult with States about issues affecting their ability to recover expenditures for some of their claims that should have been covered by Medicare.

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 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

■ For reasons set forth in the Preamble, the Centers for Medicare and Medicaid Services is amending 42 CFR chapter IV as set forth below.

## PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 1. The authority citation for part 424 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

### § 424.45 [Removed]

■ 2. Section 424.45 is removed.

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 10, 2003.

**Thomas A Scully,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: January 21, 2004.

**Tommy G. Thompson,**

*Secretary.*

[FR Doc. 04–9316 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 65

**[Docket No. FEMA–D–7555]**

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists communities where modification of the Base (1% annual chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be

calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Director reconsider the changes. The modified elevations may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

*National Environmental Policy Act.* This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

*Regulatory Classification.* This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 65**

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

**PART 65—[AMENDED]**

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

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 65.4 [Amended]**

■ 2. The tables published under the authority of § 65.4 are amended as shown below:

| State and county | Location | Dates and name of newspaper where notice was published | Chief Executive officer of community | Effective date of modification | Community number |
|---|---|---|---|---|---|
| Connecticut: New London. | City of Norwich ..... | October 10, 2003, October 17, 2003, *The Day.* | The Honorable Arthur L. Lathrop, Mayor of the City of Norwich, Norwich City Hall 100 Broadway, 3rd Floor, Norwich, Connecticut 06360. | January 16, 2004 ..... | 090102 F |
| Delaware: New Castle .. | Unincorporated Areas | February 17, 2004, February 24, 2004, *The News Journal.* | Mr. Thomas P. Gordon, New Castle County Executive, New Castle County Government Center 87 Reads Way, New Castle, Delaware 19720. | May 25, 2004 ..... | 105085 G |

| State and county | Location | Dates and name of newspaper where notice was published | Chief Executive officer of community | Effective date of modification | Community number |
|---|---|---|---|---|---|
| Georgia: Catoosa ..... | Unincorporated Areas | October 29, 2003, November 5, 2003, *The Catoosa County News.* | Mr. Winford Long, Chairman of the Catoosa County, Board of Commissioners, Catoosa County Courthouse 7694 Nashville Street Ringgold, Georgia 30736. | February 4, 2004 ..... | 130028 D |
| Georgia: Forsyth ..... | Unincorporated Areas | October 29, 2003, November 5, 2003, *Forsyth County News.* | Mr. Stevie Mills, Forsyth County Manager, 110 East Main Street, Suite 210, Cumming, Georgia 30040. | February 4, 2004 ..... | 130312 C |
| Georgia: Catoosa and Walker. | Fort Oglethorpe ..... | October 29, 2003, November 5, 2003, *The Catoosa County News.* | The Honorable Judson L. Burkhart, Mayor of the City of Fort Oglethorpe, P.O. Box 5509, 500 City Hall Drive, Fort Oglethorpe, Georgia 30742. | February 4, 2004 ..... | 130248 B |
| New Jersey: Cape May | Borough of Wildwood Crest. | February 11, 2004, February 18, 2004, *The Gazette.* | The Honorable John J. Pantalone, Mayor of the Borough of Wildwood Crest, 6101 Pacific Avenue, Wildwood Crest, New Jersey 08260. | February 3, 2004 ..... | 345330 C |
| Puerto Rico: ..... | Commonwealth ..... | March 5, 2004, March 12, 2004, *The San Juan Star.* | The Honorable Sila M. Calderon, Governor of the Commonwealth of Puerto Rico, Office of the Governor, P.O. Box 9020082, San Juan, Puerto Rico 00902–0082. | June 11, 2004 ..... | 720000 C |
| Vermont: Bennington .... | Town of Bennington .... | February 18, 2004, February 25, 2004, *Bennington Banner.* | Mr. Stuart Hurd, Bennington Town Manager, P.O. Box 469, 205 South Street, Bennington, Vermont 05201. | February 11, 2004 ..... | 500013 C |
| Virginia: Culpeper ..... | Town of Culpeper ..... | February 17, 2004, February 24, 2004, *The Culpeper Star Exponent.* | Mr. J. Brannon Godfrey, Town of Culpeper Manager, 400 South Main Street, Culpeper, Virginia 22701. | May 25, 2004 ..... | 510042 B |
| Virginia: Fairfax ..... | Unincorporated Areas | February 18, 2004, February 25, 2004, *The Washington Times.* | Mr. Anthony Griffin, Fairfax County Executive, 12000 Government Center Parkway, Suite 552, Fairfax, Virginia 22035–0066. | May 26, 2004 ..... | 515525 D |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 7, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9214 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 65

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** Modified Base (1% annual chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

**EFFECTIVE DATES:** The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect for each listed community prior to this date.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA makes the final determinations listed below of modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection.

The modifications are made pursuant to Section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR Part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities.

These modified elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

The changes in BFEs are in accordance with 44 CFR 65.4.

*National Environmental Policy Act.* This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 65**

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for Part 65 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 65.4 [Amended]**

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of Modification | Community number |
|---|---|---|---|---|---|
| Alabama: Tuscaloosa (FEMA Docket No. D–7547). | City of Northport ..... | September 19, 2003, September 26, 2003, *The Tuscaloosa News.* | The Honorable Harvey Fretwell, Mayor of the City of Northport, P.O. Box 569, Northport, Alabama 35476. | December 26, 2003 .... | 010202 E |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of Modification | Community number |
|---|---|---|---|---|---|
| Alabama: Tuscaloosa (FEMA Docket No. D–7547). | City of Tuscaloosa ..... | September 19, 2003, September 26, 2003, *The Tuscaloosa News.* | The Honorable Alvin P. Dupont, Mayor of the City of Tuscaloosa, P.O. Box 2089, Tuscaloosa, Alabama 35403. | December 26, 2003 .... | 010203 E |
| Connecticut: Fairfield (FEMA Docket No. D–7547). | Town of Greenwich ..... | September 12, 2003, September 19, 2003, *Greenwich Time.* | Mr. Richard V. Bergstresser, Town of Greenwich First Selectman, Greenwich Town Hall, 101 Field Point Road, Greenwich, Connecticut 06830. | September 5, 2003 ..... | 090008 C |
| Connecticut: Fairfield (FEMA Docket No. D–7547). | Town of Greenwich ..... | September 29, 2003, October 6, 2003, *Greenwich Time.* | Mr. Richard V. Bergstresser, Town of Greenwich First Selectman, Greenwich Town Hall, 101 Field Point Road, Greenwich, Connecticut 06830. | September 22, 2003 ... | 090008 C |
| Connecticut: New Haven (FEMA Docket No. D–7547). | Town of Madison ..... | September 12, 2003, September 19, 2003, *The Hartford Courant.* | Mr. Thomas S. Scarpati, Town of Madison First Selectman, Town Hall, 8 Campus Drive, Madison, Connecticut 06443. | December 19, 2003 .... | 090079 D |
| Connecticut: Windham (FEMA Docket No. D–7547). | Town of Windham ..... | August 11, 2003, August 18, 2003, *The Chronicle.* | Mr. Michael Paulhaus, Town of Windham First Selectman, 979 Main Street, Willimantic, Connecticut 06226–2200. | August 4, 2003 ..... | 090119 D |
| Georgia: Fulton (FEMA Docket No. D–7547). | City of Alpharetta ..... | October 10, 2003, October 17, 2003, *Fulton County Daily Report.* | The Honorable Arthur Letchas, Mayor of the City of Alpharetta, Two South Main Street, Alpharetta, Georgia 30004. | October 3, 2003 ..... | 130084 E |
| Georgia: Cobb (FEMA Docket No. D–7547). | Unincorporated Areas | August 1, 2003, August 8, 2003, *Marietta Daily Journal.* | Mr. Samuel S. Olens, Chairman of the Cobb County Board of Commissioners, 100 Cherokee Street, Marietta, Georgia 30090–9680. | November 7, 2003 ..... | 130052 F |
| Georgia: Cobb (FEMA Docket No. D–7547). | Unincorporated Areas | August 1, 2003, August 8, 2003, *Marietta Daily Journal.* | Mr. Samuel S. Olens, Chairman of the Cobb County Board of Commissioners, 100 Cherokee Street, Marietta, Georgia 30090–9680. | July 15, 2003 ..... | 130052 F |
| Georgia: Fulton (FEMA Docket No. D–7547). | Unincorporated Areas | August 1, 2003, August 8, 2003, *Fulton County Daily Report.* | Mr. Thomas C. Andrews, Fulton County Manager, Fulton County Government Center, 141 Pryor Street, 10th Floor, Atlanta, Georgia 30303. | November 7, 2003 ..... | 135160 E |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of Modification | Community number |
|---|---|---|---|---|---|
| Georgia: Gwinnett (FEMA Docket No. D–7547). | Unincorporated Areas | September 4, 2003, September 11, 2003, *Gwinnett Daily Post.* | Mr. F. Wayne Hill, Chairman of the Gwinnett County Board of Commissioners, Justice and Administration Center, 75 Langley Drive, Lawrenceville, Georgia 30045. | December 11, 2003 .... | 130322 C |
| Georgia: Fulton (FEMA Docket No. D–7547). | City of Roswell ..... | October 10, 2003, October 17, 2003, *Fulton County Daily Report.* | The Honorable Jere Wood, Mayor of the City of Roswell, 38 Hill Street, Suite 115, Roswell, Georgia 30075. | October 3, 2003 ..... | 130088 E |
| Georgia: Whitfield (FEMA Docket No. D–7547). | Unincorporated Areas | August 15, 2003, August 22, 2003, *The Daily Citizen-News.* | Mr. Mike Babb, Chairman of the Whitfield County Board of Commissioners, P.O. Box 248, Dalton, Georgia 30772. | November 21, 2003 .... | 130193 C |
| Kentucky: (FEMA Docket No. D–7547). | Lexington-Fayette Urban County Government. | August 6, 2003, August 13, 2003, *The Lexington Herald-Leader.* | The Honorable Teresa Isaac, Mayor of the Lexington-Fayette Urban County Government, 200 East Main Street, 12th Floor, Lexington, Kentucky 40507. | July 29, 2003 ..... | 210067 C |
| Maryland: Montgomery (FEMA Docket No. D–7547). | Unincorporated Areas | July 28, 2003, August 4, 2003, *The Montgomery Journal.* | Mr. Douglas M. Duncan, Montgomery County Executive, Executive Office Building, 101 Monroe Street, Rockville, Maryland 20850. | November 3, 2003 ..... | 240049 C |
| Massachusetts: Barnstable (FEMA Docket No. D–7577). | Town of Bourne ..... | September 24, 2003, October 1, 2003, *Cape Cod Times.* | Mr. Mark A. Tirrell, Chairman of the Town of Bourne Board of Selectmen, Bourne Town Hall, 24 Perry Avenue, Buzzards Bay, Massachusetts 02532. | September 17, 2003 ... | 255210 E |
| Massachusetts: Barnstable (FEMA Docket No. D–7547). | Town of Bourne ..... | September 24, 2003, October 1, 2003, *Cape Cod Times.* | Mr. Mark A. Tirrell, Chairman of the Town of Bourne Board of Selectmen, Bourne Town Hall, 24 Perry Avenue, Buzzards Bay, Massachusetts 02532. | September 17, 2003 ... | 255210 F |
| Mississippi: Harrison (FEMA Docket No. D–7547). | City of Biloxi ..... | October 3, 2003, October 10, 2003, *The Sun Herald.* | The Honorable A. J. Holloway, Mayor of the City of Biloxi, P.O. Box 429, 140 Lameuse Street, Biloxi, Mississippi 39530. | September 26, 2003 ... | 285252 C |
| New Jersey: Union (FEMA Docket No. D–7547). | Township of Scotch Plains. | September 5, 2003, September 12, 2003, *The Courier-News.* | The Honorable Martin L. Marks, Mayor of the Township of Scotch Plains, Municipal Building, 430 Park Avenue, Scotch Plains, New Jersey 07076. | December 12, 2003 .... | 340474 C |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of Modification | Community number |
|---|---|---|---|---|---|
| New Jersey: Somerset (FEMA Docket No. D–7547). | Borough of Watchung | September 5, 2003, September 12, 2003, *The Courier-News.* | The Honorable Albert S. Ellis, Mayor of the Borough of Watchung, 15 Mountain Boulevard, Watchung, New Jersey 07069. | December 12, 2003 .... | 340447 C |
| North Carolina: Gaston (FEMA Docket No. D–7547). | City of Gastonia ..... | August 18, 2003, August 25, 2003, *The Gaston Gazette.* | The Honorable Jennifer T. Stultz, Mayor of the City of Gastonia, P.O. Box 1748, 181 South Street, Gastonia, North Carolina 28053–1748. | November 24, 2003 .... | 370100 E |
| Pennsylvania: Montgomery (FEMA Docket No. D–7547). | Township of Plymouth | August 29, 2003, September 5, 2003, *The Times Herald.* | Ms. Karen Weiss, Township of Plymouth Manager, 700 Belvoir Road, Plymouth Meeting, Pennsylvania 19462. | August 20, 2003 ..... | 420955 E |
| Rhode Island: Bristol (FEMA Docket No. D–7547). | Town of Bristol ..... | September 12, 2003, September 19, 2003, *Providence Journal.* | Mr. Joseph F. Parella, Bristol Town Administrator, Town Hall, Bristol, Rhode Island 02809–2208. | September 5, 2003 ..... | 445393 F |
| South Carolina: Charleston (FEMA Docket No. D–7547). | Unincorporated Areas | September 15, 2003, September 22, 2003, *Post and Courier.* | Mr. Roland H. Windham, Jr., Charleston County Administrator, 4045 Bridge View Drive, North Charleston, South Carolina 29405. | December 22, 2003 .... | 455413 G |
| South Carolina: Richland (FEMA Docket No. D–7547). | Unincorporated Areas | August 19, 2003, August 26, 2003, *The State.* | Mr. T. Cary McSwain, Richland County Administrator, 2020 Hampton Street, P.O. Box 192, Columbia, South Carolina 29202. | November 25, 2003 .... | 450170 G |
| Tennessee: Nashville and Davidson (FEMA Docket No. D–7547). | Metropolitan Government. | August 6, 2003, August 13, 2003, *The Tennessean.* | The Honorable William Purcell Mayor of the Metropolitan Government of Nashville and Davidson County, 107 Metropolitan Courthouse, Nashville, Tennessee 37201. | August 29, 2003 ..... | 470040 F |
| Tennessee: Williamson (FEMA Docket No. D–7547). | Unincorporated Areas | August 6, 2003, August 13, 2003, *The Review Appeal.* | Mr. Roger S. Anderson, Williamson County Executive, 1320 West Main Street, Suite 100, Franklin, Tennessee 37064. | August 29, 2003 ..... | 470204 E |
| Virginia: Prince William (FEMA Docket No. D–7547). | Unincorporated Areas | August 11, 2003, August 18, 2003, *Potomac News.* | Mr. Craig Gerhart, Prince William County Executive, 1 County Complex Court, Prince William, Virginia 22192. | November 17, 2003 .... | 510119 D |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 7, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9215 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

### Final Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**EFFECTIVE DATES:** The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

**ADDRESSES:** The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR Part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR Part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

*National Environmental Policy Act.* This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

### List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended as follows:

## PART 67—[AMENDED]

■ 1. The authority citation for Part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.11 [Amended]**

■ 2. The tables published under the authority of § 67.11 are amended as follows:

| Source of flooding and location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| **ILLINOIS** | |
| **Sangamon County (FEMA Docket Nos. D–7554 and D–7578)** | |
| *Fox Creek:* | |
| At confluence with Polecat Creek | *571 |
| Approximately 1,100 feet upstream of Ptarmigan Drive | *587 |
| Village of Chatham, Sangamon County (Unincorporated Areas) | |
| *Jacksonville Branch:* | |
| At confluence with Spring Creek | *543 |
| Approximately 75 feet upstream of Koke Mill Road | *603 |
| City of Springfield, Village of Jerome, City of Leland Grove, Sangamon County (Unincorporated Areas) | |
| *Spring Creek:* | |
| Approximately 1,600 feet downstream of North 8th Street | *529 |
| Approximately 3,300 feet upstream of South Farmingdale Road | *569 |
| City of Springfield, Sangamon County (Unincorporated Areas) | |
| *Polecat Creek:* | |
| Approximately 2,300 feet upstream of confluence with Lick Creek | *563 |
| Approximately 200 feet upstream of Broaddus Road | *601 |
| Village of Chatham, Sangamon County (Unincorporated Areas), City of Springfield | |
| *Jacksonville Branch Tributary:* | |
| At the confluence with Jacksonville Branch | *570 |
| Approximately 500 feet upstream of Wiggins Avenue | *573 |
| City of Leland Grove, City of Springfield | |
| *Black Branch:* | |
| Approximately 2,000 feet downstream of CSX Transportation | *541 |
| At Maxhiemer Road | *571 |
| *Unnamed Tributary to Lick Creek:* | |
| Approximately 0.56 mile downstream of Main Street | *598 |
| Approximately 200 feet upstream of Center Street | *616 |
| *Town Branch:* | |
| At confluence with Spring Creek | *540 |
| At Lincoln Avenue | *540 |
| *Unnamed Tributary I:* | |
| At confluence with Spring Creek | *548 |
| Approximately 5,600 feet upstream of confluence with Spring Creek | *548 |

| Source of flooding and location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| *Unnamed Tributary II:* | |
| At confluence with Tributary I | *548 |
| Approximately 2,000 feet upstream of confluence with Unnamed Tributary I | *548 |
| **Sangamon County (Unincorporated Areas)** | |
| **Maps available for inspection** at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **Village of Chatham:** | |
| **Maps available for inspection** at the Chatham Village Hall, 116 East Mulberry Street, Chatham, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **Village of Jerome:** | |
| **Maps available for inspection** at the Jerome Village Hall, 2901 Leonard Street, Springfield, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **City of Leland Grove:** | |
| **Maps available for inspection** at the Leland Grove City Hall, 2000 Chatham Road, Springfield, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **Village of Loami:** | |
| **Maps available for inspection** at the Loami Village Hall, 104 South Main Street, Loami, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **Village of Rochester:** | |
| **Maps available for inspection** at the Rochester Village Hall, 1 Community Drive, Rochester, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **City of Springfield:** | |
| **Maps available for inspection** at the City of Springfield Public Works Department, 300 East Monroe Street, Room 201, Springfield, Illinois or at the Springfield-Sangamon County Regional Planning Commission, 200 South 9th Street, Room 212, Springfield, Illinois. | |
| **MINNESOTA** | |
| **Hennepin County (FEMA Docket No. D–7562)** | |
| *North Branch Bassett Creek:* | |
| Approximately 35 feet upstream of the confluence with Bassett Creek | *850 |
| At Louisiana Avenue | *883 |
| City of Crystal, City of New Hope | |
| *Bassett Creek:* | |
| At conduit entrance approximately 1,500 feet downstream of Irving Avenue | *807 |
| Approximately 100 feet downstream of South Shore Drive | *889 |
| Cities of Golden Valley, Medicine Lake, Minneapolis, and Plymouth | |
| *Twin Lakes:* | |
| Entire shoreline within the county | *856 |
| Cities of Brooklyn Center, Crystal and Robbinsdale | |
| *Ryan Lake:* | |
| Entire shoreline within the county | *856 |
| Cities of Brooklyn Center, Minneapolis, and Robbinsdale | |
| *Lake Minnetonka:* | |
| Entire shoreline within the county | *931 |
| Cities of Deephaven, Greenwood, and Minnetrista | |
| *Gleason Creek:* | |
| Approximately 450 feet downstream of the confluence of Gleason Lake | *945 |
| Approximately 175 feet downstream of the confluence of Gleason Lake | *945 |
| City of Plymouth | |
| *Unnamed Ponding Area Southwest of Hadley Lake:* | |
| Entire shoreline within the county | *952 |
| City of Wayzata | |
| *Pioneer Creek:* | |
| Approximately 0.6 mile upstream of County Highway 90 | *958 |
| Approximately 400 feet downstream of Pagenkopf Road | *958 |
| City of Maple Plain | |
| *Lake Sarah:* | |
| Entire shoreline within the county | *981 |
| City of Greenfield | |
| *North Fork Rush Creek:* | |
| Approximately 400 feet upstream of the downstream crossing of 109th Avenue North (County Route 117) | *926 |
| Approximately 75 feet downstream of the upstream crossing of 109th Avenue North (County Route 117) | *927 |
| Township of Hassan | |
| *Crystal Bay:* | |
| Entire shoreline within the county | *931 |
| City of Minnetonka Beach | |
| *Lafayette Bay:* | |
| Entire shoreline within the county | *931 |
| City of Minnetonka Beach | |
| *Halstead Bay:* | |
| Entire shoreline within the county | *931 |
| City of Minnetrista | |
| *Dutch Lake:* | |
| Entire shoreline within the county | *940 |
| City of Minnetrista | |
| *Jennings Bay:* | |
| Entire shoreline within the county | *931 |
| City of Minnetrista | |
| *Six Mile Creek:* | |
| At the confluence with Halstead Bay | *931 |
| Approximately 200 feet upstream of Highland Road | *931 |
| City of Minnetrista | |
| **City of Brooklyn Center:** | |
| **Maps available for inspection** at the Brooklyn Center City Hall, 6301 Shingle Creek Parkway, Brooklyn Center, Minnesota. | |
| **City of Crystal:** | |
| **Maps available for inspection** at the Crystal City Hall, 4141 Douglas Drive, Crystal, Minnesota. | |
| **City of Deephaven:** | |
| **Maps available for inspection** at the Deephaven City Hall, 20225 Cottagewood Road, Deephaven, Minnesota. | |
| **City of Golden Valley:** | |
| **Maps available for inspection** at the Golden Valley City Hall, 7800 Golden Valley Road, Golden Valley, Minnesota. | |
| **City of Greenfield:** | |
| **Maps available for inspection** at the Greenfield City Hall, 6390 Town Hall Drive, Loretto, Minnesota. | |
| **City of Greenwood:** | |
| **Maps available for inspection** at the Greenwood City Hall, Zoning Office, 20225 Cottagewood Road, Deephaven, Minnesota. | |
| **Township of Hassan:** | |

| Source of flooding and location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| **Maps available for inspection** at the Hassan Township Hall, 25000 Hassan Parkway, Rogers, Minnesota. | |
| **City of Maple Plain:** | |
| **Maps available for inspection** at the Maple Plain City Hall, 1620 Maple Avenue, Maple Plain, Minnesota. | |
| **City of Medicine Lake:** | |
| **Maps available for inspection** at the Medicine Lake City Hall, 10609 South Shore Drive, Medicine Lake, Minnesota. | |
| **City of Minneapolis:** | |
| **Maps available for inspection** at the Minneapolis City Hall, Public Works Office, 350 South Fifth Street, Minneapolis, Minnesota. | |
| **City of Minnetonka Beach:** | |
| **Maps available for inspection** at the Minnetonka Beach City Hall, 2945 West Wood Road, Minnetonka Beach, Minnesota. | |
| **City of Minnetrista:** | |
| **Maps available** at the Minnetrista City Hall, 7701 County Road 110 West, Minnetrista, Minnesota. | |
| **City of New Hope:** | |
| **Maps available for inspection** at the New Hope City Hall, 4401 Xylon Avenue North, New Hope, Minnesota. | |
| **City of Plymouth:** | |
| **Maps available for inspection** at the Plymouth City Hall, 3400 Plymouth Boulevard, Plymouth, Minnesota. | |
| **City of Robbinsdale:** | |
| **Maps available for inspection** at the Robbinsdale City Hall, 4100 Lakeview Avenue North, Robbinsdale, Minnesota. | |
| **City of Wayzata:** | |
| **Maps available for inspection** at the Wayzata City Hall, 600 Rice Street, Wayzata, Minnesota. | |
| **PENNSYLVANIA** | |
| **Bucks County (Unincorporated Areas) (FEMA Docket No. D–7562)** | |
| *East Branch Perkiomen Creek:* | |
| Approximately 550 feet upstream of County Line Road | *278 |
| Approximately 600 feet upstream of East Callowhill Road | *318 |
| Township of West Rockhill, Borough of Sellersville, Borough of Perkasie, Township of East Rockhill | |
| *Pleasant Spring Creek:* | |
| At the confluence with East Branch Perkiomen Creek | *311 |
| Approximately 240 feet upstream of Dam No. 2 | *311 |
| Borough of Perkasie | |
| **Township of East Rockhill:** | |
| **Maps available for inspection** at the East Rockhill Township Hall, 1622 Ridge Road, Perkasie, Pennsylvania. | |
| **Borough of Perkasie:** | |
| **Maps available for inspection** at Perkasie Borough Hall, 620 West Chestnut Street, Perkasie, Pennsylvania. | |
| **Borough of Sellersville:** | |
| **Maps available for inspection** at the Sellersville Borough Hall, 140 East Church Street, Sellersville, Pennsylvania. | |
| **Township of West Rockhill:** | |
| **Maps available for inspection** at the West Rockhill Township Office, 1028 Ridge Road, West Rockhill, Pennsylvania. | |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 7, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9219 Filed 4–22–04; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### 49 CFR Part 192

**[Docket No. RSPA–00–7666; Amendment 192–91]**

**RIN 2137–AD64**

### Pipeline Safety: High Consequence Areas for Gas Transmission Pipelines

**AGENCY:** Office of Pipeline Safety (OPS), Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects the amendment number cited in the caption of the final rule published in the **Federal Register** on August 6, 2002 (67 FR 50824). The amendment number cited in the caption of this final rule was "Amendment 192–77." The correct amendment number is "Amendment 192–91." This correction does not affect the substance or content of the rule.

**DATES:** *Effective Date:* The effective date for this correction is April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Richard Huriaux by phone at (202) 366–4565, by fax at (202) 366–4566, or by e-mail at *richard.huriaux@rspa.dot.gov*, regarding the subject matter of this correction.

**SUPPLEMENTARY INFORMATION:** Amendment numbers are used by RSPA/OPS to track the changes made to the pipeline safety rules in 49 CFR Parts 190–199. An incorrect amendment number is confusing to pipeline companies and federal and state pipeline inspectors who closely follow pipeline regulatory developments. This correction does not affect the substance or content of the rule.

Issued in Washington, DC, on April 16, 2004.

**Samuel G. Bonasso,**

*Deputy Administrator.*

[FR Doc. 04–9200 Filed 4–22–04; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 031016262–4107–02; I.D. 100603E]**

**RIN 0648–AR08**

### Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to revise the descriptions of Gulf of Alaska (GOA) reporting areas 620 and 630 in paragraph b of Figure 3 to 50 CFR part 679 to include the entire Alitak/Olga/Deadman's/Portage Bay complex of Kodiak Island within reporting area 620. This action is necessary to improve quota management and fishery enforcement in the GOA. This action is

intended to meet the conservation and management requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and to further the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP).

**DATES:** Effective May 24, 2004.

**ADDRESSES:** Copies of the regulatory impact review/initial regulatory flexibility analysis (RIR/IRFA) and the final regulatory flexibility analysis (FRFA) prepared for this action may be obtained from the NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Durall, or by calling 907–586–7247.

**FOR FURTHER INFORMATION CONTACT:** Patsy A. Bearden, 907–586–7008 or *patsy.bearden@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The U.S. groundfish fisheries of the GOA in the exclusive economic zone (EEZ) off Alaska are managed by NMFS under the FMP. The FMP was prepared by the North Pacific Fishery Management Council under the Magnuson-Stevens Act and is implemented by regulations at 50 CFR part 679. General regulations that also pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

This action revises the description of reporting areas 620 and 630 in paragraph b of Figure 3 to 50 CFR part 679 by including all waters of the Alitak/Olga/Deadman's/Portage Bay complex of Kodiak Island within reporting area 620 and excluding all such waters from reporting area 630. The background regarding this action is detailed in the preamble to the proposed rule (68 FR 62423, November 4, 2003). Public comments on the proposed rule were invited through December 4, 2003. No public comments were received on this rule.

The boundary between GOA reporting areas 620 and 630 near Kodiak Island, Alaska, is 154°00' W. longitude from the south side of the Alaska Peninsula, southward to the limits of the EEZ off Alaska. On Kodiak Island, this line of longitude bisects the Alitak/Olga/Deadman's/Portage Bay complex on the southwestern end of the island.

The division of the bay complex between reporting areas 620 and 630 means that different parts of the bay open and close on different schedules. Openings and closings in the lower part of the bay complex are driven by reporting area 620 openings and closings, while openings and closings in the upper part, including Deadman's and Portage Bays and a tip of Olga Bay, are driven by openings and closings in reporting area 630. In recent years, the part of the bay in reporting area 620 has tended to be open to fishing more days per year than the part of the bay in reporting area 630.

Deadman's Bay has deep water that often provides good opportunities for pollock mid-water trawling. The waters are relatively protected, and suitable for small vessels. The deep water in reporting area 620 (in Alitak Bay and the lower reaches of Deadman's Bay) is relatively constricted and dotted with pinnacles, making these waters less suitable for pollock fishing. This action would place the deeper waters in Deadman's Bay under the reporting area 620 openings and closings schedule, and should give fishermen more days of access to the deeper waters in a typical year than they would have otherwise.

## Classification

The Administrator, Alaska Region, NMFS, determined that this final rule is necessary for the conservation and management of the groundfish fishery in the GOA and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

An FRFA was prepared to address the requirements of the Regulatory Flexibility Act at section 604(a). The FRFA incorporates the IRFA and a summary of the analyses completed to support the action. A copy of this analysis is available from the NMFS (see **ADDRESSES**). A summary of the FRFA follows:

### *Need for and Objectives of This Action*

The boundary between GOA reporting areas 620 and 630 near Kodiak Island, Alaska, is 154°00' W. longitude from the south side of the Alaska Peninsula, southward to the limits of the EEZ off Alaska. On Kodiak Island, this line of longitude bisects the Alitak/Olga/Deadman's/Portage Bay complex on the southwestern end of the island. This action is necessary to include all the waters of this complex of bays within one reporting area, thereby improving management and enforcement of groundfish quotas.

The objectives of this action are to: (1) reduce the potential costs of harvesting pollock in reporting areas 620 and 630, and (2) maintain the biological integrity of fish stocks managed by NMFS under the Magnuson-Stevens Act.

### *Issues Raised by Public Comments on the IRFA*

The proposed rule was published in the **Federal Register** on November 4, 2003 (68 FR 62423). An IRFA was prepared for the proposed rule and summarized in the Classification section of the preamble to that rule. The public comment period ended on December 4, 2003. No public comments were received in response to the IRFA.

### *Number and Description of Small Entities Affected by the Rule*

The directly regulated entities are groundfish vessels targeting pollock in Alitak and Deadman's Bays. Since inshore-offshore regulations assign GOA pollock harvests 100 percent to the catcher vessels harvesting pollock for processing by the inshore component, all directly regulated entities are catcher vessels.

The information necessary to determine whether a vessel is independently owned and operated and has gross revenues of less than $3.5 million, in all its affiliated activities, is not available. However, by using estimates of Alaska groundfish revenue by vessel, it is possible to identify vessels that clearly are not small entities. In 2001, 117 catcher vessels fished for groundfish in Federal waters in the GOA. None of these had more than $3.5 million in groundfish revenues from the GOA. Therefore, none of these vessels were clearly large vessels; all of them may be small entities. For this reason, all the vessels directly regulated by this action (a subset of the GOA trawlers) are treated as small entities.

Harvest records indicate that a large proportion of the GOA pollock trawl fleet has been active in the Alitak, Olga, Deadman's, Portage Bay area. In the four Alaska Department of Fish and Game statistical areas that comprise the bay complex, 29 vessels were identified as having targeted pollock in 1998, 30 in 1999, 0 in 2000, and 29 in 2001. As noted above, all of these vessels are believed to be small entities.

Average GOA trawl catcher vessel groundfish revenues were about $350,000 in 2001. Average revenues from targeted pollock trawling activity in the Alitak/Olga/Deadman's/Portage Bay complex were about $15,000 in 1998, about $18,000 in 1999, nothing in 2000, and about $15,000 in 2001.

### *Recordkeeping and Reporting Requirements*

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities.

### *Description of Steps Taken to Minimize Significant Economic Impacts*

This action shifts the reporting area 630 waters in the Alitak Bay complex from reporting area 630 to reporting area 620. This action modifies existing regulations so as to reduce the burden of those regulations on the fleet of small

entities. These entities will benefit through reduced costs and potentially increased revenues. No alternative was identified that would accomplish the objectives of this action, with a smaller adverse impact on small entities. This analysis identified one alternative to this action: the status quo. Under this alternative the boundaries do not change, and fishing opportunities available to GOA pelagic trawlers are limited to a greater extent than under the preferred alternative. The status quo is thus inferior in this regard to the preferred alternative.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This rule does not duplicate, overlap, or conflict with other Federal regulations.

This action does not impose new reporting, recordkeeping or other compliance requirements.

**Small Entity Compliance Guide**

Small entities are not required to take any additional actions to comply with this action.

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: April 19, 2004.

**Rebecca Lent**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For reasons set out in the preamble, 50 CFR part 679 is amended as follows:

## PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*, 1801 *et seq.*; 3631 *et seq.*; Title II of Division C, Pub. L. 105–277; Sec 3027, Pub. L. 106–31; 113 Stat. 57; 16 U.S.C. 1540(f); and Sec. 209, Pub. L. 106–554.

■ 2. Paragraph b to Figure 3 to Part 679 is revised as follows:

B. COORDINATES

| Code | Description |
|---|---|
| 610 | *Western GOA Regulatory Area, Shumagin District.* Along the south side of the Aleutian Islands, including those waters south of Nichols Point (54°51′30″ N lat) near False Pass, and straight lines between the islands and the Alaska Peninsula connecting the following coordinates in the order listed:<br>52°49.18′ N, 169°40.47′ W;<br>52°49.24′ N, 169°07.10′ W;<br>53°23.13′ N, 167°50.50′ W;<br>53°18.95′ N, 167°51.06′ W;<br>53°58.97′ N, 166°16.50′ W;<br>54°02.69′ N, 166°02.93′ W;<br>54°07.69′ N, 165°39.74′ W;<br>54°08.40′ N, 165°38.29′ W;<br>54°11.71′ N, 165°23.09′ W;<br>54°23.74′ N, 164°44.73′ W; and<br>southward to the limits of the US EEZ as described in the current editions of NOAA chart INT 813 (Bering Sea, Southern Part) and NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass), between 170°00′ W long and 159°00′ W long. |
| 620 | *Central GOA Regulatory Area, Chirikof District.* Along the south side of the Alaska Peninsula, between 159°00′ W long and 154°00′ W long, and southward to the limits of the US EEZ as described in the current edition of NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass) except that all waters of the Alitak/Olga/Deadman's/Portage Bay complex of Kodiak Island are included in this area. |
| 630 | *Central GOA Regulatory Area, Kodiak District.* Along the south side of continental Alaska, between 154°00′ W long and 147°00′ W long, and southward to the limits of the US EEZ as described in the current edition of NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass) excluding all waters of the Alitak/Olga/Deadman's/Portage Bay complex of Kodiak Island and Area 649. |
| 640 | *Eastern GOA Regulatory Area West Yakutat District.* Along the south side of continental Alaska, between 147°00′ W long and 140°00′ W long, and southward to the limits of the US EEZ, as described in the current edition of NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass), excluding area 649. |
| 649 | *Prince William Sound.* Includes those waters of the State of Alaska inside the base line as specified in Alaska State regulations at 5 AAC 28.200. |
| 650 | *Eastern GOA Regulatory Area, Southeast Outside District.* East of 140°00′ W long and southward to the limits of the US EEZ as described in the current edition of NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass), excluding area 659. |
| 659 | *Eastern GOA Regulatory Area, Southeast Inside District.* As specified in Alaska State regulations at 5 AAC 28.105 (a)(1) and (2). |
| 690 | *GOA Outside the U.S. EEZ.* As described in the current editions of NOAA chart INT 813 (Bering Sea, Southern Part) and NOAA chart 500 (West Coast of North America, Dixon Entrance to Unimak Pass). |

NOTE: A statistical area is the part of a reporting area contained in the EEZ.

[FR Doc. 04–9297 Filed 4–20–04; 4:31 pm]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 69, No. 79
Friday, April 23, 2004

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.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 71

### Regulations for the Safe Transport of Radioactive Material; Solicitation of Proposed Changes

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Solicitation of proposed changes.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) and the U.S. Department of Transportation (DOT) are jointly seeking proposed changes to the International Atomic Energy Agency (IAEA) Regulations for the Safe Transport of Radioactive Material (referred to as TS–R–1). The proposed changes that are submitted by the U.S. and other IAEA member states and International Organizations might necessitate subsequent domestic compatibility rulemakings by both the NRC and the DOT.

**DATES:** Proposed changes will be accepted until June 7, 2004. Proposed changes received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for proposed changes received on or before this date.

**ADDRESSES:** Mail proposed changes to Michael Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand deliver proposed changes to Two White Flint North, 11545 Rockville Pike (Mail Stop T6D59), Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays.

**FOR FURTHER INFORMATION CONTACT:** John Cook, Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–8521; e-mail: *jrc1@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

The IAEA periodically revises its Regulations for the Safe Transport of Radioactive Material (TS–R–1) to reflect new information and accumulated experience. The DOT is the U.S. competent authority before the IAEA for radioactive material transportation matters. The NRC provides technical support to the DOT in this regard, particularly with regard to Type B and fissile packages.

The IAEA has recently initiated the review cycle for the 2007 edition of TS–R–1. The IAEA's review process calls for Member States and International Organizations to provide proposed changes to the IAEA by July 15, 2004. The objective is publication of revised regulations in 2007, nominally to become effective worldwide in 2009. To assure opportunity for public involvement in the international regulatory development process, the DOT and the NRC are soliciting proposed changes at this time. This information will assist the DOT and the NRC in having a full range of views as the agencies develop the proposed changes the U.S. will submit to the IAEA.

Proposed changes must be submitted in writing (electronic file on disk in Word format preferred) and are to include:

- Name;
- Address;
- Telephone no.;
- Fax no.;
- E-mail address;
- Objective of change/regulatory problem (*e.g.*, a description of the problem being addressed and its consequences);
- Justification for change (*e.g.*, the proposed change maintains safety in transport, is risk-informed, and is effective and efficient (*e.g.*, does not impose an undue burden on shippers or carriers));
- TS–R–1 paragraphs affected (existing text, and proposed new text);
- Modification of or additional guidance material (existing text, and proposed new text); and
- Reference(s) and/or reference material as needed.

The NRC and the DOT will review the proposed changes and rationales received by June 7, 2004. Based in part on the information, the agencies will determine the U.S. proposed changes to be submitted to IAEA by July 15, 2004.

Proposed changes from all Member States and International Organizations will be considered at an IAEA Review Panel Meeting to be convened by IAEA on September 27—October 1, 2004, in Vienna, Austria. Prior to that meeting, the DOT and the NRC anticipate holding a public meeting to solicit comment on all (including U.S.) proposed changes submitted to the IAEA. Note that future domestic rulemakings, if necessary, will continue to follow established rulemaking procedures, including the opportunity to formally comment on proposed rules.

Dated in Rockville, Maryland, this 23rd day of April, 2004.

For the Nuclear Regulatory Commission.

**John R. Cook,**

*Senior Transportation Safety Scientist, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 04–9226 Filed 4–22–04; 8:45 am]

BILLING CODE 7590–01–P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### 12 CFR Part 32

**[Docket No. 04–11]**

**RIN 1557–AC83**

### Lending Limits Pilot Program

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is proposing to extend for three years an OCC pilot program that authorizes new, special lending limits for 1–4 family residential real estate loans and small business loans. Under the program, eligible national banks with main offices located in states that have a lending limit available for residential real estate loans or small business loans that is higher than the current Federal limit, may apply to take part in the pilot and make use of the higher limits. The pilot program will expire on June 11, 2004, although national banks approved to participate in the program as of that date may continue to lend under the higher limits until September 10, 2004. While our preliminary analysis indicates that

the pilot program has operated in a safe and sound manner, additional experience with the program is needed before we can make a determination to retain, modify, or rescind these special lending limits. Accordingly, the proposal would extend the pilot program for an additional three years. The proposal also seeks comment on expansion or modification of the scope of the current pilot program.

**DATES:** Comments must be received by May 24, 2004.

**ADDRESSES:** Please designate the OCC in your comment and include the docket number 04–11. Because paper mail in the Washington area and at OCC may be subject to delays, please submit your comments by e-mail or fax whenever possible. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OCC Web Site: http://www.occ.treas.gov.* Click on "Contact the OCC," scroll down and click on "Comments on Proposed Regulations."
- *E-mail address: regs.comments@occ.treas.gov.*
- *Fax:* (202) 874–4448.
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Public Reference Room, Mail Stop 1–5, Washington, DC 20219.
- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Reference Room, Mail Stop 1–5, Washington, DC 20219.

*Instructions:* As a general rule, the OCC will enter all comments received into the docket without change, including any business or personal information that you provide. The Freedom of Information Act (FOIA) protects certain information, such as trade secrets and commercial or financial information from disclosure. You may request, and the OCC may grant, confidential treatment for items of information in your comment that you identify as protected under FOIA.

You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Reference Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874–5043.
- *Viewing Comments Electronically:* You may request e-mail or CD–ROM copies of comments that the OCC has received by contacting the OCC's Public Reference Room at *foia-pa@occ.treas.gov.*
- *Docket:* You may also request available background documents using the methods described earlier.

**FOR FURTHER INFORMATION CONTACT:** Tom O'Dea, National Bank Examiner, Credit Risk, (202–874–5170); Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090, Mitchell Plave, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090, or Jonathan Fink, Senior Attorney, Bank Activities and Structure, (202) 874–5300.

**SUPPLEMENTARY INFORMATION:**

## Background

Twelve U.S.C. 84 governs the percentage of capital and surplus that a bank may loan to any one borrower. Section 84 and the OCC's implementing regulations, 12 CFR part 32, permit a national bank to make loans in an amount up to 15 percent of its unimpaired capital and surplus to a single borrower. A national bank may extend credit up to an additional 10 percent of unimpaired capital and surplus to the same borrower if the amount of the loan that exceeds the 15 percent limit is secured by "readily marketable collateral." Part 32 refers to these lending limits as the "combined general limit." The statute and regulation also provide other exceptions to, and exemptions from, the combined general limit for various types of loans and extensions of credit.

Section 84 authorizes the OCC to establish lending limits "for particular classes or categories of loans" that are different from those expressly provided by the statute's terms. Effective September 10, 2001, the OCC published a final rule (2001 final rule) to amend part 32 to establish a pilot program with special lending limits for residential real estate loans and small business loans. 66 FR 31114 (June 11, 2001). The purpose of the program was to enable community banks to remain competitive in states that provide their state-chartered institutions with a higher lending limit for these types of loans, while maintaining national bank safety and soundness.

For purposes of the pilot program, a residential real estate loan is a loan secured by a perfected first-lien security interest in one-to-four family real estate in an amount that does not exceed 80 percent of the appraised value of the collateral at the time the loan is made. A small business loan is a loan secured by "nonfarm, nonresidential property" or a "commercial and industrial loan" as those terms are defined in the instructions for preparation of the Consolidated Report of Condition and Income (Call Report), Schedule RC–C, Part 1, 1.e and 4 (rev. 3–03).

The pilot program authorizes eligible national banks to apply for approval to make residential real estate loans and small business loans to a single borrower in addition to amounts that they may already lend to a single borrower under the existing combined general limit and special limits in 12 CFR 32.3(a) and (b). A bank is eligible for the pilot program only if it is well capitalized, as defined in 12 CFR 6.4(b)(1), and has a rating of 1 or 2 under the Uniform Financial Institutions Rating System (UFIRS), with at least a rating of 2 for asset quality and for management. These criteria ensure that only banks with sufficient capital and good managerial oversight are permitted to use the increased limits.

Under the pilot program, an eligible national bank may make residential loans in an additional amount up to the lesser of 10 percent of its capital and surplus, or the percent of its capital and surplus in excess of 15 percent that a state bank is permitted to lend under the state lending limit that is available for residential real estate loans or unsecured loans in the state where the main office of the national bank is located. Similarly, an eligible national bank may make small business loans in an additional amount up to the lesser of 10 percent of capital and surplus or the percent of its capital and surplus in excess of 15 percent that a state bank is permitted to lend under the state lending limit that is available for small business loans or unsecured loans in the state where the main office of the national bank is located. In each case, the bank may not lend more than $10 million to a single borrower under the new authority.

The OCC adopted a number of safeguards that apply to banks using the authority under the pilot program. For example, the amount that a bank may lend under the pilot program's special limits is subject to an individual borrower cap and an aggregate borrower cap. Under the individual borrower cap, the total outstanding amount of a bank's loans to one borrower under 12 CFR 32.3(a) and (b), together with loans made under the program, may not exceed 25 percent of the bank's capital and surplus. The aggregate cap provides that the total outstanding amount of any loan or parts of loans made by a bank to all of its borrowers under the special limits of the pilot program may not exceed 100 percent of the bank's capital and surplus.

A bank must apply and obtain the OCC's approval before it may use the

special lending limits. The application includes a certification that the bank is well capitalized and has the requisite ratings, citation to state law on lending limits, a copy of a written resolution by a majority of the bank's board of directors approving the use of the new lending authority, and a description of how the board will exercise its continuing responsibility to oversee the use of this lending authority.

**Description of the Proposal**

The pilot program is scheduled to expire on June 11, 2004, although national banks approved to participate in the program as of June 11, 2004 can continue to lend under the extended limits until September 10, 2004. The OCC stated in the preamble to the 2001 final rule that prior to the conclusion of the pilot program it would evaluate its experiences and determine whether, and under what circumstances, to extend the program.

As of the end of February 2004, 169 national banks headquartered in 23 states had received approval to participate in the program. The OCC compared the performance of 129 banks that participated in the program to that of comparable state-chartered banks and national banks that did not participate in the program focusing on: (1) Loan portfolio composition; (2) asset quality; (3) liquidity and capital; and (4) differences in interest expense, non-interest expense and profitability indicators between participating banks and their peers. Based on this review, the OCC could not attribute any statistical differences directly to participation in the program. In the OCC's view, banks in the program have not had the additional lending authority for a sufficient period of time for the OCC to assess fully the effects of their participation in the program. In particular, the limited number of banks in the program, and the relatively small number of quarters of data available for review, make reaching a definitive conclusion about the program premature.

For these reasons, this proposal would amend 12 CFR part 32 to continue the pilot program in its current form until June 11, 2007. Banks that receive OCC approval to participate in the program before June 11, 2007, would be authorized to lend under the expanded limits until September 10, 2007, provided that a bank continues to be an "eligible bank" as defined in 12 CFR 32.2(i). Banks already approved under the pilot program need not do anything further to continue their approval.

The OCC invites comment on all aspects of this proposal, including whether to continue the pilot program as proposed and, if it is continued, whether to modify it for the next three-year period. Commenters recommending modifications that would expand the types of loans covered by, or otherwise liberalize the program are encouraged to identify appropriate safeguards to ensure that the changes they propose are consistent with safety and soundness.

Commenters urging the expansion of the pilot program also are asked to describe situations or circumstances in which a higher state lending limit has competitively disadvantaged a national bank in that lending market. For example, in what circumstances has the current scope of the pilot program prevented the bank from making loans?

The part 32 lending limits apply to all loans and extensions of credit made by national banks and their "domestic operating subsidiaries." The OCC is aware that some national banks control entities authorized by statute ("statutory subsidiaries") other than operating subsidiaries or financial subsidiaries (*e.g.*, agricultural credit corporations) that make loans that are currently excluded from the part 32 lending limits. The OCC invites comment on the current treatment of such "statutory subsidiaries," including whether the current treatment provides a means to achieve additional flexibility in agricultural lending, and whether, and if so how, loans by such entities should be included in the scope of the part 32 lending limits.

**Solicitation of Comments on Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

**Solicitation of Comments on Impact on Community Banks**

The OCC adopted the pilot program following a review of our regulations that focused specifically on ways to change the regulations to respond to community bank needs. 66 FR 31114, 31115 (June 11, 2001). The purpose of the review was to explore ways in which our regulations could be modified, consistent with safety and soundness, to reflect the fact that community banks operate with more limited resources, and often different risk profiles, than larger institutions. Our goal was to identify alternative regulatory approaches to minimize the burden on community banks and promote their competitiveness.

The OCC seeks comments on how community banks assess the program and on the impact of the proposal on community banks' current resources and available personnel with requisite expertise. The OCC also seeks comments on whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

**Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act (RFA) requires Federal agencies either to certify that a proposed rule would not, if adopted in final form, have a significant impact on a substantial number of small entities or to prepare an initial regulatory flexibility analysis (IRFA) of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 605. On the basis of the information currently available, the OCC is of the opinion that this proposal, if adopted in final form, is unlikely to have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Commenters are invited to provide the OCC with any information they may have about the likely quantitative effects of the proposal.

**Executive Order 12866**

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866.

**Unfunded Mandates Reform Act of 1995 Determinations**

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before

promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. The OCC has determined that this proposal will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

**Paperwork Reduction Act**

The Office of Management and Budget (OMB) has reviewed and approved the collection of information requirements contained in the pilot program under control number 1557–0221, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). However, because OCC is proposing to extend the pilot program, we invite comment on:

(1) Whether the proposed collection of information contained in this notice of proposed rulemaking is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(2) The accuracy of the OCC's estimate of the burden of the proposed information collection;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collection on the respondents, including the use of automated collection techniques or other forms of information technology; and

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

**List of Subjects in 12 CFR Part 32**

National banks, Reporting and recordkeeping requirements.

**Authority and Issuance**

For the reasons set forth in the preamble, part 32 of chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 32—LENDING LIMITS

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

**Authority:** 12 U.S.C. 1 *et seq.*, 84, and 93a.

2. In § 32.7, paragraphs (c) and (e) are revised to read as follows:

**§ 32.7 Pilot program for residential real estate and small business loans.**

* * * * *

(c) *Duration of approval.* Except as provided in paragraph (d) of this section, a national bank that has received OCC approval may continue to make loans and extensions of credit under the special lending limits in paragraphs (a)(1) and (2) of this section until the date three years after September 10, 2004, provided the bank remains an "eligible bank."

* * * * *

(e) *Duration of pilot program.* The pilot program will terminate on June 11, 2007, unless it is terminated sooner by the OCC.

* * * * *

Dated: April 20, 2004.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

[FR Doc. 04–9360 Filed 4–22–04; 8:45 am]

**BILLING CODE 4810–33–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP Memphis 04–001]**

**RIN 1625–AA00**

## Safety Zone; Lower Mississippi River Mile Marker 778.0 to 781.0, Osceola, AR

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a temporary safety zone for all the waters of the Lower Mississippi River from mile 778.0 and to mile 781.0, extending the entire width of the channel. This proposed safety zone is needed to protect construction personnel, equipment, and vessels involved in the construction of ten bendway weir sites. Entry into this proposed zone during the enforcement periods would be prohibited unless specifically authorized by the Captain of the Port Memphis or a designated representative.

**DATES:** Comments and related material must reach the Coast Guard on or before June 22, 2004.

**ADDRESSES:** You may mail comments and related material to U.S. Coast Guard, Marine Safety Office Memphis, 200 Jefferson Avenue, Suite 1301, Memphis, Tennessee 38103–2300, Attn: Chief Petty Officer James Dixon. Marine Safety Office Memphis maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Marine Safety Office Memphis, 200 Jefferson Avenue, Suite 1301, Memphis, Tennessee, 38103–2300 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Chief Petty Officer (CPO) James Dixon, Marine Safety Office Memphis at (901) 544–3941, extension 2116.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [COTP Memphis 04–001], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

**Public Meeting**

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Marine Safety Office Memphis at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register.**

**Background and Purpose**

On February 26, 2004, the Army Corps of Engineers requested a channel closure for the Lower Mississippi River from mile 778.0 to 781.0, to occur daily from 6 a.m. until 6 p.m. beginning on August 1, 2004 and ending on September 30, 2004. The effective dates for this proposed rule are based upon the best available information and may change. This closure is needed to protect construction personnel, equipment, and vessels from potential safety hazards associated with vessels transiting in the vicinity of ten,

bendway weir construction sites. These ten bendway weir sites are located on the left descending bank, in the vicinity of Driver Bar between mile 778.0 and 781.0, Lower Mississippi River. Construction of the bendway weirs is needed to maintain the integrity of the left descending bank of the Mississippi River at the project site and can only be performed under optimal conditions. During working hours, construction equipment will be located in the navigable channel creating a hazard to navigation. A safety zone is needed to protect construction personnel, equipment, and vessels involved in the construction of ten bendway weir sites. During non-working hours, the construction equipment will be moved out of the channel, allowing vessels unrestricted passage through the safety zone.

**Discussion of Proposed Rule**

The Captain of the Port Memphis proposes to establish a temporary safety zone for all the waters of the Lower Mississippi River from mile 778.0 to mile 781.0. Entry into this proposed zone by vessels other than those contracted by the U.S. Army Corps of Engineers and operating in support of the bendway weir construction project, would be prohibited unless specifically authorized by the Captain of the Port Memphis or a designated representative. This proposed regulation would be effective from 6 a.m. on August 1, 2004 until 6 p.m. on September 30, 2004. This proposed rule would only be enforced from 6 a.m. until 6 p.m. each day of the effective period. During non-enforcement hours all vessels would be allowed to transit through the safety zone without permission from the Captain of the Port Memphis or a designated representative. The Captain of the Port Memphis or a designated representative would inform the public through broadcast notice to mariners of any changes to the enforcement periods for the safety zone. The Captain of the Port Memphis may permit vessels to navigate through the safety zone during work hours if conditions allow for safe transit. A broadcast notice to mariners would be issued announcing those times when it is safe to transit.

**Regulatory Evaluation**

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

This proposed rule would be enforced for 12 hours each day that it is effective. During non-enforcement hours all vessels would be allowed to transit through the safety zone without permission from the Captain of the Port Memphis or a designated representative. The Captain of the Port Memphis or a designated representative would inform the public through broadcast notice to mariners of changes to the enforcement periods for the safety zone. The Captain of the Port Memphis may permit vessels to transit through the safety zone during work hours if conditions allow for safe transit. A broadcast notice to mariners would be issued announcing those times when it is safe to transit. The impacts on routine navigation are expected to be minimal.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit the waters of the Lower Mississippi River, Mile Marker 778.0 to 781.0 daily from 6 a.m. on August 1, 2004 until 6 p.m. on September 30, 2004.

This proposed rule zone would not have a significant economic impact on a substantial number of small entities for the following reasons: (1) This proposed rule would be enforced from 6 a.m. until 6 p.m. on each day that it is effective; (2) During non-enforcement hours all vessels would be allowed to transit through the safety zone without permission from the Captain of the Port Memphis or a designated representative; (3) The Captain of the Port Memphis may permit vessels to transit through the safety zone during work hours if conditions allow for safe transit.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Chief Petty Officer James Dixon at (901) 544–3941, extension 2116.

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because this rule is not expected to result in any significant adverse environmental impact as described in the National Environmental Policy Act of 1969 (NEPA).

A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

**List of Subjects in 33 CFR Part 165**

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. From August 1, 2004, to September 30, 2004, add temporary § 165.T08–024 to read as follows:

**§ 165.T08–024 Safety Zone; Lower Mississippi River Mile Marker 778.0 to 781.0, Osceola, AR.**

(a) *Location.* The following area is a safety zone: all waters of the Lower Mississippi River from mile 778.0 to mile 781.0, extending the entire width of the channel.

(b) *Effective period.* This section is effective from 6 a.m. on August 1, 2004, until 6 p.m. on September 30, 2004.

(c) *Enforcement period.* This section will be enforced from 6 a.m. until 6 p.m. each day of the effective period. The Captain of the Port Memphis or a designated representative will inform the public through broadcast notice to mariners of any changes to the enforcement periods for the safety zone.

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone by vessels other than those contracted by the U.S. Army Corps of Engineers and operating in support of the bendway weir construction project is prohibited unless authorized by the Captain of the Port Memphis.

(2) During non-enforcement hours all vessels are permitted to transit through the safety zone without permission from the Captain of the Port Memphis or a designated representative.

(3) The Captain of the Port Memphis may permit vessels to navigate during work hours if conditions allow for safe transit. A broadcast notice to mariners will be issued announcing those times when it is safe to transit.

(4) Persons or vessels requiring entry into or passage through the zone at times other than those specified in section (d)(2) and (d)(3) of this section must request permission from the Captain of the Port Memphis or a designated representative. The Captain of the Port Memphis may be contacted by telephone at (901) 544–3912, extension 2124. Coast Guard Group Lower Mississippi River may be contacted on VHF-FM Channel 13 or 16.

(5) All persons and vessels shall comply with the instructions of the Captain of the Port Memphis and designated representatives. Designated representatives include Coast Guard Group Lower Mississippi River.

Dated: April 6, 2004.

**D.C. Stalfort,**

*Commander, U.S. Coast Guard, Captain of the Port Memphis.*

[FR Doc. 04–9199 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–15–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[R04–OAR–2004–KY–0001–200415; FRL–7653–1]**

### Approval and Promulgation of Implementation Plans; KY: 1-Hour Ozone Maintenance Plan Update for Lexington Area

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to approve the Lexington portion of a draft revision to the state implementation plan (SIP) of the Commonwealth of Kentucky submitted on February 19, 2004. The draft SIP revision provides the 10-year update to the original 1-hour ozone maintenance plans for five 1-hour maintenance areas, including the Lexington Maintenance Area, which is composed of the Kentucky counties of Fayette and Scott. Kentucky has requested that EPA parallel process this draft SIP revision, for which the Commonwealth scheduled a public hearing on March 31, 2004. EPA is parallel processing the Lexington portion of this draft SIP revision and is proposing to approve the Lexington portion because it satisfies the requirement of the Clean Air Act (CAA) for the 10-year update to the 1-hour

ozone maintenance plan for the Lexington Maintenance Area. EPA's proposed approval of the Lexington Maintenance Area's second 10-year 1-hour ozone maintenance plan is contingent on Kentucky addressing EPA's clarifying comments in the final SIP submittal.

In addition, in this proposed rulemaking, EPA is providing information on the status of its transportation conformity adequacy determination for new motor vehicle emission budgets (MVEBs) for the year 2015 that are contained in the draft 10-year update to the 1-hour ozone maintenance plan for the Lexington Maintenance Area.

**DATES:** Written comments must be received on or before May 24, 2004.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID No. R04–OAR–2004–KY–0001, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Agency Web site: http://docket.epa.gov/rmepub/ RME,* EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. *E-mail: notarianni.michele@epa.gov.*

4. *Fax:* (404) 562–9019.

5. *Mail:* "R04–OAR–2004–KY–0001", Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

6. *Hand Delivery or Courier.* Deliver your comments to: Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division 12th floor, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

*Instructions:* Direct your comments to RME ID No. R04–OAR–2004–KY–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://docket.epa.gov/rmepub,* 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 RME, regulations.gov, or e-mail. The EPA RME website and the federal regulations.gov website are "anonymous access" systems, 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 RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the RME index at *http://docket.epa.gov/rmepub.* Although listed in the index, some information is not publicly available, *i.e.*, 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 electronically in RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9031. E-mail: *notarianni.michele@epa.gov.* or Lynorae Benjamin, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9040. E-mail: *benjamin.lynorae@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. What is the background for this action?
II. What is EPA's analysis of the Lexington Maintenance Area's second 10-year plan?
III. What is EPA's Proposed Action on the Lexington Maintenance Area's second 10-year plan?
IV. What is an adequacy determination and what is the status of EPA's adequacy determination for the Lexington Maintenance Area's new MVEB for the year 2015?
V. Statutory and Executive Order Reviews

## I. What Is the Background for This Action?

The air quality maintenance plan is a requirement of the 1990 CAA for nonattainment areas that come into compliance with the national ambient air quality standard (NAAQS) to assure their continued maintenance of that standard. Eight years after redesignation to attainment, Section 175A(b) of the CAA requires the state to submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for the ten years following the initial ten-year period (this is known as the second 10-year plan). This second 10-year plan updates the original 10-year 1-hour ozone maintenance plan for the next 10-year period.

EPA designated the Kentucky counties of Fayette and Scott of the Lexington Metropolitan Statistical Area as marginal nonattainment for the 1-hour ozone NAAQS on November 6, 1991, (56 FR 56694), effective on January 6, 1992. EPA approved the redesignation of Fayette and Scott Counties (*i.e.*, Lexington Maintenance Area) to attainment for the 1-hour ozone standard, on September 11, 1995, (60 FR 47092), effective on November 13, 1995. In this same rulemaking, EPA also approved the Lexington Maintenance Area's plan for maintaining the 1-hour ozone NAAQS for the time period 1994 through 2004.

On February 19, 2004, Kentucky submitted to EPA a draft SIP revision for parallel processing to provide for the 10-year update to the original maintenance plans for five 1-hour ozone maintenance

areas as required by Section 175A(b) of the CAA. Specific to the Lexington Maintenance Area, the draft revision provides an update to the Lexington 1-Hour Ozone Maintenance Plan for the next 10 years, *i.e.*, 2005 through 2015. This draft 10-year update for the Lexington Maintenance Area includes updated MVEBs for the year 2004 and establishes new MVEBs for the year 2015. EPA is parallel processing the Lexington portion of Kentucky's draft SIP revision and is proposing approval of the Lexington Maintenance Area's 10-year update for its 1-hour ozone maintenance plan, including approval of the updated 2004 MVEBs and the newly-established 2015 MVEBs, because EPA has determined that the draft Plan complies with the requirements of Section 175A of the CAA.

**II. What Is EPA's Analysis of the Lexington Maintenance Area's Second 10-Year Plan?**

The Commonwealth's draft SIP revision includes a second 10-year draft maintenance plan for the Lexington Maintenance Area that indicates continued maintenance of the 1-hour ozone standard through 2015. The draft revision also includes a new ozone precursor emission inventory for 2000 for Fayette and Scott Counties which reflects any emission controls applicable for the area, and projected emissions for 2004, 2005, 2009, 2012, and 2015. The draft revision updates the MVEBs for the Lexington Maintenance Area for 2004, and establishes new MVEBs for 2015.

The emission reduction measures for ozone precursor emissions implemented in the Lexington Maintenance Area from 1990 through 2000, and those implemented after 2000 and projected to 2015, are accounted for in the 2000 emission inventory and projected emissions estimates for 2004–2015. The following two tables provide emissions data and projections, calculated using MOBILE6.2, for the ozone precursors, volatile organic compounds (VOC) and nitrogen oxides ($NO_X$). Italicized figures in Tables 1 and 2 highlight data comprising the 2004 and 2015 MVEBs presented in Table 3.

TABLE 1.—LEXINGTON 1 HOUR OZONE MAINTENANCE AREA

[VOC Emissions (Tons Per Day)]

[Year 2000 Emission Inventory and Projected VOC Emissions (2004–2015)]

| County | Source category | 2000 | 2004 | 2005 | 2009 | 2012 | 2015 |
|---|---|---|---|---|---|---|---|
| Fayette | Point | 1.21 | 1.30 | 1.33 | 1.35 | 1.37 | 1.47 |
| | Area | 10.91 | 11.48 | 11.62 | 12.22 | 12.58 | 13.08 |
| | Highway | 17.63 | *14.82* | 13.57 | 11.09 | 9.43 | *8.32* |
| | Non-Hwy | 5.19 | 4.46 | 4.18 | 3.45 | 3.32 | 3.35 |
| | Total | 34.94 | 32.06 | 30.70 | 28.11 | 26.70 | 26.22 |
| Scott | Point | 11.99 | 13.61 | 14.06 | 15.97 | 16.55 | 17.93 |
| | Area | 2.11 | 2.38 | 2.46 | 2.80 | 3.06 | 3.34 |
| | Highway | 3.99 | *3.32* | 3.06 | 2.71 | 2.45 | *2.27* |
| | Non-Hwy | 0.50 | 0.40 | 0.39 | 0.31 | 0.28 | 0.28 |
| | Total | 18.59 | 19.71 | 19.97 | 21.79 | 22.34 | 23.82 |
| Maintenance Area Total | | | 53.53 | 51.77 | 50.67 | 49.90 | 49.04 | 50.04 |
| Safety Margin | | | N/A | 1.76 | 2.86 | 3.63 | 4.94 | 3.49 |

TABLE 2.—LEXINGTON 1-HOUR OZONE MAINTENANCE AREA

[$NO_X$ Emissions (Tons Per Day)]

[Year 2000 Emission Inventory and Projected $NO_X$ Emissions (2004–2015)]

| County | Source category | 2000 | 2004 | 2005 | 2009 | 2012 | 2015 |
|---|---|---|---|---|---|---|---|
| Fayette | Point | 2.08 | 2.21 | 2.24 | 2.40 | 2.48 | 2.57 |
| | Area | 0.29 | 0.30 | 0.30 | 0.33 | 0.33 | 0.34 |
| | Highway | 23.26 | 20.80 | 19.84 | 15.87 | 12.47 | 9.73 |
| | Non-Hwy | 10.03 | 9.61 | 9.52 | 8.72 | 8.23 | 8.11 |
| | County Total | 35.66 | 32.92 | 31.90 | 27.32 | 23.51 | 20.75 |
| Scott | Point | 0.69 | 0.77 | 0.79 | 0.88 | 0.91 | 0.99 |
| | Area | 0.14 | 0.16 | 0.16 | 0.18 | 0.20 | 0.22 |
| | Highway | 7.50 | 6.56 | 6.33 | 5.40 | 4.40 | 3.54 |
| | Non-Hwy | 2.80 | 2.80 | 2.81 | 2.74 | 2.73 | 2.81 |
| | County Total | 11.13 | 10.29 | 10.09 | 9.20 | 8.24 | 7.56 |
| Maintenance Area Total | | 46.79 | 43.21 | 41.99 | 36.52 | 31.75 | 28.31 |
| Safety Margin | | N/A | 3.58 | 4.80 | 10.27 | 15.04 | 18.48 |

A "safety margin" is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. The safety margin is for the entire

Lexington Area and is not sub-allocated by county. For example, the Lexington Area attained the 1-hour ozone NAAQS based on air quality data for the 1988–1990 time period. The Lexington Area originally used 1990 as its attainment year and as the base year for calculations to demonstrate maintenance. In this draft revision, the year 2000 is used as the new attainment level of emissions for the area. Because MOBILE6.2 was used to calculate the emission levels and projections for years 2000–2015, the 1990 emission levels calculated using MOBILE5 are not included in this document for comparison.

The emissions from point, area, nonroad, and mobile sources in 2000 equal 53.53 tons per day (tpd) of VOC for the entire Lexington Area. Projected VOC emissions out to the year 2015 equal 50.04 tpd of VOC. The safety margin for VOCs is calculated to be the difference between these amounts or, in this case, 3.49 tpd of VOC for 2015. By this same method, 18.48 tpd (*i.e.*, 46.79 tpd less 28.31 tpd) is the safety margin for $NO_X$ for 2015. The emissions are projected to maintain the area's air quality consistent with the NAAQS. The safety margin credit, or a portion thereof, can be allocated to the transportation sector. The total emission level must stay below the attainment level to be acceptable. The safety margin is the extra emissions that can be allocated as long as the total attainment level of emissions is maintained.

Maintenance plans and other control strategy SIPs create MVEBs for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEB is the portion of the total allowable emissions that is allocated to highway and transit vehicle use and emissions. The MVEB serves as a ceiling on emissions from an area's planned transportation system. In this draft revision, Kentucky used MOBILE6.2 to update the Lexington MVEBs for 2004, in addition to establishing MVEBs for VOC and $NO_X$ for the year 2015. In today's action, EPA is proposing to approve both revisions to the 2004 MVEBs and the establishment of the 2015 MVEBs for the Lexington Maintenance Area. These MVEBs are listed in Table 3 and described below.

TABLE 3.—LEXINGTON 1-HOUR OZONE MAINTENANCE AREA

[MVEBs (Tons Per Day)]

| Lexington area | 2004 VOC | 2015 VOC | 2004 $NO_X$ | 2015 $NO_X$ |
|---|---|---|---|---|
| Fayette County | 14.82 | 8.32 | 20.80 | 9.73 |
| Scott County | 3.32 | 2.27 | 6.56 | 3.54 |
| MVEBs | 18.14 | 10.59 | 27.36 | 13.27 |

The MVEBs presented in Table 3 are directly reflective of the combined onroad (or "highway") emissions for Fayette and Scott Counties for VOC and $NO_X$, which are presented in italicized text in Tables 1 and 2. These onroad emissions are included in Table 3 to show how the 2004 and 2015 MVEBs were derived and to demonstrate that none of the available safety margins for VOC and $NO_X$ were allocated to the MVEBs. Thus, the safety margins listed in Tables 1 and 2 represent the available safety margins.

**III. What Is EPA's Proposed Action on the Lexington Maintenance Area's Second 10-year Plan?**

EPA is proposing to approve Kentucky's draft SIP revision pertaining to the Lexington Maintenance Area's 10-year update for its 1-hour ozone maintenance plan. This revision was submitted by the Commonwealth, through the Kentucky Environmental and Public Protection Cabinet, on February 19, 2004, for parallel processing as part of a larger package which includes four other 1-hour ozone maintenance plan updates. Under the parallel processing procedure, the Regional Office works closely with the Commonwealth of Kentucky while the Commonwealth is developing new or revised regulations. The Commonwealth submits a copy of the proposed regulation or other revisions to EPA before conducting its public hearing. EPA reviews this proposed state action, and prepares a notice of proposed rulemaking. EPA's notice of proposed rulemaking is published in the **Federal Register** during the same time frame that the Commonwealth is holding its public hearing. The Commonwealth is conducting a public hearing on this proposed revision on March 31, 2004. The Commonwealth and EPA then provide for concurrent public comment periods on both the state action and the Federal action. After the Commonwealth submits the formal SIP revision request (including a response to all public comments raised during the Commonwealth's public participation process, and the approved, amended Lexington 1-Hour Ozone Maintenance Plan), EPA will prepare a final rulemaking notice. If the Commonwealth's formal SIP submittal contains changes which occur after EPA's notice of proposed rulemaking, such changes must be described in EPA's final rulemaking action. If the Commonwealth's changes are significant, then EPA must decide whether it is appropriate to re-propose the Commonwealth's action.

EPA's proposed approval of the Lexington Maintenance Area's second 10-year 1-hour ozone maintenance plan is contingent on Kentucky addressing EPA's clarifying comments in the final SIP submittal. In particular, the safety margin for the budget years of 2004 and 2015 must be clearly documented in the narrative portion of the submittal for both VOC and $NO_X$. Additionally, comparisons of the 1990 emissions inventory based on MOBILE5 to 2000 inventory data and future year projections based on MOBILE6.2 must be corrected; data derived from these two versions of the MOBILE model cannot be compared for SIP purposes.

As part of this proposed approval, EPA is proposing to approve both the revisions to the 2004 MVEBs and the newly-established 2015 MVEBs for the Lexington Maintenance Area. Once EPA approves the revised 2004 and new 2015 MVEBs in a final rulemaking on this action, the Lexington Area must use the revised MVEBs for future transportation conformity determinations effective the date of publication of EPA's approval of the MVEBs in the **Federal Register**. More information on transportation conformity is contained in section IV below.

**IV. What Is an Adequacy Determination and What Is the Status of EPA's Adequacy Determination for the Lexington Maintenance Area's New MVEB for the Year 2015?**

Under the CAA, States are required to submit, at various times, control strategy SIPs and maintenance plans in ozone areas. These control strategy SIPs (*e.g.*,

reasonable further progress SIPs and attainment demonstration SIPs) and maintenance plans create MVEBs for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEBs are the portion of the total allowable emissions that is allocated to highway and transit vehicle use and emissions. The MVEBs serve as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble also describes how to establish and revise MVEBs in the SIP.

Under Section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must "conform" to (*e.g.*, be consistent with) the part of the State's air quality plan that addresses pollution from cars and trucks. "Conformity" to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. Under the transportation conformity rule, at 40 CFR part 93, projected emissions from transportation plans and programs must be equal to or less than the MVEBs for the area. If a transportation plan does not "conform," most projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

Until a MVEB in a SIP submittal is approved by EPA, it cannot be used for transportation conformity purposes unless EPA makes an affirmative finding that the MVEBs contained therein are "adequate." Once EPA affirmatively finds the submitted MVEBs adequate for transportation conformity purposes, those MVEBs can be used by the State and Federal agencies in determining whether proposed transportation projects "conform" to the SIP even though EPA approval of the SIP revision containing those MVEBs has not yet been finalized. EPA's substantive criteria for determining "adequacy" of MVEBs in submitted SIPs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining "adequacy" of MVEBs in submitted SIPs consists of three basic steps: public notification of a SIP submission, a public comment period, and EPA's adequacy finding. This process for determining the adequacy of submitted SIP MVEBs is set out in EPA's May 1999 guidance, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision." This guidance is incorporated into EPA's June 30, 2003, proposed rulemaking entitled "Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes" (68 FR 38974). EPA follows this guidance in making its adequacy determinations.

EPA's "adequacy" processing guidance allows EPA to "parallel process" a MVEB adequacy review. Under parallel processing, as noted above, the Commonwealth submits a proposed SIP to EPA, and the Commonwealth and EPA then request public comment on the proposed SIP and the adequacy of the MVEBs included in the SIP at the same time. If no significant adverse comments are received at either the Commonwealth or Federal levels, EPA could then make an adequacy finding as soon as the state formally adopts the SIP and submits it to EPA, as long as no substantive changes to the SIP have occurred that would affect the adequacy of the MVEBs. However, if the formal maintenance plan submission changes in a way that affects the adequacy of the proposed MVEBs, the adequacy review process would start over; EPA would announce that it has a submitted SIP under adequacy review and reopen the public comment period.

The Lexington Maintenance Area's draft second 10-year maintenance plan submission contains new proposed VOC and $NO_X$ MVEBs for the year 2015. The availability of the draft SIP submission with these 2015 MVEBs was announced for public comment on EPA's adequacy Web page on February 24, 2004, at: *http://www.epa.gov/otaq/transp/conform/currsips.htm*. The EPA public comment period on adequacy of the 2015 MVEBs for the Lexington Area closed on March 25, 2004. Following a thorough review of all public comments received and an evaluation of whether the adequacy criteria have been met, EPA will make its adequacy determination. EPA intends to make its determination of the adequacy of the 2015 MVEBs for the Lexington Area for transportation conformity purposes in the final rulemaking on the Lexington Maintenance Area's second 10-year 1-hour ozone maintenance plan submittal.

If EPA approves both the 2004 and 2015 MVEBs, and finds the 2015 MVEBs adequate for transportation conformity purposes in the final rulemaking action, the revised and new MVEBs must be used for future transportation conformity determinations. The revised 2004 MVEBs and the new 2015 MVEBs, if approved, will be effective the date of publication of EPA's final rulemaking in the **Federal Register**. For transportation plan analysis years that involve the year 2014 or before, the applicable budget for the purposes of conducting transportation conformity analyses will be the 2004 VOC (18.14 tpd) and $NO_X$ (27.36 tpd) MVEB for this maintenance area. For transportation plan analysis years that involve the year 2015 or beyond, the applicable budget for the purposes of conducting transportation conformity analyses will be the 2015 VOC (10.59 tpd) and $NO_X$ (13.27 tpd) MVEB for this maintenance area.

## V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the

distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: April 14, 2004.

**A. Stanley Meiburg,**

*Acting, Regional Administrator, Region 4.*

[FR Doc. 04–9285 Filed 4–22–04; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

**[Docket No. FEMA–D–7586]**

### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

**ADDRESSES:** The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

*Regulatory Classification.* This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This proposed rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| State | City/town/county | Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) | |
|---|---|---|---|---|---|
| | | | | Existing | Modified |
| Virginia | Stafford County | Accokeek Creek | Approximately 0.66 mile downstream of State Route 609. | None | •12 |
| | | | Approximately 350 feet upstream of State Route 628. | None | •189 |
| | | Aquia Creek | Approximately 0.79 mile downstream of Aquia Drive. | •7 | •8 |
| | | | Approximately 930 feet upstream of Tacketts Mill Road. | None | •281 |
| | | Austin Run | Approximately 0.63 mile upstream of the confluence with Aquia Creek. | None | •7 |
| | | | Approximately 285 feet upstream of Winding Creek Road (State Route 628). | None | •258 |
| | | Claiborne Run | At the upstream side of Kings Highway (State Route 3). | •39 | •41 |
| | | | Approximately 0.56 mile upstream of U.S. Route 1. | None | •168 |
| | | England Run | Approximately 185 feet upstream of the confluence with Rappahannock River. | None | •59 |
| | | | Approximately 1.0 mile upstream of State Route 670. | None | •225 |
| | | Falls Run | Approximately 1,000 feet upstream of U.S. Route 17. | •41 | •40 |
| | | | Approximately 1.06 miles upstream of Cardinal Forest Drive. | None | •345 |
| | | Little Falls Run | Approximately 1,280 feet upstream of Kings Highway. | •33 | •32 |
| | | | Approximately 0.52 mile upstream of State Route 218. | None | •142 |
| | | Tributary 2 to Austin Run | At the confluence with Tributary 3 to Austin Run. | None | •54 |
| | | | Approximately 225 feet upstream of Rockdale Road (State Route 617). | None | •149 |
| | | Tributary 3 to Austin Run | At the confluence with Austin Run | •29 | •31 |
| | | | Approximately 800 feet upstream of the confluence of Austin Run Tributary 2. | None | •54 |
| | | Whitsons Run (previously known as Tributary 1 to Austin Run). | At the confluence with Austin Run | None | •56 |
| | | | Approximately 0.65 mile upstream of Eustace Road (State Route 751). | None | •253 |

Maps available for inspection at the Stafford County Administration Center, Department of Code Administration, 1300 Courthouse Road, Stafford, Virginia.

*Send comments to Mr. Robert Crosby, Stafford County Administrator, P.O. Box 339, Stafford, Virginia 22555–0339.*

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 7, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9216 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

**[Docket No. FEMA–D–7588]**

### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

**ADDRESSES:** The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The

respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

*Regulatory Classification.* This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |
| **VIRGINIA** | | | | |
| **Albemarle County** | | | | |
| Cow Branch | At the confluence with Moores Creek | None | •333 | Albemarle County (Unincorporated Areas). |
| | Approximately 285 feet upstream of Mill Creek Drive | None | •439 | |
| Flat Branch | At the confluence with North Fork Rivanna River | None | •386 | Albemarle County (Unincorporated Areas). |
| | Approximately 4,890 feet upstream of the confluence with Flat Branch Tributary. | None | •441 | |
| Flat Branch Tributary | At the confluence with Flat Branch | None | •386 | Albemarle County (Unincorporated Areas). |
| | Approximately 2,490 feet upstream of Lewis & Clark Drive. | None | •442 | |
| Herring Branch | At the confluence with North Fork Rivanna River | None | •389 | Albemarle County (Unincorporated Areas). |
| | Approximately 2,530 feet upstream of private drive | None | •443 | |
| Jacobs Run | At the confluence with North Fork Rivanna River | None | •396 | Albemarle County (Unincorporated Areas). |
| | At the Chris Green Lake Dam | None | •396 | |
| Lickinghole Creek | Approximately 70 feet downstream of railroad bridge | •500 | •501 | Albemarle County (Unincorporated Areas). |
| | Approximately 150 feet upstream of Jarmans Gap Road. | None | •902 | |
| North Fork Rivanna River | At the confluence with Rivanna River | •352 | •356 | Albemarle County (Unincorporated Areas). |
| | Approximately 1,375 feet upstream of Dickerson Road | None | •398 | |
| Powells Creek | At the confluence with Lickinghole Creek | None | •623 | Albemarle County (Unincorporated Areas). |
| | Approximately 320 feet upstream of Railroad Avenue | None | •786 | |
| Rivanna River | At the County boundary | None | •287 | Albemarle County (Unincorporated Areas), Independent City of Charlottesville. |

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |
| | At the confluence with North Fork Rivanna River | •352 | •356 | |
| Slabtown Branch | At the confluence with Lickinghole Creek | None | •600 | Albemarle County (Unincorporated Areas). |
| | Approximately 3,000 feet upstream of State Route 684 | None | •766 | |
| Moores Creek | At the confluence with Rivanna River | •324 | •329 | Albemarle County (Unincorporated Areas), Independent City of Charlottesville. |
| | Approximately 1,300 feet downstream of State Route 20. | •331 | •330 | |
| Meadow Creek | At the confluence with Rivanna River | •343 | •345 | Albemarle County (Unincorporated Areas), Independent City of upstream of Charlottesville. |
| | Approximately 100 feet upstream of Rio Road | None | •358 | |
| South Fork Rivanna River | At the confluence with Rivanna River | •351 | •356 | Albemarle County (Unincorporated Areas). |
| | Approximately 630 feet upstream of the confluence of Powells Creek. | •357 | •358 | |

**Albemarle County (Unincorporated Areas)**

Maps available for inspection at the Albemarle County Engineering Office, 401 McIntire Road, Charlottesville, Virginia.

Send comments to Mr. Robert W. Tucker, Jr., Albemarle County Executive, Albemarle County Building, 401 McIntire Road, Charlottesville, Virginia 22902.

**Independent City of Charlottesville**

Maps available for inspection at the Charlottesville City Hall, Neighborhood Development Services, 4th Street, NW., Charlottesville, Virginia.

Send comments to The Honorable Maurice Cox, Mayor of the Independent City of Charlottesville, P.O. Box 911, Charlottesville, Virginia 22902.

**VIRGINIA**

**Roanoke County (Unincorporated Areas)**

| | | | | |
|---|---|---|---|---|
| Peters Creek Tributary A | At the confluence with Peters Creek | *1,103 | *1,106 | Roanoke County (Unincorporated Areas). |
| | Approximately 160 feet upstream of Timberview Road | None | *1,120 | |
| Peters Creek | Approximately 1,150 feet upstream of the confluence with Roanoke River. | *969 | *968 | City of Roanoke, Roanoke County (Unincorporated Areas) |
| | At the confluence of Peters Creek Tributaries A and B | *1,103 | *1,106 | |
| Peters Creek Tributary B | At the confluence with Peters Creek | *1,103 | *1,106 | Roanoke County (Unincorporated Areas) |
| | Approximately 2,000 feet upstream of the confluence with Peters Creek. | *1,124 | *1,127 | |
| Peters Creek Tributary C | Approximately 20 feet upstream of the confluence with Peters Creek. | *1,027 | *1,028 | City of Roanoke, Roanoke County (Unincorporated Areas). |
| | Approximately 1,100 feet upstream of Embassy Drive | None | *1,088 | |

**Roanoke County (Unincorporated Areas)**

Maps available for inspection at the Roanoke County Engineering Office, 5204 Bernard Drive, SW., Roanoke, Virginia.

Send comments to Mr. Elmer C. Hodge, Roanoke County Administrator, P.O. Box 29800, Roanoke, Virginia 24018.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 7, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9217 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

**[Docket No. FEMA–D–7590]**

### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

**ADDRESSES:** The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

*Regulatory Classification.* This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 12612, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

*Executive Order 12778, Civil Justice Reform.* This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

Accordingly, 44 CFR Part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for Part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |
| **KENTUCKY** | | | | |
| **Boyd County** | | | | |
| Ohio River | Approximately 0.8 mile upstream of the downstream county boundary. | *547 | *546 | City of Ashland, City of Catlettsburg, Body County (Unincorporated Areas) |
| | At upstream county boundary | *550 | *549 | |
| Keys Creek | From the confluence with Ohio River | *550 | *549 | City of Ashland, Boyd County (Unincorporated Areas) |
| | Just upstream of Catlett Creek Road | *550 | *549 | |

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |

**City of Ashland**

Maps available for inspection at the Ashland Department of Planning and Community Development, 1700 Greenup Avenue, Room 208, Ashland, Kentucky.

Send comments to The Honorable Stephen E. Gilmore, Mayor of the City of Ashland, P.O. Box 1839, Ashland, Kentucky 41105–1839.

**City of Catlettsburg**

Maps available for inspection at the Catlettsburg City Hall, 216 26th Street, Catlettsburg, Kentucky.

Send comments to The Honorable Roger M. Hensley, Mayor of the City of Catlettsburg, P.O. Box 533, Catlettsburg, Kentucky 41129.

**Boyd County (Unincorporated Areas)**

Maps available for inspection at the Boyd County Courthouse, 2800 Louisa Street, Catlettsburg, Kentucky.

Send comments to The Honorable Bill F. Scott, Boyd County Judge Executive, Boyd County Courthouse, P.O. Box 423, Catlettsburg, Kentucky 41129.

**KENTUCKY**
**Bracken County**

| | | | | |
|---|---|---|---|---|
| Ohio River | At the downstream County boundary | None | *506 | City of Augusta, Bracken County (Unincorporated Areas) |
| | Approximately 125 feet upstream of the upstream County boundary. | None | *512 | |
| Bracken Creek | At the confluence with the Ohio River | None | *510 | Bracken County (Unincorporated Areas) |
| | Approximately 1,100 feet upstream of State Route 8. | None | *510 | |

**City of Augusta**

Maps available for inspection at the Augusta City Office, 219 Main Street, Augusta, Kentucky.

Send comments to The Honorable John Laycock, Mayor of the City of Augusta, P.O. Box 85, Augusta, Kentucky 41002.

**Bracken County (Unincorporated Areas)**

Maps available for inspection at the Bracken County Courthouse, 116 West Miami, Brooksville, Kentucky.

Send comments to The Honorable Leslie Newman, Bracken County Judge Executive, P.O. Box 264, Brooksville, Kentucky 41004.

**KENTUCKY**
**Campbell County**

| | | | | |
|---|---|---|---|---|
| Ohio River | Approximately 4.1 miles upstream of Louisville and Nashville Railroad Bridge. | None | *501 | Cities of California, Fort Thomas, Melbourne, Mentor and Silver Grove, and Campbell County (Unincorporated Areas) |
| | At upstream County boundary | *507 | *506 | |
| Mook Road Tributary | Approximately 100 feet upstream of Bentwood Hills Drive. | None | *502 | City of Southgate |
| | Approximately 2,050 feet upstream of Bentwood Hills Drive. | None | *521 | |
| Four Mile Creek | Approximately 900 feet upstream of the confluence of Owl Creek. | *502 | *503 | City of Melbourne |
| | Approximately 0.6 mile upstream of the confluence of Owl Creek. | *502 | *503 | |
| Woodlawn Creek | Approximately 325 feet downstream of the confluence of Woodlawn Creek Tributary 2. | None | *517 | City of Woodlawn |
| | Approximately 450 feet upstream of Wilson Road. | None | *518 | |
| Woodlawn Creek Tributary 2. | Approximately 225 feet upstream of the confluence with Woodlawn Creek. | None | *517 | City of Woodlawn |
| | Approximately 340 feet downstream of Grand Avenue. | None | *517 | |

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |

**City of California**

Maps available for inspection at the California City Clerk's Office, 45 Madison Street, California, Kentucky.

Send comments to The Honorable Frank Smith, Mayor of the City of California, P.O. Box 25, California, Kentucky 41007.

**Campbell County (Unincorporated Areas)**

Maps available for inspection at the Campbell County Fiscal Court, Planning and Zoning Department, 24 West Fourth Street, Newport, Kentucky.

Send comments to The Honorable Steve Pendry, Campbell County Judge/Executive, 24 West Fourth Street, Newport, Kentucky 41071.

**City of Fort Thomas**

Maps available for inspection at the Fort Thomas City Office, 130 North Fort Thomas Avenue, Fort Thomas, Kentucky.

Send comments to The Honorable Mary Brown, Mayor of the City of Fort Thomas, 130 North Fort Thomas Avenue, Fort Thomas, Kentucky 41075.

**City of Melbourne**

Maps available for inspection at the Melbourne City Hall, 502 Garfield Avenue, Melbourne, Kentucky.

Send comments to The Honorable Helen Lutz, Mayor of the City of Melbourne, P.O. Box 63, Melbourne, Kentucky 41059.

**City of Mentor**

Maps available for inspection at the Campbell County Fiscal Court, Planning and Zoning Department, 24 West Fourth Street, Newport, Kentucky.

Send comments to The Honorable Dave Gearding, Mayor of the City of Mentor, Box 4870, California, Kentucky 41007.

**City of Silver Grove**

Maps available for inspection at the Silver Grove City Hall, 308 Oak Street, Silver Grove, Kentucky.

Send comments to The Honorable Carl J. Schwarber, Mayor of the City of Silver Grove, P.O. Box 417, Silver Grove, Kentucky 41085.

**City of Southgate**

Maps available for inspection at the Southgate City Hall, 122 Electric Avenue, Southgate, Kentucky.

Send comments to The Honorable Charles Melville, Mayor of the City of Southgate, 122 Electric Avenue, Southgate, Kentucky 41071.

**City of Woodlawn**

Maps available for inspection at the Campbell County Fiscal Court, Planning and Zoning Department, 24 West Fourth Street, Newport, Kentucky.

Send comments to The Honorable Ron Barth, Mayor of the City of Woodlawn, 1110 Waterworks Avenue, Woodlawn, Kentucky 41071.

**KENTUCKY**
**Greenup County**

| | | | | |
|---|---|---|---|---|
| Ohio River | Approximately 1.2 miles upstream of downstream County boundary. | *535 | *536 | Cities of Greenup, Russell, Worthington, Wurtland, and Greenup County (Unincorporated Areas) |
| | At upstream County boundary | *547 | *546 | |
| Lower White Oak Creek. | At the confluence with Tygarts Creek | *536 | *537 | Greenup County (Unincorporated Areas) |
| | Approximately 1,660 feet upstream of State Highway 1134. | *536 | *537 | |
| White Oak Creek | Approximately 325 feet downstream of U.S. Highway 23. | *547 | *546 | Cities of Bellefonte and Russell |
| | Approximately 330 feet downstream of State Route 693. | *547 | *546 | |
| Tygarts Creek | Entire length within community | *536 | *537 | Greenup County (Unincorporated Areas) |

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |

**City of Bellefonte**
Maps available for inspection at the Bellefonte City Hall, 705 Bellefonte Princess Road, Ashland, Kentucky.
Send comments to The Honorable Tom Bradley, Mayor of the City of Bellefonte, 705 Bellefonte Princess Road, Ashland, Kentucky 41101–2183.
**Greenup County (Unincorporated Areas)**
Maps available for inspection at the Greenup County Courthouse, Room 102, Greenup, Kentucky.
Send comments to The Honorable Bobby W. Carpenter, Greenup County Judge Executive, Greenup County Courthouse, Room 102 Box 2, Greenup, Kentucky 41144.
**City of Greenup**
Maps available for inspection at the Greenup City Hall, 1005 Walnut Street, Greenup, Kentucky.
Send comments to The Honorable Charles Veach, Mayor of the City of Greenup, 1005 Walnut Street, Greenup, Kentucky 41144.
**City of Russell**
Maps available for inspection at the Russell City Hall, 410 Ferry Street, Russell, Kentucky.
Send comments to The Honorable Donald G. Fraley, Mayor of the City of Russell, P.O. Box 394, Russell, Kentucky 41169.
**City of Worthington**
Maps available for inspection at the Worthington City Hall, 512 Ferry Street, Worthington, Kentucky.
Send comments to The Honorable Jerry Epling, Mayor of the City of Worthington, P.O. Box 366, Worthington, Kentucky 41183.
**City of Wurtland**
Maps available for inspection at the Wurtland City Hall, 500 Wurtland Avenue, Wurtland, Kentucky.
Send comments to The Honorable Donna K. Hayes, Mayor of the City of Wurtland, 500 Wurtland Avenue, Wurtland, Kentucky 41144.

**KENTUCKY**
**Lewis County**

| | | | | |
|---|---|---|---|---|
| Ohio River | Approximately 0.5 mile upstream of the County boundary. | *518 | *519 | Town of Concord, City of Vanceburg, Lewis County (Unincorporated Areas) |
| | Approximately 4.7 miles downstream of the County boundary. | *533 | *534 | |
| Kinniconick Creek | Approximately .07 mile downstream of McDowell Creek Road. | None | *533 | Lewis County (Unincorporated Areas) |
| | Approximately 8 miles upstream of State Route 59. | None | *678 | |

**Town of Concord**
Maps available for inspection at the Concord Town Hall, Route 2, Vanceburg, Kentucky.
Send comments to The Honorable Lovell Polley, Mayor of the Town of Concord, Route 2, Box 510, Vanceburg, Kentucky 41179.
**Lewis County (Unincorporated Areas)**
Maps available for inspection at the Lewis County Courthouse, 514 Second Street, Vanceburg, Kentucky.
Send comments to The Honorable Steve Applegate, Lewis County Judge Executive, Lewis County Courthouse, 514 Second Street, Room 201, Vanceburg, Kentucky 41179.
**City of Vanceburg**
Maps available for inspection at the Vanceburg City Hall, 615 2nd Street, Vanceburg, Kentucky.
Send comments to The Honorable William T. Cooper, Mayor of the City of Vanceburg, 615 2nd Street, Vanceburg, Kentucky 41179.

**KENTUCKY**
**Magoffin County**

| | | | | |
|---|---|---|---|---|
| Licking River | Approximately 0.5 mile downstream of State Route 30. | *849 | *848 | City of Salyersville, Magoffin County (Unincorporated Areas) |
| | Approximately 0.2 mile downstream of Combs Mountain Parkway. | *861 | *860 | |
| Burning Fork | At the confluence with Licking River | *857 | *853 | City of Salyersville, Magoffin County (Unincorporated Areas) |
| | Approximately 0.1 mile upstream of Lick Branch Road. | *864 | *863 | |
| State Road Fork | At the confluence with Licking River | *856 | *853 | City of Salyersville, Magoffin County (Unincorporated Areas) |
| | Approximately 1.7 miles upstream of State Route 2020. | *885 | *886 | |
| Route 7 Cut-Thru | At the confluence with Licking River | *852 | *850 | City of Salyersville, Magoffin County (Unincorporated Areas) |
| | At the divergence from Licking River | *858 | *857 | |
| Route 30 Cut-Thru | At the upstream side of State Route 30 | None | *848 | Magoffin County (Unincorporated Areas) |
| | At the divergence from Licking River | *851 | *849 | |
| Mash Fork | Approximately 0.36 mile upstream of the confluence with State Road Fork. | *861 | *860 | Magoffin County (Unincorporated Areas) |

| Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) | | Communities affected |
|---|---|---|---|---|
| | | Existing | Modified | |
| | Approximately 0.56 mile upstream of the confluence with State Road Fork. | *865 | *864 | |

**Magoffin County (Unincorporated Areas)**

Maps available for inspection at Magoffin County Courthouse, Judge's Office, 457 Parkway Drive, Salyersville, Kentucky.

Send comments to The Honorable Bill W. May, Magoffin County Judge Executive, Magoffin County Courthouse, P.O. Box 430, Salyersville, Kentucky 41465.

**City of Salyersville**

Maps available for inspection at the Salyersville City Hall, 315 East Maple Street, Salyersville, Kentucky.

Send comments to The Honorable Stanley Howard, Mayor of the City of Salyersville, P.O. Box 640, Salyersville, Kentucky 41465.

**KENTUCKY**
**Mason County**

| | | | | |
|---|---|---|---|---|
| Ohio River | Approximately 0.28 mile downstream of the downstream county boundary. | None | *512 | City of Dover, City of Maysville, Mason County (Unincorporated Areas) |
| | Approximately 0.04 mile upstream of the upstream county boundary. | None | *518 | |

**City of Dover**

Maps available for inspection at the Dover City Hall, 2060 Lucretia Street, Dover, Kentucky.

Send comments to The Honorable Eddie Sidell, Mayor of the City of Dover, P.O. Box 149, Dover, Kentucky 41034.

**Mason County (Unincorporated Areas)**

Maps available for inspection at the Mason County Judge/Executive's Office, 219 Court Street, Maysville, Kentucky.

Send comments to The Honorable James L. Gallenstein, Mason County Judge Executive, 221 Stanley Reed Court Street, Maysville, Kentucky 41056.

**City of Maysville**

Maps available for inspection at the Maysville City Hall, 216 Bridge Street, Maysville, Kentucky.

Send comments to The Honorable David Cartmell, Mayor of the City of Maysville, 216 Bridge Street, Maysville, Kentucky 41056.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: April 19, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–9218 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF DEFENSE

### 48 CFR Parts 217 and 219

**[DFARS Case 2003–D092]**

### Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Businesses and Leader Company Contracting

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise text pertaining to DoD review of small business subcontracting plans, and to remove text pertaining to leader company contracting. This proposed rule is a result of a transformation initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before June 22, 2004, to be considered in the formation of the final rule.

**ADDRESSES:** Respondents may submit comments via the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm*. As an alternative, respondents may e-mail comments to: *dfars@osd.mil*. Please cite DFARS Case 2003-D092 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Karen Fischetti, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2003–D092.

At the end of the comment period, interested parties may view public comments on the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karen Fischetti, (703) 602–0288.

**SUPPLEMENTARY INFORMATION:**

#### A. Background

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at *http://www.acq.osd.mil/dpap/dfars/transf.htm*.

This proposed rule is a result of the DFARS Transformation initiative. The proposed changes—

• Remove DFARS Subpart 217.4, which addresses the participation of small disadvantaged business concerns

in leader company contracting. DoD rarely uses leader company contracting. Incentives for major DoD contractors to assist small disadvantaged business concerns are provided through the DoD Pilot Mentor-Protégé Program, in accordance with DFARS Subpart 219.71 and Appendix I.

• Lower the approval level at DFARS 219.705–4(d), from two levels above the contracting officer to one level above the contracting officer, for small business subcontracting plans that contain a small disadvantaged business goal of less than five percent.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule deletes text that is seldom used and revises review procedures that are internal to DoD. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003-D092.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 217 and 219**

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, DoD proposes to amend 48 CFR parts 217 and 219 as follows:

1. The authority citation for 48 CFR parts 217 and 219 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

## PART 217—SPECIAL CONTRACTING METHODS

### Subpart 217.4—[Removed]

2. Subpart 217.4 is removed.

## PART 219—SMALL BUSINESS PROGRAMS

3. Section 219.705–4 is amended in paragraph (d) by revising the second sentence to read as follows:

**219.705–4 Reviewing the subcontracting plan.**

(d) * * * A small disadvantaged business goal of less than five percent must be approved one level above the contracting officer.

[FR Doc. 04–9270 Filed 4–22–04; 8:45 am]
BILLING CODE 5001–08–P

## DEPARTMENT OF DEFENSE

### 48 CFR Part 219

**[DFARS Case 2003–D060]**

### Defense Federal Acquisition Regulation Supplement; Threshold for Small Business Specialist Review

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise text pertaining to DoD implementation of small business programs. This proposed rule is a result of an initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before June 22, 2004, to be considered in the formation of the final rule.

**ADDRESSES:** Respondents may submit comments via the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm*. As an alternative, respondents may e-mail comments to: *dfars@osd.mil*. Please cite DFARS Case 2003-D060 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Karen Fischetti, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2003-D060.

At the end of the comment period, interested parties may view public comments on the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karen Fischetti, (703) 602–0288.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at *http://www.acq.osd.mil/dpap/dfars/transf.htm*.

This proposed rule is a result of the DFARS Transformation initiative. The proposed changes—

• Delete an unnecessary general policy statement at DFARS 219.201(a).

• Revise DFARS 219.201(d)(10) to eliminate requirements for small business specialists to review proposed acquisitions that are (1) within the scope and under the terms of the existing contract; or (2) under $100,000 and totally set aside for small business concerns.

• Delete text at DFARS 219.201(e) regarding the appointment and functions of DoD small business specialists. Text on this subject will be relocated to DoD Directive 4205.1, DoD Small Business and Small Disadvantaged Business Utilization Programs, or to the new DFARS companion resource, Procedures, Guidance, and Information (PGI). A proposed rule describing the purpose and structure of PGI was published at 69 FR 8145 on February 23, 2004.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule pertains to internal DoD procedures for the implementation of small business programs. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C.

610. Such comments should be submitted separately and should cite DFARS Case 2003–D060.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 219**

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, DoD proposes to amend 48 CFR Part 219 as follows:

1. The authority citation for 48 CFR Part 219 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

## PART 219—SMALL BUSINESS PROGRAMS

2. Section 219.201 is amended as follows:

a. By removing paragraph (a);

b. By revising paragraph (d)(10)(A);

c. In paragraph (d)(10)(B), by removing "issue" and adding in its place "issuance"; and

d. By revising paragraph (e) to read as follows:

**219.201 General policy.**

(d) * * *

(10) * * *

(A) Reviewing and making recommendations for all acquisitions over $10,000, except those—

(*1*) Within the scope and under the terms of the existing contract; or

(*2*) Under $100,000 that are totally set aside for small business concerns in accordance with FAR 19.502–2;

* * * * *

(e) For information on the appointment and functions of small business specialists, see PGI 219.201(e).

* * * * *

[FR Doc. 04–9269 Filed 4–22–04; 8:45 am]

BILLING CODE 5001–08–P

# Notices

Federal Register
Vol. 69, No. 79
Friday, April 23, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Docket No. FV–04–331]**

### United States Standards for Grades of Canned Beets, United States Standards for Grades of Canned Carrots, and United States Standards for Grades of Canned Potatoes

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The United States Standards for Grades of Canned Beets, United States Standards for Grades of Canned Carrots, and United States Standards for Grades of Canned White Potatoes were corrected to affect a change in Table IA of each of the standards to reflect current values in the Recommended Minimum Drained Weights, Metric System. The change is identified by the date April 2003 in each of the Tables.

**FOR FURTHER INFORMATION CONTACT:** Chere L. Shorter, (202) 720–5021, or e-mail *chere.shorter@usda.gov*.

**SUPPLEMENTARY INFORMATION:** A Notice was published in the **Federal Register**, (63 FR 127 pages 36201–36202) dated July 2, 1998, revising the United States Standards for Grades of Canned Beets, United States Standards for Grades of Canned Carrots, and United States Standards for Grades of Canned Potatoes, effective August 3, 1998. However, the Recommended Minimum Drained Weight tables, (Metric version), in each of the grade standards contained incorrect values. Accordingly, Table IA of each U.S. grade standard was corrected April 2003 to reflect the change.

Corrected copies of the U.S. grade standards are located on the website at *www.ams.usda.gov/fv/ppb.html* and are available from Standardization Section, Processed Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 0709, South Building; STOP 0247, Washington, DC 20250; telephone: (202) 720–5021 or fax (202) 690–1527.

**Authority:** 7 U.S.C. 1621–1627.

Dated: April 19, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04–9260 Filed 4–22–04; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. 04–035–1]**

### Availability of an Environmental Assessment for Field Testing Marek's Disease—Newcastle Disease Vaccine, Serotypes 2 and 3, Live Herpesvirus Vector

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Marek's Disease—Newcastle Disease Vaccine for use in chickens. The environmental assessment, which is based on a risk analysis prepared to assess the risks associated with the field testing of this vaccine, examines the potential effects that field testing this veterinary vaccine could have on the quality of the human environment. Based on the risk analysis, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment, and that an environmental impact statement need not be prepared. We intend to authorize shipment of this vaccine for field testing following the close of the comment period for this notice unless new substantial issues bearing on the effects of this action are brought to our attention. We also intend to issue a U.S. Veterinary Biological Product license for this vaccine, provided the field test data support the conclusions of the environmental assessment and the issuance of a finding of no significant impact and the product meets all other requirements for licensing.

**DATES:** We will consider all comments that we receive on or before May 24, 2004.

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

- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 04–035–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 04–035–1.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 04–035–1" on the subject line.
- *Agency Web Site:* Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.

*Reading Room:* You may read the environmental assessment, the risk analysis (with confidential business information removed), and any comments that we receive 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.

*Other Information:* You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

**FOR FURTHER INFORMATION CONTACT:** Dr. Albert P. Morgan, Chief Staff Officer, Operational Support Section, Center for Veterinary Biologics, Licensing and Policy Development, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; phone (301) 734–8245, fax (301) 734–4314.

For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment (as well as the risk analysis with confidential business information removed) contact Dr. Michel Y. Carr, USDA, APHIS, VS, CVB–LPD, 510 South 17th Street, Suite 104, Ames, IA 50010, or by calling (515) 232–5785. Please refer to the docket number, date, and complete title of this notice when requesting copies.

**SUPPLEMENTARY INFORMATION:** Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), a veterinary biological product must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from the Animal and Plant Health Inspection Service (APHIS), as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of the unlicensed product referenced in this notice, APHIS conducted a risk analysis to assess the potential effects of this product on the safety of animals, public health, and the environment. Based on the risk analysis, APHIS has prepared an environmental assessment (EA) concerning the field testing of the following unlicensed veterinary biological product:

*Requester:* Biomune Company.

*Product:* Marek's Disease—Newcastle Disease Vaccine, Serotypes 2, and 3, Live Herpesvirus Vector, Code 1A88.R1.

*Field Test Locations:* Arkansas, California, Delaware, Georgia, Nebraska, Pennsylvania, and Texas.

The above-mentioned product is composed of a genetically modified serotype 3 Marek's disease virus expressing a gene from a lentogenic strain of Newcastle disease virus. The vaccine is for use in chickens as an aid in the prevention of disease caused by Marek's disease virus and Newcastle disease virus.

The EA has been 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 provision 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).

Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the EA and authorize shipment of the above product for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the product license, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine following completion of the field test provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

**Authority:** 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 20th day of April, 2004.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 04–9264 Filed 4–22–04; 8:45 am]

**BILLING CODE 3410–34–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Addition

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Addition to Procurement List.

**SUMMARY:** This action adds to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**EFFECTIVE DATE:** November 23, 2003.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Sheryl D. Kennerly, (703) 603–7740.

**SUPPLEMENTARY INFORMATION:** On August 22, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 50750) of proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

**Regulatory Flexibility Act Certification**

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. The action will result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

**End of Certification**

Accordingly, the following service is added to the Procurement List:

**Service**

*Service Type/Location:* Food Service Attendant, Elmendorf Air Force Base, Alaska.

*NPA:* M.C. Resources Management, Anchorage, Alaska.

*Contract Activity:* AF–Elmendorf, Elmendorf AFB, Alaska.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

**Sheryl D. Kennerly,**

*Director, Information Management.*

[FR Doc. 04–9312 Filed 4–22–04; 8:45 am]

**BILLING CODE 6353–01–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under

provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35)

*Agency:* Bureau of Industry and Security (BIS).

*Title:* Delivery Verification Certificate.

*Agency Form Number:* BXA–647P.

*OMB Approval Number:* 0694–0016.

*Type of Request:* Extension of a currently approved collection.

*Burden:* 31 hours.

*Average Hours Per Response:* 31 to 271 minutes.

*Number of Respondents:* 100.

*Needs and Uses:* The Delivery Verification Certificate is the result of an agreement between the United States and a number of other countries to increase the effectiveness of their respective controls over international trade in strategic commodities. The form is issued and certified by the government of the country of ultimate destination, at the request of the U.S. government (BXA). It is a service performed to honor an agreement between the U.S. Government and the other countries participating in this Delivery Verification procedure.

*Affected Public:* Individuals, businesses or other for-profit institutions.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, DOC Paperwork Clearance Officer, (202) 482–3129, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: April 20, 2004.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 04–9307 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–33–P

## DEPARTMENT OF COMMERCE

### Economic Development Administration

**[Docket No. 991215339–3300–09]**

### University Center (UC) Program

**AGENCY:** Economic Development Administration (EDA), Department of Commerce (DOC).

**ACTION:** Supplemental notice and request for proposals.

**SUMMARY:** EDA's Austin regional office will hold a teleconference on May 6 to answer questions about its FY 2004 competition for University Center funding, which is open to colleges and universities in Arkansas, Louisiana, New Mexico, Oklahoma and Texas. EDA's Denver regional office will hold a teleconference on May 10 to answer questions about its FY 2004 competition for University Center funding, which is open to colleges and universities in Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming. Notice of this competition was published in the **Federal Register** on April 15, 2004.

**DATES:** Austin regional office teleconference: May 6, 2004, 10 a.m.–12 p.m. (central time). Please register for this call by sending an e-mail to *ttijerina@eda.doc.gov* no later than May 4 to insure there are sufficient incoming lines for this call.

Denver regional office teleconference: May 10, 2004, 9 a.m.–11 a.m. (mountain time). Please register for this call by sending an e-mail to *tyarkosky@eda.doc.gov* no later than May 6 to insure there are sufficient incoming lines for this call.

**FOR FURTHER INFORMATION CONTACT:** The Federal Funding Opportunity announcement for this request for proposals is available on the *http://www.grants.gov* Web site, as well as EDA's Web site, *http://www.eda.gov*. For questions about these calls, please contact Tozi Tijerina in the Austin regional office at 512–381–8157 or Terri Yarkosky in the Denver regional office at 303–844–4717.

**SUPPLEMENTARY INFORMATION:** EDA is soliciting competition proposals for FY 2004 University Center funding in the areas served by its Denver and Austin regional offices (69 FR 19973, April 15, 2004). EDA's mission is to help our partners across the Nation create wealth and minimize poverty by promoting a favorable business involvement to attract private capital investment and higher-skill, higher-wage jobs through world-class capacity-building, planning, infrastructure, research grants and strategic initiatives. With funding from EDA, institutions of higher education establish and operate University Centers, which provide technical assistance to public and private sector organizations with the goal of enhancing local economic development. EDA has traditionally renewed an award to a University Center on an annual basis as long as it maintained a satisfactory level of performance and Congress appropriated funds for the program. With the competition announced in this notice for University Centers in the regions served by EDA's Austin and Denver regional offices, EDA is beginning to phase in competition for University Center funding. EDA's Austin regional office will hold a teleconference on May 6 and EDA's Denver regional office will hold a teleconference on May 10.

*Telephone Numbers:* Austin regional office call: 1–888–396–9925. The passcode is EDA. (Callers may need to provide the name of the host, Tozi Tijerina, and her telephone number, 512–381–8157.)

Denver regional office call: 1–877–709–5339. The passcode is 10529.

**David Bearden,**

*Deputy Assistant Secretary for Economic Development.*

[FR Doc. 04–9229 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–24–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Technical Data Letter of Explanation

**ACTION:** Proposed Collection: Request for Comments.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 22, 2004.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Stephen Baker, BIS ICB Liaison, Department of Commerce, Room 6622, 14th & Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION**

#### I. Abstract

The information contained in these letters will assure BIS that no unauthorized technical data will be exported for unauthorized end-uses or

to unauthorized destinations and thus provide assurance that U.S. national security and foreign policy programs are followed. In addition, shipments to Poland, Hungary, and Czechoslovakia, need an Import Certificate issued by the appropriate national government.

**II. Method of Collection**

Submitted, as appropriate, with form BIS–748P.

**III. Data**

*OMB Number:* 0694–0047.

*Form Number:* BIS 748–P.

*Type of Review:* Regular submission for extension of a currently approved collection.

*Affected Public:* Individuals, businesses or other for-profit and not-for-profit institutions.

*Estimated Number of Respondents:* 5,050.

*Estimated Time Per Response:* 30 minutes to 2 hours per response.

*Estimated Total Annual Burden Hours:* 8,807.

*Estimated Total Annual Cost:* No capital start up expenditures.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: April 20, 2004.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 04–9308 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–33–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**[Docket No. 040416120–4120–01]**

### Revisions to the Unverified List—Guidance as to "Red Flags"

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice.

**SUMMARY:** On June 14, 2002, the Bureau of Industry and Security ("BIS") published a notice in the **Federal Register** that set forth a list of persons in foreign countries who were parties to past export transactions where pre-license checks ("PLC") or post-shipment verifications ("PSV") could not be conducted for reasons outside the control of the U.S. Government ("Unverified List"). This notice advised exporters that the involvement of a listed person as a party to a proposed transaction constitutes a "red flag" as described in the guidance set forth in Supplement No. 3 to 15 CFR part 732, requiring heightened scrutiny by the exporter before proceeding with such a transaction. The notice also stated that, when warranted, BIS would remove persons from the Unverified List. Recently a PSV was completed at the facilities of Power Test & Research Institute of Guangzhou, No. 38 East Huangshi Road, Guangzhou, People's Republic of China. Accordingly, by this notice, Power Test & Research Institute of Guangzhou is removed from the Unverified List.

**DATES:** This notice is effective April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Thomas W. Andrukonis, Office of Enforcement Analysis, Bureau of Industry and Security, Telephone: (202) 482–4255.

**SUPPLEMENTARY INFORMATION:** In administering export controls under the Export Administration Regulations (15 CFR parts 730 to 774) ("EAR"), BIS carries out a number of preventive enforcement activities with respect to individual export transactions. Such activities are intended to assess diversion risks, identify potential violations, verify end-uses, and determine the suitability of end-users to receive U.S. commodities or technology. In carrying out these activities, BIS officials, or officials of other federal agencies acting on BIS's behalf, selectively conduct PLCs to verify the bona fides of the transaction and the suitability of the end-user or ultimate consignee. In addition, such officials sometimes carry out PSVs to ensure that U.S. exports have actually been delivered to the authorized end-user, are being used in a manner consistent with the terms of a license or license exception, and are otherwise consistent with the EAR.

In certain instances BIS officials, or other federal officials acting on BIS's behalf, have been unable to perform a PLC or PSV with respect to certain export transactions for reasons outside the control of the U.S. Government (including a lack of cooperation by the host government authority, the end-user, or the ultimate consignee). In a notice issued on June 14, 2002 (67 FR 40910), BIS set forth an Unverified List of certain foreign end-users and consignees involved in such transactions.

The June 14, 2002 notice also advised exporters that participation of a person on the Unverified List in a proposed transaction will be considered by BIS to raise a "red flag" under the "Know Your Customer" guidance set forth in Supplement No. 3 to 15 CFR part 732 of the EAR. Under that guidance, whenever there is a "red flag," exporters have an affirmative duty to inquire, verify, or otherwise substantiate the proposed transaction to satisfy themselves that the transaction does not involve a proliferation activity prohibited in 15 CFR part 744, and does not violate other requirements set forth in the EAR.

The **Federal Register** notice further stated that BIS may periodically add persons to the Unverified List based on the criteria set forth above, and remove names of persons from the list when warranted.

BIS has now conducted a PSV in a transaction involving Power Test & Research Institute of Guangzhou, No. 38 East Huangshi Road, Guangzhou, People's Republic of China, a person included on the Unverified List. This notice advises exporters that Power Test & Research Institute of Guangzhou is removed from the Unverified List, and the "red flag" resulting from Power Test & Research Institute of Guangzhou's inclusion on the Unverified List is rescinded.

The Unverified List, as modified by this notice, is set forth below.

Dated: April 20, 2004.

**Julie Myers,**

*Assistant Secretary for Export Enforcement.*

**Unverified List (as of April 23, 2004)**

The Unverified List includes names and countries of foreign persons who in the past were parties to a transaction with respect to which BIS could not conduct a pre-license check ("PLC") or

a post-shipment verification ("PSV") for reasons outside of the U.S. Government's control. Any transaction to which a listed person is a party will be deemed by BIS to raise a "red flag" with respect to such transaction within the meaning of the guidance set forth in Supplement No. 3 to 15 CFR part 732. The red flag applies to the person on the Unverified List regardless of where the person is located in the country included on the list.

| Name | Country | Last known address |
|---|---|---|
| Lucktrade International | Hong Kong Special Administrative Region. | P.O. Box 91150, Tsim Sha Tsui, Hong Kong. |
| Brilliant Intervest | Malaysia | 14–1, Persian 65C, Jalan Pahang Barat, Kuala Lumpur, 53000. |
| Dee Communications M SDN. BHD | Malaysia | G5/G6, Ground Floor, Jin Gereja, Johor Bahru. |
| Shaanxi Telecom Measuring Station | People's Republic of China | 39 Jixiang Road, Yanta District Xian, Shaanxi. |
| Yunma Aircraft Mfg. | People's Republic of China | Yaopu, Anshun, Guizhou. |
| Civil Airport Construction Corporation | People's Republic of China | 111 Bei Sihuan Str., East, Chao Yang District, Beijing. |
| Beijing San Zhong Electronic Equipment Engineer Co., Ltd. | People's Republic of China | Hai Dian Fu Yuau, Men Hao 1 Hao, Beijing. |
| Huabei Petroleum Administration, Bureau Logging Company | People's Republic of China | South Yanshan Road, Ren Qiu City, Hebei. |
| Peluang Teguh | Singapore | 203 Henderson Road #09–05H Henderson Industrial Park, Singapore. |
| Lucktrade International PTE Ltd. | Singapore | 35 Tannery Road #01–07 Tannery Block Ruby Industrial Complex Singapore 347740. |
| Arrow Electronics Industries | United Arab | 204 Arbift Tower, Benyas Road, Emirates Dubai. |

[FR Doc. 04–9313 Filed 4–22–04; 8:45 am]
BILLING CODE 3510–33–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Materials Processing Equipment; Technical Advisory Committee; Notice of Open Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on May 13, 2004, at 9 a.m. in Room 6087B of the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda

1. Opening remarks and introductions.
2. Approval of minutes from previous meeting.
3. Presentation of papers and comments by the public.
4. Update on Wassenaar Arrangement negotiations.
5. Comments on machine tool and other Category 2 controls. The meeting will be open to the public and a limited number of seats will be available.

Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to Lee Ann Carpenter at *Lcarpent@bis.doc.gov*. For more information, please contact Ms. Carpenter at 202–482–2583.

Dated: April 20, 2004.

**Lee Ann Carpenter,**

*Committee Liaison Officer.*

[FR Doc. 04–9248 Filed 4–22–04; 8:45 am]
BILLING CODE 3510–JT–M

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Request for Duty-Free Entry of Scientific Instrument or Apparatus

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burdens, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506 (c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 22, 2004.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th & Constitution Avenue, NW., Washington, DC 20230; phone (202) 482–0266 or via the Internet at *dHynek@doc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to: Gerald Zerdy, U.S. Department of Commerce, FCB Suite 4100W, 14th Street & Constitution Avenue, NW., Washington, DC 20230; phone (202) 482–1660, fax (202) 482–0949.

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The Departments of Commerce and Homeland Security ("DHS") are required to determine whether nonprofit institutions established for scientific or educational purposes are entitled to duty-free entry under the Florence Agreement of certain scientific instruments they import. Form ITA–338P enables: (1) DHS to determine whether the statutory eligibility requirements for the institution and the instrument are fulfilled, and (2) Commerce to make a comparison and

finding as to the scientific equivalency of comparable instruments being manufactured in the United States. Without the collection of the information, DHS and Commerce would not have the necessary information to carry out the responsibilities of determining eligibility for duty-free entry assigned by law.

**II. Method of Collection**

The Department of Commerce distributes Form ITA–338P to potential applicants upon request. The applicant completes the form and then forwards it to the DHS. Upon acceptance by DHS as a valid application, the application is transmitted to Commerce for processing.

**III. Data**

*OMB Number:* 0625–0037.

*Form Number:* ITA–338P.

*Type of Review:* Extension-Regular Submission.

*Affected Public:* State or local governments; Federal agencies; nonprofit institutions.

*Estimated Number of Respondents:* 60.

*Estimated Time per Response:* 2 hours.

*Estimated Total Annual Burden Hours:* 120.

*Estimated Total Annual Cost:* $152,640 ($2,640 for respondents and $150,000 for federal government).

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 20, 2004.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 04–9306 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-570–851]**

## Certain Preserved Mushrooms from the People's Republic of China: Notice of Partial Rescission of Seventh New Shipper Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Partial Rescission of Seventh New Shipper Review.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Brian Smith or Terre Keaton, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1766 or (202) 482–1280, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On October 7, 2003, the Department published a notice of initiation of an antidumping duty new shipper review on certain preserved mushrooms from the People's Republic of China ("PRC") with respect to the following two PRC companies: Nanning Runchao Industrial Trade Company, Ltd. ("Nanning Runchao") and Guangxi Hengxian Pro-Light Foods, Inc. ("Guangxi Hengxian"). *See Certain Preserved Mushrooms from the People's Republic of China: Initiation of Seventh Antidumping Duty New Shipper Review*, 68 FR 57877.

On April 7, 2004, Nanning Runchao's counsel notified the Department that the U.S. Food and Drug Administration ("USFDA") had ruled that its U.S. shipment of subject merchandise (*i.e.*, the entry which is the basis for its new shipper review request) was being returned to the PRC because it did not comply with USFDA regulations. As a result, the Department informed Nanning Runchao that it was cancelling the verification which was to commence during April 2004 (*see* April 7, 2004, memorandum from team leader to the file). On April 9, 2004, Nanning Runchao withdrew its request for a new shipper review.

Accordingly, we are rescinding the new shipper review with respect to Nanning Runchao for the reasons mentioned below.

**Scope of Order**

The products covered by this order are certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.

Excluded from the scope of this order are the following: (1) all other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified," or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.[1]

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153 and 0711.51.0000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

**Period of Review**

The period of review ("POR") is February 1, 2003, through July 31, 2003.

**Partial Recission of Review**

The Department's regulations at 19 CFR 351.214(f)(1) provide that the Department may rescind a new shipper review "... if a party that requested a review withdraws its request no later than 60 days after the date of publication of notice of initiation of the requested review." Nanning Runchao withdrew its request for new shipper

[1] On June 19, 2000, the Department affirmed that "marinated," "acidified," or "pickled" mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. *See* "Recommendation Memorandum-Final Ruling of Request by Tak Fat, *et al.* for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China," dated June 19, 2000. This decision is currently on appeal .

review on April 9, 2004. Although Nanning Runchao's withdrawal is more than 60 days from the date of initiation, consistent with the Department's past practice in the context of administrative reviews conducted under section 751(a) of the Act, the Department has discretion to extend the time period for withdrawal on a case-by-case basis. (*See e.g. Iron Construction Castings from Canada: Notice of Rescission of Antidumping Duty Administrative Review*), 63 FR 45797 (August 27, 1998)). In this case, the Department has determined to grant the request to rescind this new shipper review with respect to Nanning Runchao because rescission of this review would not prejudice any party in this proceeding, as Nanning Runchao would continue to be included in the PRC-wide rate to which it was subject at the time of its request for a new shipper review. (*See Silicon Metal from the People's Republic of China: Notice of Rescission of New Shipper Review*), 64 FR 40831 (July 28, 1999).). Nanning Runchao is the only party that requested a review of its sale during the POR, and no other party has objected to its withdrawal of that request. Accordingly, we are rescinding, in part, this new shipper review on certain preserved mushrooms from the People's Republic of China as to Nanning Runchao. This review will continue with respect to Guangxi Hengxian.

**Notification**

We will instruct Customs and Border Protection ("CBP") that bonding will no longer be permitted to fulfill security requirements for shipments from Nanning Runchao of certain preserved mushrooms from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date of this rescission notice. We will also instruct CBP to liquidate any entries by Nanning Runchao during the period of review at the cash deposit rate in effect at the time of entry.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(2)(B)(iv) and 777(i) of the Act, as amended, and 19 CFR 351.214(f)(3).

Dated: April 19, 2004.

**Jeffrey May,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 04–9298 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–351–826]**

### Notice of Extension of Preliminary Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** The Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on small diameter circular seamless carbon and alloy steel standard, line and pressure pipe ("seamless pipe") from Brazil in response to a request by respondent V&M do Brasil, S.A. ("VMB"). The review covers shipments to the United States during the period August 1, 2002, to July 31, 2003. For the reasons discussed below, we are fully extending the preliminary results of this administrative review by 120 days, to no later than August 30, 2004. This extension is made pursuant to Section 751(a)(3)(A) of the Tariff Act of 1930, as amended.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Patrick Edwards or Helen Kramer at (202) 482–8029 or (202) 482–0405, respectively; Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

**Background**

On August 12, 2003, in response to the Department's notice of opportunity to request a review published in the **Federal Register**, VMB requested that the Department conduct an administrative review of the antidumping duty order on seamless pipe from Brazil. The current antidumping duty order applies a company-specific rate for Mannesmann S.A. as well as the "all-others" rate. See Notice of Antidumping Duty Order and Amended Final Determination: Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil, 60 FR 39707 (August 3, 1995).

The Department initiated the review for VMB on September 30, 2003. See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Reviews, 68 FR 56262.

On January 13, 2004, the Department received a request from United States Steel Corporation, petitioner in this review, to commence a sales-below-cost investigation in this review. See Letter with Attachments from Skadden, Arps, Slate, Meagher & Flom LLP to the Secretary of Commerce, January 13, 2004, on file in the Central Records Unit (CRU) located in room B–099 of the main Commerce Building. The Department initiated a sales-below-cost investigation in this review on February 3, 2004. See Letter and Decision Memorandum from Abelali Elouaradia and Richard Weible, February 3, 2004, on file in the CRU.

The preliminary results are currently due not later than May 1, 2004.

**Extension of Time Limits for Preliminary Results**

Pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), the Department may extend the deadline for completion of the preliminary results of a review if it determines that it is not practicable to complete the preliminary results within 245 days after the last day of the anniversary month of the date of publication of the order for which the administrative review was requested. There are several complexities in this administrative review that require additional time to resolve, including issues regarding model match characteristics, the necessary revision of cost data, and the need to conduct an analysis of successorship to verify that VMB is the successor in Brazil to Mannesmann S.A. Furthermore, public

holidays in Brazil have resulted in a delay in the scheduling of verification. Therefore, it is not practicable for the Department to complete this review within the originally anticipated time limit (i.e., May 1, 2004) mandated by section 751(a)(3)(A) of the Act.

Therefore, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), the Department is extending the time limits for the preliminary results by 120 days, to no later than August 30, 2004. The deadline for the final results of this review will continue to be 120 days after publication of the preliminary results.

Dated: April 19, 2004.

**Joseph A. Spetrini,**

*Deputy Assistant Secretary for Import Administration, Group 3.*

[FR Doc. 04–9299 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Call for Applications for an Alternate Seat to the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council for the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve

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

**ACTION:** Notice and request for applications.

**SUMMARY:** The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve is seeking an applicant for the following vacant alternate seat on its Reserve Advisory Council (Council): (1) Research. Council Representatives and Alternates are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the State of Hawaii. The applicant who is chosen as the Research Alternate should expect to serve a concurrent term with the existing Research member, which will expire in September 2006, pursuant to the Council's Charter. Persons who are interested in applying as a Research Alternate on the Council may obtain an application from the person on website identified under the **ADDRESSES** section below.

**DATES:** Completed applications must be postmarked no later than May 10, 2004.

**ADDRESSES:** Applications may be obtained from Moani Pai, 6700 Kalanianaole Highway, Suite 215, Honolulu, Hawaii 96825, (808) 397–2661 or online at *http://hawaiireef.noaa.gov*. Completed applications should be sent to the same address.

**FOR FURTHER INFORMATION CONTACT:** Aulani Wilhelm, 6700 Kalanianaole Highway, Suite 215, Honlulu, Hawaii 96825, (808) 397–2657, *Aulani.Wilhelm@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** The NWHI Coral Reef Ecosystem Reserve is a new marine protected area designed to conserve and protect the coral reef ecosystem and related natural and cultural resources of the area. The Reserve was established by Executive Order pursuant to the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106–513). The NWHI Reserve was established by Executive Order 13178 (12/00), as finalized by Executive Order 13196 (1/01).

The Reserve encompasses an area of the marine waters and submerged lands of the Northwestern Hawaiian Islands, extending approximately 1200 nautical miles long and 100 nautical miles wide. The Research is adjacent to and seaward of the seaward boundary of Hawaii State waters and submerged lands and the Midway Atoll National Wildlife Refuge, and includes the Hawaiian Islands National Wildlife Refuge to the extent that any such refuge waters extend beyond Hawaii State waters and submerged lands. The Reserve is managed by the Secretary of Commerce pursuant to the National Marine Sanctuaries Act and Executive Orders. The Secretary has also initiated the process to designate the Reserve as a National Marine Sanctuary. The management principles and implementation strategy and requirements for the Reserve are found in the enabling Executive Orders, which are part of the application kit and can be found on the Web site listed above.

In designating the Reserve, the Secretary of Commerce was directed to establish a Coral Reef Ecosystem Reserve Advisory Council, pursuant to section 315 of the National Marine Sanctuaries Act, to provide advice and recommendations on the development of the Reserve Operations Plan and the proposal to designate and manage a Northwestern Hawaiian Islands National Marine Sanctuary by the Secretary.

The National Marine Sanctuary Program (NMSP) has established the Reserve Advisory Council and is now accepting applications from interested individuals for a Council Alternate for the following citizen/constituent position on the Council:

1. One (1) representative from the non-federal science community with experience specific to the Northwestern Hawaiian Islands and with expertise in at least one of the following areas:

(A) Marine mammal science.

(B) Coral reef ecology.

(C) Native marine flora and fauna of the Hawaiian Islands.

(D) Oceanography.

(E) Any other scientific discipline the Secretary determines to be appropriate.

The Council consists of 25 members, 14 of which are non-government voting members (the State of Hawaii representative is a voting member) and 10 of which are government non-voting members. The voting members are representatives of the following constituencies: Conservation, Citizen-At-Large, Ocean-Related Tourism, Recreational Fishing, Research, Commercial Fishing, Education, State of Hawaii and Native Hawaiian. The government non-voting seats are represented by the following agencies: Department of Defense, Department of the Interior, Department of State, Marine Mammal Commission, NOAA's Hawaiian Islands Humpback Whale National Marine Sanctuary, NOAA's National Marine Fisheries Service, National Science Foundation, U.S. Coast Guard, Western Pacific Regional Fishery Management Council, and NOAA's National Ocean Service.

**Authority:** 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: April 19, 2004.

**Jamison S. Hawkins,**

*Deputy Assistant Administrator for Management, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.*

[FR Doc. 04–9249 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–NK–M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 041904A]**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) will hold a three-day Council meeting on May 11–13, 2004, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Tuesday, May 11, 2004 beginning at 1 p.m. and on Wednesday and Thursday, May 12 and 13, beginning at 8:30 a.m.

**ADDRESSES:** The meeting will be held at the Providence Biltmore Hotel, 11 Dorrance Street, Providence, RI 02903; telephone (401)421–0700. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone (978) 465–0492.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council, (978) 465–0492.

**SUPPLEMENTARY INFORMATION:**

**Tuesday, May 11, 2004**

Following introductions, the Council will receive a report from its Habitat/Marine Protected Areas Committee. During the discussion, the Council will review and select Essential Fish Habitat alternatives for inclusion in the Draft Supplemental Environmental Impact Statement being prepared for Amendment 1 to the Herring Fishery Management Plan (FMP). After considering recommendations from its Dogfish Committee as well as the Mid-Atlantic Council, the New England Council will approve issues to be addressed in Amendment 1 to the Spiny Dogfish FMP.

**Wednesday, May 12, 2004**

Reports on recent activities will be provided by the Council Chairman and Executive Director, the NMFS Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel and representatives of the U.S. Coast Guard, NMFS Enforcement and the Atlantic States Marine Fisheries Commission. The Council will use the remainder of the day to consider groundfish management issues. The Council could take final action on Framework Adjustment 40A to the Northeast Multispecies FMP, alternatives that would create limited opportunities for the use of Category "B" days-at-sea as discussed in Amendment 13 to the FMP. B days are among the effort controls included in the amendment which has not yet been approved by the Secretary of Commerce. After a mid-day break, the Council will review the operations plan of the Cape Cod Commercial Hook Fishermen's Association Hook Sector and provide its comments to the Regional Administrator.

**Thursday, May 13, 2004**

On Thursday, the Council's Research Steering Committee will report on and ask for approval of a policy that addresses the review and use of new research in the fishery management process. Following this agenda item NOAA Fisheries staff will solicit comments from the Council on Amendment 2 to Highly Migratory Species FMP and Amendment 2 to the Billfish FMP as part of scoping for these actions. The Council will consider whether to propose changing the specification process in the Red Crab FMP from an annual to a three-year process in a future framework adjustment to the plan. The Council also will consider making a recommendation to NOAA Fisheries on a possible change to the current penalty schedule as it concerns egregious violations of fishery management rules. Following a break there will be an open comment period for anyone wishing to bring issues before the Council that do not appear on the agenda. Before adjourning, there will be a report from the Chairman of the Council's Scientific and Statistical Committee on how the Council should use stock assessment advice in light of changing assessments and retrospective patterns in fishing mortality and biomass estimates. Any other outstanding business will be addressed at the end of the day.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: April 19, 2004.

**Alan D. Risenhoover,**

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

[FR Doc. E4–907 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 041604A]**

### Marine Mammals; Permit No. 909–1465–02

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

**ACTION:** Issuance of permit amendment.

**SUMMARY:** Notice is hereby given that a request for amendment of scientific research Permit No. 909–1465–02 submitted by Dan Engelhaupt, Biological Sciences Department, University of Durham, P.O. Box 197, Picton, New Zealand, has been granted.

**ADDRESSES:** The amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289, fax (301)713–0376;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9200; fax (978)281–9371; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

**FOR FURTHER INFORMATION CONTACT:** Carrie Hubard or Ruth Johnson, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The requested amendment has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the provisions of 50 CFR 222.306 of the regulations governing the taking, importing, and exporting of endangered and threatened fish and wildlife (50 CFR 222–226).

The modification extends the expiration date of the Permit from April 30, 2004, to April 30, 2005, for takes of sperm whales (*Physeter macrocephalus*) and other cetacean species in the Gulf of Mexico, Caribbean Sea, and western North Atlantic.

Issuance of this amendment, as required by the ESA was based on a

finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the threatened and endangered species which are the subject of this permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: April 16, 2004.

**Stephen L. Leathery,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 04–9305 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–22–S

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Nepal

April 19, 2004.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection Web site at *http://www.cbp.gov.* For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel Web site at *http://otexa.ita.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being adjusted to reflect Nepal's accession to the World Trade Organization (WTO). Also, the limit for Category 369-S, increased for carryover in a previous **Federal Register** notice and letter to Customs, is being revised to reflect WTO accession.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also see 68 FR 68598, published on December 9, 2003; and 69 FR 5838, published on February 6, 2004.

**D. Michael Hutchinson,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

April 19, 2004.

Commissioner,

*Bureau of Customs and Border Protection, Washington, DC 20229.*

Dear Commissioner: This directive amends, but does not cancel, the directives issued to you on December 3, 2003 and February 2, 2004 by the Chairman, Committee for the Implementation of Textile Agreements. These directives concern imports of certain cotton and man-made fiber textile products, produced or manufactured in Nepal and exported during the twelve-month period beginning on January 1, 2004 and extending through December 31, 2004.

Effective on April 23, 2004, you are directed to adjust the current limits for the following categories to reflect Nepal's accession to the World Trade Organization (WTO), as provided for under the Uruguay Round Agreement on Textiles and Clothing:

| Category | adjusted twelve-month limit [1] |
|---|---|
| 336/636 | 369,322 dozen. |
| 340 | 484,925 dozen. |
| 341 | 1,347,305 dozen. |
| 342/642 | 423,230 dozen. |
| 347/348 | 1,092,267 dozen. |
| 363 | 9,876,850 numbers. |
| 369–S [2] | 1,235,323 kilograms. |
| 640 | 244,061 dozen. |
| 641 | 550,294 dozen. |

[1] The limits have not been adjusted to account for any imports exported after December 31, 2003.

[2] Category 369–S: only HTS number 6307.10.2005.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[Doc. E4–908 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–DR–S

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Designations under the Textile and Apparel Commercial Availability Provisions of the Caribbean Basin Trade Partnership Act (CBTPA)

April 19, 2004.

**AGENCY:** The Committee for the Implementation of Textile Agreements (The Committee).

**ACTION:** Designation.

**SUMMARY:** The Committee has determined that certain fabrics, classified in subheading 5210.11 of the Harmonized Tariff Schedule of the United States (HTSUS), not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA. The Committee hereby designates such apparel articles that are both cut and sewn or otherwise assembled in an eligible country from these fabrics as eligible for quota-free and duty-free treatment under the textile and apparel commercial availability provisions of the CBTPA, and eligible under the HTSUS subheading 9820.11.27 to enter free of quotas and duties, provided all other fabrics are U.S. formed from yarns wholly formed in the U.S., including fabrics not formed from yarns, if such fabrics are classifiable under HTS heading 5602 or 5603 and are wholly formed in the United States.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Janet Heinzen, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Authority: Section 211 of the CBTPA, amending Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act (CBERA); Presidential Proclamations 7351 of October 2, 2000; Executive Order No. 13191 of January 17, 2001.

### Background

The commercial availability provision of the CBTPA provides for duty-free and quota-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary CBTPA countries from fabric or yarn that is not formed in the United States or a beneficiary CBTPA country if it has been determined that such yarns or fabrics cannot be supplied

by the domestic industry in commercial quantities in a timelymanner and certain procedural requirements have been met. In Presidential Proclamation 7351, the President proclaimed that this treatment would apply to such apparel articles from fabrics or yarns designated by the appropriate U.S. government authority in the Federal Register. In Executive Order 13191, the President authorized the Committee to determine whether particular yarns or fabrics cannot be supplied by the domestic industry in commercial quantities ina timely manner under the CBTPA.

On December 18, 2003, the Committee received a request alleging that certain fabrics, classified in HTSUS subheading 5210.11, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA. It requested that apparel articles from such fabrics be eligible for preferential treatment under the CBTPA. On December 24, 2003, the Committee requested public comment on the petition (68 FR 74554). On January 9, 2004, the Committee and the U.S. Trade Representative (USTR) sought the advice of the Industry Sector Advisory Committee for Wholesaling and Retailing and the Industry Sector Advisory Committee for Textiles and Apparel. On January 9, 2004, the Committee and USTR offered to hold consultations with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate (collectively, the Congressional Committees). On January 29, 2004, the U.S. International Trade Commission provided advice on the petition. Based on the information and advice received and its understanding of the industry, the Committee determined that the fabrics set forth in the request cannot be supplied by the domestic industry in commercial quantities in a timely manner. On February 13, 2004, the Committee and USTR submitted a report to the Congressional Committees that set forth the action proposed, the reasons for such action, and advice obtained. A period of 60 calendar days since this report was submitted has expired, as required by the CBTPA.

The Committee hereby designates as eligible for preferential treatment under subheading 9820.11.27 of the HTSUS, women's and girls' blouses, that are both cut and sewn or otherwise assembled in one or more eligible beneficiary CBTPA countries, from fabrics, classified in subheading 5210.11 of the Harmonized Tariff Schedule of the United States (HTSUS), not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, not formed in the United States, provided that all other fabrics are wholly formed in the United States from yarns wholly formed in the United States, including fabrics not formed from yarns, is such fabrics are classifiable under HTS heading 5602 or 5603 and are wholly formed in the United States, that are imported directly into the customs territory of the United States from an eligible beneficiary CBTPA country.

An "eligible beneficiary CBTPA country" means a country which the President has designated as a CBTPA beneficiary country under section 213(b)(5)(B) of the CBERA (19 U.S.C. 2703(b)(5)(B)) and which has been the subject of a finding, published in the Federal Register, that the country has satisfied the requirements of section 213(b)(4)(A)(ii) of the CBERA (19 U.S.C. 2703(b)(4)(A)(ii)) and resulting in the enumeration of such country in U.S. note 1 to subchapter XX of chapter 98 of the HTS.

**James C. Leonard III,**

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 04–9188 Filed 4–22–04; 8:45 am]

BILLING CODE 3510–DR–S

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Designations under the Textile and Apparel Commercial Availability Provisions of the Caribbean Basin Trade Partnership Act (CBTPA)

April 19, 2004.

**AGENCY:** The Committee for the Implementation of Textile Agreements (The Committee).

**ACTION:** Designation.

**SUMMARY:** The Committee has determined that certain fabrics, classified in subheadings 5513.11 and 5513.21 of the Harmonized Tariff Schedule of the United States (HTSUS), not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA. The Committee hereby designates such apparel articles that are both cut and sewn or otherwise assembled in an eligible country from these fabrics as eligible for quota-free and duty-free treatment under the textile and apparel commercial availability provisions of the CBTPA, and eligible under the HTSUS subheading 9820.11.27 to enter free of quotas and duties, provided all other fabrics are U.S. formed from yarns wholly formed in the U.S., including fabrics not formed from yarns, if such fabrics are classifiable under HTS heading 5602 or 5603 and are wholly formed in the United States.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Janet Heinzen, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Authority: Section 211 of the CBTPA, amending Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act (CBERA); Presidential Proclamations 7351 of October 2, 2000; Executive Order No. 13191 of January 17, 2001.

**BACKGROUND:**

The commercial availability provision of the CBTPA provides for duty-free and quota-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary CBTPA countries from fabric or yarn that is not formed in the United States or a beneficiary CBTPA country if it has been determined that such yarns or fabrics cannot be supplied by the domestic industry in ommercial quantities in a timely manner and certain procedural requirements have been met. In Presidential Proclamation 7351, the President proclaimed that this treatment would apply to such apparel articles from fabrics or yarns designated by the appropriate U.S. government authority in the Federal Register. In Executive Order 13191, the President authorized the Committee to determine whether particular yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

On December 18, 2003, the Committee received a request alleging that certain fabrics, classified in HTSUS subheadings 5513.11 and 5513.21, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA. It requested that apparel articles from such fabrics be eligible for preferential treatment under the CBTPA.

On December 24, 2003, the Committee requested public comment on the petition (68 FR 74555). On January 9, 2004, the Committee and the U.S. Trade Representative (USTR) sought the advice of the Industry Sector Advisory Committee for Wholesaling and Retailing and the Industry Sector Advisory Committee for Textiles and Apparel. On January 9, 2004, the Committee and USTR offered to hold consultations with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate (collectively, the Congressional Committees). On January 29, 2004, the U.S. International Trade Commission provided advice on the petition. Based on the information and advice received and its understanding of the industry, the Committee determined that the fabrics set forth in the request cannot be supplied by the domestic industry in commercial quantities in a timely manner. On February 13, 2004, the Committee and USTR submitted a report to the Congressional Committees that set forth the action proposed, the reasons for such action, and advice obtained. A period of 60 calendar days since this report was submitted has expired, as required by the CBTPA.

The Committee hereby designates as eligible for preferential treatment under subheading 9820.11.27 of the HTSUS, women's and girls' blouses, that are both cut and sewn or otherwise assembled in one or more eligible beneficiary CBTPA countries, from fabrics, classified in subheadings 5513.11 and 5513.21 of the Harmonized Tariff Schedule of the United States (HTSUS), not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, not formed in the United States, provided that all other fabrics are wholly formed in the United States from yarns wholly formed in the United States, including fabrics not formed from yarns, is such fabrics are classifiable under HTS heading 5602 or 5603 and are wholly formed in the United States, that are imported directly into the customs territory of the United States from an eligible beneficiary CBTPA country.

An "eligible beneficiary CBTPA country" means a country which the President has designated as a CBTPA beneficiary country under section 213(b)(5)(B) of the CBERA (19 U.S.C. 2703(b)(5)(B)) and which has been the subject of a finding, published in the Federal Register, that the country has satisfied the requirements of section 213(b)(4)(A)(ii) of the CBERA (19 U.S.C. 2703(b)(4)(A)(ii)) and resulting in the enumeration of such country in U.S. note 1 to subchapter XX of chapter 98 of the HTS.

**James C. Leonard III,**

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 04–9189 Filed 4–22–04; 8:45 am]

**BILLING CODE 3510–DR–S**

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Request for Public Comments on Revoking a Commercial Availability Designation under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

April 21, 2004.

**AGENCY:** The Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Request for public comments concerning a request for a revocation of a CITA designation under the CBTPA regarding two patented fusible interlining fabrics, used in the construction of waistbands.

**SUMMARY:** On April 16, 2004 the Chairman of CITA received a petition from Hodgson Russ Attorneys, LLP, on behalf of Narroflex Inc. (Narroflex), alleging that certain ultra-fine elastomeric crochet fabrics, detailed below, can be supplied by the domestic industry in commercial quantities in a timely manner, and requesting that CITA revoke its previous designation regarding these fabrics. On April 22, 2003, following a determination that the subject fabrics could not be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA, CITA designated apparel from these fabrics as eligible for duty-free treatment under the CBTPA. CITA hereby solicits public comments on this request from Narroflex, in particular with regard to whether such fabrics can be supplied by the domestic industry in commercial quantities. Comments must be submitted by May 10, 2004 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, 14th and Constitution Avenue, N.W. Washington, D.C. 20230.

**FOR FURTHER INFORMATION CONTACT:** Richard Stetson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act, as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

**BACKGROUND:**

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The CBTPA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary countries from fabric or yarn that is not formed in the United States or a beneficiary country, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On April 22, 2003, following a determination that certain ultra-fine elastomeric crochet fabrics, detailed below, could not be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA, CITA designated apparel from these fabrics as eligible for duty-free treatment under the CBTPA (68 FR 19788). On April 16, 2004, the Chairman of CITA received a petition from Hodgson Russ Attorneys, LLP, on behalf of Narroflex, alleging that these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner, and requesting that CITA revoke its previous designation regarding these fabrics. This petition can be viewed online at **http://otexa.ita.doc.gov/Commercial_Availability.htm.**

**The two fabrics at issue are:**

**Fusible Interlining 1 -**

An ultra-fine elastomeric crochet outer-fusible material with a fold line that is knitted into the fabric. A patent is pending for this fold-line fabric. The fabric is a 45mm wide base substrate, crochet knitted in narrow width, synthetic fiber based (49% polyester/43% elastane/8% nylon with a weight of 4.4 oz., a 110/110 stretch and a dull yarn), stretch elastomeric

material with adhesive coating that has the following characteristics:

a) The 45mm is divided as follows: 34mm solid followed by a 3mm seam allowing it to fold over followed by 8mm of solid.
b) In the length it exhibits excellent stretch and recovery properties at low extension levels.
c) It is delivered pre-shrunk with no potential for relaxation shrinkage during high temperature washing or fusing and deliveredlap laid, i.e., tension free adhesion level will be maintained or improved through garment processing temperatures of up to 350 degrees and dwell times of 20 minute durations.
d) The duration and efficacy of the bond will be such that the adhesive will not become detached from the fabric or base substrate during industrial washing or in later garment wear or after-care of 50 home washes.

In summary, the desired fabric will be an interlining fabric with the above properties. The finished interlining fabric is a fabric that has been coated with an adhesive coating after going through a finishing process to remove all shrinkage from the product and impart a stretch to the fabric. This finishing process of imparting stretch to fabrics is patented, U.S. Patent 5,987,721.

**Fusible Interlining 2 -**

A fine elastomeric crochet inner-fusible material with an adhesive coating that is applied after going through a finishing process to remove all shrinkage from the product. This finishing process of imparting stretch to fabrics is patented, U.S. Patent 5,987,721.

Specifically, the fabric is a 40mm synthetic fiber based stretch elastomeric fusible (80% nylon type 6/20% spandex with a weight of 4.4 oz., a 110/110 stretch and a dull yarn), with the following characteristics:

a) It is supplied pre-coated with an adhesive that will adhere to 100% cotton and other composition materials such as polyester/cotton blends during fusing at a temperature of 180 degrees.
b) The adhesive is of a melt flow index which will not strike back through the interlining substrate or strike through the fabric to which it is fused and whose adhesion level will be maintained or improved through garment processing temperatures of up to 350 degrees and dwell times of 20 minute durations.
c) The duration and efficacy of the bond will be such that the adhesive will not become detached from the fabric or base substrate during industrial washing or in later garment wear or after-care of 50 home washes.
d) Delivered on rolls of more than 350 yards or lap laid in boxes.

Both interlining fabrics are classifiable under 5903.90.2500, HTSUS. The adhesive coating adds approximately 25% - 30% weight to the fusible interlining 1 and adds approximately 20% - 25% weight to the fusible interlining 2.

The fusible interlining fabrics are used in the construction of waistbands in pants, shorts, skirts, and other similar products that have waistbands.

Fusible interlining 1 reinforces the twill pant fabric and also exclusively contributes to the "stretch ability" of the twill pant fabric in the waistband area. Fusible interlining 2 is used on the underside of the waistband lining fabric. This interlining reinforces the waistband lining, which is made from pocketing-type fabric, and also exclusively contributes to that fabric's "stretch ability." It also serves to "firm up" the seam area of the waistband lining so that the fabric will not rip or otherwise be damaged during the assembly/sewing process.

In describing the fabrics above, Narroflex used the trademark name "Lycra". CITA will not make a determination on a trademark name, so the term "elastomeric" has been substituted.

CITA is soliciting public comments regarding this request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be received no later than May 10, 2004. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the fabrics stating that it produces the fabrics that are the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production. Similarly, if a comment alleges that these fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation.

CITA will protect any business confidential information that is marked business confidential from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

**D. Michael Hutchinson,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 04–9388 Filed 4–21–04; 12:31 pm]

BILLING CODE 3510–DR–S

## DEPARTMENT OF DEFENSE

### Incentive Program for Major Defense Acquisition Programs To Use Machine Tools and Other Capital Assets Produced Within the United States

**AGENCY:** Department of Defense.

**ACTION:** Request for public comments.

**SUMMARY:** The Department of Defense is establishing an incentive program in accordance with Section 822 of the National Defense Authorization Act for Fiscal Year 2004 and is seeking information that will assist it in identifying appropriate incentives for industry to use machine tools and other capital assets produced in the United States. It is the Department's goal to structure this incentive program and publish interim implementing regulations in the Fall of 2004.

**DATES:** Submit written comments to the address shown below on or before May 24, 2004.

**ADDRESSES:** Submit comments to: Director, Defense Procurement and Acquisition Policy, 3060 Defense Pentagon, Attn: Mr. Daniel C. Nielsen, Washington, DC 20301–3060; or by e-mail to *daniel.nielsen@osd.mil.*

**FOR FURTHER INFORMATION CONTACT:** Susan Hildner, (703) 695–4258.

**SUPPLEMENTARY INFORMATION:** Section 822 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136)—Incentive Program for Major Defense Acquisition Programs to Use Machine Tools and Other Capital Assets Produced within the United States—requires the Secretary of Defense to plan and establish an

incentive program for contractors to purchase capital assets manufactured in the United States. This incentive program applies to contracts for the procurement of a major defense acquisition program and applies to contracts entered into after May 2005. Section 822 authorizes the Secretary of Defense to use the Industrial Base Capabilities Fund established under Section 814 of Public Law 108–136 for this purpose. This section also directs the Secretary to provide consideration in source selection for contractors with eligible assets for major defense systems and makes provision for establishing implementing regulations.

As the Department crafts this incentive program, industry input is considered essential. What does industry believe are the factors or inducements that would motivate contractors to purchase capital assets manufactured in the United States? It should be noted that no funds have been appropriated for the Industrial Base Capabilities Fund. Therefore, the Department is seeking suggestions for other alternatives. Interested parties are invited to submit written comments to assist the Department in its deliberations and discussions.

Material that is business confidential information will be exempted from public disclosure as provided for by 5 U.S.C. 552(b)(4) (Freedom of Information Act rules). Anyone submitting business confidential information should clearly identify the business confidential portion of the submission and also provide a non-confidential submission, which can be placed in the public file. Comments not marked business confidential may be subject to disclosure under the Freedom of Information Act.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

[FR Doc. 04–9267 Filed 4–22–04; 8:45 am]

**BILLING CODE 5001–08–P**

## DEPARTMENT OF DEFENSE

**[OMB Control Number 0704–0398]**

## Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Substitutions for Military or Federal Specifications and Standards

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice and request for comments regarding a proposed extension of an approved information collection requirement.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use through August 31, 2004. DoD proposes that OMB extend its approval for use through August 31, 2007.

**DATES:** DoD will consider all comments received by June 22, 2004.

**ADDRESSES:** Respondents may submit comments via the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm*. As an alternative, respondents may e-mail comments to: *dfars@osd.mil*. Please cite OMB Control Number 0704–0398 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Teresa Brooks, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite OMB Control Number 0704–0398.

At the end of the comment period, interested parties may view public comments on the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Teresa Brooks, (703) 602–0326. The information collection requirements addressed in this notice are available electronically on the Internet at: *http://www.acq.osd.mil/dpap/dfars/index.htm*. Paper copies are available from Ms. Teresa Brooks, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

**SUPPLEMENTARY INFORMATION:**

*Title and OMB Number:* Defense Federal Acquisition Regulation Supplement (DFARS) Section 211.273, Substitutions for Military or Federal Specifications and Standards, and related clause at DFARS 252.211–7005; OMB Control Number 0704–0398.

*Needs and Uses:* This information collection permits offerors to propose Single Process Initiative (SPI) processes as alternatives to military or Federal specifications and standards cited in DoD solicitations for previously developed items. DoD uses the information to verify Government acceptance of an SPI process as a valid replacement for a military or Federal specification or standard.

*Affected Public:* Businesses or other for-profit institutions.

*Annual Burden Hours:* 20.

*Number of Respondents:* 10.

*Responses Per Respondent:* 2.

*Annual Responses:* 20.

*Average Burden Per Response:* 1 hour.

*Frequency:* On occasion.

**Summary of Information Collection**

The clause at DFARS 252.211–7005, Substitutions for Military or Federal Specifications and Standards, is used in solicitations and contracts for previously developed items. The clause encourages offerors to propose management or manufacturing processes, that have been previously accepted by DoD under the SPI program, as alternatives to military or Federal specifications and standards cited in the solicitation. An offeror proposing to use an SPI process must'

(1) Identify the specific military or Federal specification or standard for which the SPI process has been accepted;

(2) Identify each facility at which the offeror proposes to use the SPI process in lieu of military or Federal specifications or standards cited in the solicitation;

(3) Identify the contract line items, subline items, components, or elements affected by the SPI process; and

(4) If the proposed SPI process has been accepted at the facility at which it is proposed for use, but is not yet listed at the SPI Internet site, submit documentation of DoD acceptance of the SPI process.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

[FR Doc. 04–9266 Filed 4–22–04; 8:45 am]

**BILLING CODE 5001–08–P**

## DEPARTMENT OF DEFENSE

**[OMB Control Number 0704–0225]**

### Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Administrative Matters

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice and request for comments regarding a proposed extension of an approved information collection requirement.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use through August 31, 2004. DoD proposes that OMB extend its approval for use through August 31, 2007.

**DATES:** DoD will consider all comments received by June 22, 2004.

**ADDRESSES:** Respondents may submit comments via the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm.* As an alternative, respondents may e-mail comments to: *dfars@osd.mil.* Please cite OMB Control Number 0704–0225 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Mr. Euclides Barrera, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite OMB Control Number 0704–0225.

At the end of the comment period, interested parties may view public comments on the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Euclides Barrera, (703) 602–0296. The information collection requirements addressed in this notice are available electronically on the Internet at: *http://www.acq.osd.mil/dpap/dfars/index.htm.* Paper copies are available from Mr. Euclides Barrera, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

**SUPPLEMENTARY INFORMATION:**

*Title, Associated Forms, and OMB Number:* Defense Federal Acquisition Regulation Supplement (DFARS) Part 204, Administrative Matters, and related clauses at DFARS 252.204; DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code, and DD Form 2051–1, Request for Information/Verification of Commercial and Government Entity (CAGE) Code; OMB Control Number 0704–0225.

*Needs and Uses:* DoD uses this information to control unclassified contract data that is sensitive and inappropriate for release to the public; and to facilitate data exchange among automated systems for contract award, contract administration, and contract payment by assigning a unique code to each DoD contractor.

*Affected Public:* Businesses or other for-profit and not-for-profit institutions.

*Annual Burden Hours:* 19,624.

*Number of Respondents:* 32,240.

*Responses Per Respondent:* 1.

*Annual Responses:* 32,240.

*Average Burden Per Response:* .61 hours.

*Frequency:* On occasion.

**Summary of Information Collection**

DFARS 204.404–70(a) prescribes use of the clause at DFARS 252.204–7000, Disclosure of Information, in contracts that require the contractor to access or generate unclassified information that may be sensitive and inappropriate for release to the public. The clause requires the contractor to obtain approval of the contracting officer before release of any unclassified contract-related information outside the contractor's organization, unless the information is already in the public domain. In requesting this approval, the contractor must identify the specific information to be released, the medium to be used, and the purpose for the release.

DFARS 204.7207 prescribes use of the provision at DFARS 252.204–7001, Commercial and Government Entity (CAGE) Code Reporting, in solicitations when CAGE codes for potential offerors are not available to the contracting officer. The provision requires an offeror to enter its CAGE code on its offer. If an offeror does not have a CAGE code, the offeror may request one from the contracting officer, who will ask the offeror to complete Section B of DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

[FR Doc. 04–9268 Filed 4–22–04; 8:45 am]

**BILLING CODE 5001–08–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Meeting of the Chief of Naval Operations (CNO) Executive Panel

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Notice of closed meeting.

**SUMMARY:** The CNO Executive Panel is to report the findings and recommendations of the Inter American Naval Conference Study Group to the Chief of Naval Operations. The meeting will consist of discussions relating to appraisals of regional security issues and the role of U.S. Naval cooperation with Inter American Naval Conference member-states within the context of broader U.S. national objectives.

**DATES:** The meeting will be held on April 27, 2004, from 1 p.m. to 1:30 p.m.

**ADDRESSES:** The meeting will be held at the Chief of Naval Operations office, Room 4E540, 2000 Navy Pentagon, Washington, DC 20350–2000.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Commander Chris Corgnati, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, Virginia 22311, (703) 681–4909.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Dated: April 19, 2004.

**S.A. Hughes,**

*Lieutenant Commander, Judge Advocate General's Corps, U. S. Navy, Federal Register Liaison Officer.*

[FR Doc. 04–9368 Filed 4–22–04; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Meetings of the Naval Research Advisory Committee

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Notice of closed meetings.

**SUMMARY:** The Naval Research Advisory Committee (NRAC) Panel on Venture Capital Technology will meet to review and access emerging standards and technologies in the technology sector that the Department of the Navy should incorporate in its technology roadmap for providing state-of-the-art capabilities to the Fleet/Force.

**DATES:** The meetings will be held on Wednesday, May 5, 2004, and Thursday, May 6, 2004, from 8 a.m. to 5 p.m.

**ADDRESSES:** The meetings will be held in the Pentagon, Room BF943, Washington, DC, on May 5, 2004, and at the Marine Corps Base Quantico on May 6, 2004.

**FOR FURTHER INFORMATION CONTACT:** Dennis Ryan, Program Director, Naval Research Advisory Committee, 800 North Quincy Street, Arlington, VA 22217–5660, (703) 696–6769.

**SUPPLEMENTARY INFORMATION:** This notice is provided in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2). All sessions of the meetings will be devoted to executive sessions that will include discussions and technical examination of information related to venture capital technologies. These briefings and discussions will contain proprietary information and classified information that is specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense and are in fact properly classified pursuant to such Executive Order.

The proprietary, classified and non-classified matters to be discussed are so inextricably intertwined as to preclude opening any portion of the meetings. In accordance with 5 U.S.C. App. 2, section 10(d), the Secretary of the Navy has determined in writing that all sessions of the meetings must be closed to the public because they are concerned with matters listed in 5 U.S.C. section 552b(c)(1) and (4).

Dated: April 20, 2004.

**S.A. Hughes,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 04–9367 Filed 4–22–04; 8:45 am]

BILLING CODE 3810–FF–P

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, 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 June 22, 2004.

**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 Leader, Regulatory Information Management Group, Office of the Chief Information Officer, 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: April 19, 2004.

**Angela C. Arrington,**

*Leader, Regulatory Information Management Group, Office of the Chief Information Officer.*

**Office of Special Education and Rehabilitative Services**

*Type of Review:* Extension.
*Title:* Case Service Report.
*Frequency:* Annually.
*Affected Public:* State, local, or tribal gov't, SEAs or LEAs.
*Reporting and Recordkeeping Hour Burden:*
*Responses:* 80.
*Burden Hours:* 3,600.
*Abstract:* As required by sections 13, 101(a)(10), 106 and 626 of the Rehabilitation Act, the data are submitted annually by State VR agencies. The data contain personal and program-related characteristics, including economic outcomes of persons with disabilities whose case records are closed.

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 2484. 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., Potomac Center South, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at 202–245–6432. 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. 04–9187 Filed 4–22–04; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Privacy Act of 1974; System of Records—DC Choice Program Evaluation

**AGENCY:** Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Department of Education.

**ACTION:** Notice of a new system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended (Privacy Act), the Department of Education (ED) publishes this notice of a new system of records entitled DC Choice Program Evaluation (18–13–07). The system will contain information about program applicants (students), their parents, and other adults living

with the applicants. It will include names, addresses, telephone numbers, social security numbers, demographic information—such as race/ethnicity, age, marital status, disability, language spoken in the home, educational background, and income—and the results of academic assessments. The system will also collect information about parents' satisfaction with their children's current schools and the reasons for seeking a new school. In addition, the system will collect scores on academic achievement examinations administered by a Department contractor for applicants who may not have participated in Spring, 2004 District of Columbia public schools (DCPS) testing. It will also contain academic achievement data and other student performance measures, including attendance and disciplinary records, from existing DCPS education records for all students in grades K thru 12.

**DATES:** The Department seeks comment on this new system of records described in this notice, in accordance with the requirements of the Privacy Act. We must receive your comments on the proposed routine use for the system of records included in this notice on or before May 24, 2004.

The Department filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Governmental Affairs, the Chair of the House of Representatives Committee on Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), on April 20, 2004.

Except for the provisions governing routine uses of records maintained in the system, this system of records notice is effective upon publication. The proposed routine use included in this new system of records will become effective on—(1) the expiration of the 40-day period for OMB review on May 30, 2004; (2) the expiration of a 30-day period for OMB review on May 20, 2004, if OMB waives 10 days of its review; or, (3) May 24, 2004, unless the proposed routine use included in the system of records needs to be changed as a result of public comment or OMB review.

**ADDRESSES:** Address all comments about the proposed routine uses to Dr. Ricky Takai, Director, Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue, NW., room 502d, Washington, DC 20208. Telephone: (202) 208–7083. If you prefer to send comments through the Internet, use the following address: *comments@ed.gov*. You must include the term "DC Choice Evaluation" in the subject line of the electronic message.

During and after the comment period, you may inspect all public comments about this notice in room 502, 555 New Jersey Avenue, NW., Washington, DC, between the hours of 8 a.m. and 4:30 p.m., eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

**FOR FURTHER INFORMATION CONTACT:** Dr. Ricky Takai. Telephone: (202) 208–7083. If you use a telecommunications devise for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

The Privacy Act (5 U.S.C. 552a) requires ED to publish in the **Federal Register** this notice of a new system of records maintained by the Department. The Department's regulations implementing the Privacy Act are contained in part 5b of title 34 of the Code of Federal Regulations (CFR).

The Privacy Act applies to information about individuals that contain individually identifiable information that may be retrieved by a unique identifier associated with each individual, such as a name or social security number. The information about each individual is called a "record" and the system, whether manual or computer-based, is called a "system of records." The Privacy Act requires each agency to publish notices of systems of records in the **Federal Register** and to prepare a report to OMB whenever the agency publishes a new or altered system of records. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Governmental Affairs and the Chair of the House Committee on Government Reform. These reports are intended to permit an evaluation of the probable or potential effect of the proposal on the privacy of individuals.

**Electronic Access to This Document**

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *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 CFR is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: April 20, 2004.

**Grover Whitehurst,**

*Director, Institute of Education Sciences.*

For the reasons discussed in the preamble, the Director of the Institute of Education Sciences, U.S. Department of Education publishes a notice of a new system of records to read as follows:

**18–13–07**

**SYSTEM NAME:**

DC Choice Program Evaluation.

**SECURITY CLASSIFICATION:**

None.

**SYSTEM LOCATION:**

Westat, 1650 Research Boulevard, Rockville, MD, 20850.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

There are two categories of individuals who are covered by this system. The system will contain records on DC Choice Program applicants (students), their parents and other adults living with these students. The system will also contain information on all DCPS non-applicant students from K thru 12.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

This system consists of the names, addresses, telephone numbers, social security numbers, demographic information—such as race/ethnicity,

age, marital status, disability, language spoken in the home, educational background, and income—and the results of academic assessments. The system will collect information about parents' satisfaction with their children's current schools and the reasons for seeking a new school. The system will also collect scores on academic achievement examinations for applicants who may not have participated in Spring, 2004 DCPS testing. In addition, the system will also contain academic achievement data and other student performance measures, including attendance and disciplinary records, from existing DCPS school records for all students in grades K thru 12.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

DC School Choice Incentive Act of 2003, Pub. L. 108–199, Division C, Title III, Section 309(a)(3) and (4).

**PURPOSE(S):**

This statute is intended to provide low-income parents residing in the District of Columbia (the District) with expanded opportunities for enrolling their children in higher-performing private schools in the District. The information in this system will be used to fulfill the requirements of the DC School Choice Incentive Act of 2003 (D.C. Choice Act), especially section 309, which calls for a detailed evaluation of the program. In particular, section 309 directs the Department to evaluate the performance of students participating in the program by comparing them with the students in the same grade at DCPS as well as students in DCPS who applied for the program but were not selected.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

ED may disclose information contained in a record in this system of records under the routine use listed in this system without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. Any disclosure of individually identifiable information from a record in this system must also comply with the requirements of: (A) Section 183 of the Education Sciences Reform Act of 2002 (ESRA), Pub. L. 107–279, providing for confidentiality standards that apply to all collections, reporting and publication of data by the Institute of Education Sciences (IES); (B) if applicable, Title V of the E-Government Act of 2002 (E-Gov Act), Pub. L. 107–347, governing any pledges of confidentiality given to the public for statistical purposes; and (C) Section 309(a)(5) of the D.C. Choice Act, prohibiting the disclosure of personally identifiable information to the public regarding the results of the measurements used for the evaluations.

*Contract Disclosure.* If the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. Before entering into such a contract, the Department shall require the contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the records in the system and to agree in writing to comply with all other provisions of law that affect the disclosure of the information, including section 183 of the ESRA, Title V of the E-Gov Act, and section 309(a)(5) of the D.C. Choice Act.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Not applicable to this system notice.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM: STORAGE:**

The contractor will maintain data for this system on its computers and in hard copy.

**RETRIEVABILITY:**

Records in this system are indexed by a number assigned to each individual, which is cross-referenced by the individual's name on a separate list.

**SAFEGUARDS:**

Individual access to the offices of Department contractor, Westat, that maintains the system of records is controlled and monitored by security personnel. The contractor has established a set of procedures to ensure confidentiality of data. The system ensures that information identifying individuals is in files physically separated from other research data. Westat will maintain security of the complete set of all master data files and documentation. Access to individually identifiable data will be strictly controlled. All data will be kept in locked file cabinets during nonworking hours, and work on hardcopy data will take place in a single room, except for data entry.

Physical security of electronic data will also be maintained. Security features that protect project data include password-protected accounts that authorize users to use the Westat system but to access only specific network directories and network software; user rights and directory and file attributes that limit those who can use particular directories and files and determine how they can use them; e-mail passwords that authorize the user to access mail services and additional security features that the network administrator establishes for projects as needed.

**RETENTION AND DISPOSAL:**

Records are maintained and disposed of in accordance with ED's record disposition schedules (ED/RDS). In particular, ED will follow the schedules outlined in Part 3 (Research Projects and Management Study Records) and Part 14 (Electronic Records).

**SYSTEM MANAGER AND ADDRESS:**

Director, Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue, NW., room 502, Washington, DC 20208.

**NOTIFICATION PROCEDURE:**

If you wish to determine whether a record exists regarding you in the system of records, contact the systems manager. Your request must meet the requirements of the regulations in 34 CFR 5b.5, including proof of identity.

**RECORD ACCESS PROCEDURE:**

If you wish to gain access to your record in the system of records, contact the system manager. Your request must meet the requirements of the regulations in 34 CFR 5b.5, including proof of identity.

**PROCEDURE FOR CONTESTING RECORD:**

If you wish to contest the content of a record regarding you in the system of records, contact the system manager. Your request must meet the requirements of the regulations in 34 CFR 5b.7, including proof of identity.

**RECORD SOURCE CATEGORIES:**

There are three principal record source categories in this system. Information will be obtained from applications submitted by potential scholarship winners. Information will also be obtained directly from applicants who have to take academic assessment examinations administered directly by the contractor. Finally, information will be gathered from the education records of DCPS students in grades K thru 12.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

[FR Doc. 04–9303 Filed 4–22–04; 8:45 am]
BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

**[Docket Nos. EA–291]**

### Application To Export Electric Energy; Dominion Energy Marketing, Inc.

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of application.

**SUMMARY:** Dominion Energy Marketing, Inc. (DEMI) has applied to export electric energy from the United States to Canada, pursuant to section 202(e) of the Federal Power Act.

**DATES:** Comments, protests or requests to intervene must be submitted on or before May 24, 2004.

**ADDRESSES:** Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

**FOR FURTHER INFORMATION CONTACT:** Xavier Puslowski (Program Office) 202–586–4708 or Michael Skinker (Program Attorney) 202–586–2793.

**SUPPLEMENTARY INFORMATION:** Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On April 6, 2004, DEMI applied to the Department of Energy ("DOE") for authority to export electric energy from the United States to Canada. DEMI, a Delaware corporation with its principal place of business in Richmond, Virginia, is a wholly-owned indirect subsidiary of Dominion Resources, Inc. DEMI does not own or control any electric generation or transmission facilities nor does it have a franchised service area. DEMI will be engaged in the marketing of power as both a broker and as a marketer of electric power at wholesale. DEMI proposes to purchase the power that it will export to Canada from Federal power marketing agencies and electric utilities within the United States.

In FE Docket No. EA–291, DEMI proposes to export electric energy to Canada and to arrange for the delivery of those exports to Canada over the international transmission facilities owned by Basin Electric Power Cooperative, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power and Light, Minnkota Power Cooperative, Inc., New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power Company, Vermont Electric Power Company, and Vermont Electric Transmission Company.

The construction of each of the international transmission facilities to be utilized by DEMI has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

*Procedural Matters:* Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the date listed above.

Comments on the DEMI application to export electric energy to Canada should be clearly marked with Docket EA–291. Additional copies are to be filed directly with Michael C. Regulinski, Esquire, Dominion Resources Services, Inc., 120 Tredegar Street, Richmond, VA 23219 *and* David Martin Connelly, Esquire, Bruder, Gentile and Marcoux, L.L.P., 1701 Pennsylvania Avenue, NW., Suite 900, Washington, DC 20006–5805.

A final decision will be made on this application after the environmental impact has been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy home page at *http://www.fe.doe.gov*. Upon reaching the Fossil Energy home page, select "Electricity Regulation," and then "Pending Proceedings" from the options menus.

Issued in Washington, DC, on April 20, 2004.

**Anthony Como,**

*Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.*

[FR Doc. 04–9275 Filed 4–22–04; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

**[Docket No. EA–264–A]**

### Application to Export Electric Energy; ENMAX Energy Marketing, Inc.

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of application.

**SUMMARY:** ENMAX Energy Marketing Inc. (ENMAX) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

**DATES:** Comments, protests or requests to intervene must be submitted on or before May 10, 2004.

**ADDRESSES:** Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (fax 202–287–5736).

**FOR FURTHER INFORMATION CONTACT:** Rosalind Carter (Program Office) 202–586–7983 or Michael Skinker (Program Attorney) 202–586–2793.

**SUPPLEMENTARY INFORMATION:** Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On May 30, 2002, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued Order No. EA–264 authorizing ENMAX to transmit electric energy from the United States to Canada. That two-year authorization will expire on May 30, 2004.

On April 5, 2004, FE received an application from ENMAX to renew the authorization contained in EA–264 for a term of five (5) years. ENMAX is a Canadian corporation having its principal place of business in Calgary, Alberta, Canada. ENMAX is a wholly-owned subsidiary of ENMAX Energy Cooperation which in turn is a wholly-owned subsidiary of ENMAX Corporation. ENMAX Corporation is wholly owned by the City of Calgary and provides electricity transmission and distribution services in the City of Calgary.

ENMAX proposes to arrange for the delivery of electric energy to Canada over the existing international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine

Public Service Company, Minnesota Power Inc., New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company. In addition, ENMAX has requested it be authorized to export electric energy using international transmission facilities currently owned by Boise Cascade and NSP/Excel which have not previously been authorized for third-party exports.

The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by ENMAX, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

*Procedural Matters:* Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's rules of practice and procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the ENMAX application to export electric energy to Canada should be clearly marked with Docket EA–264–A. Additional copies are to be filed directly with Darin L. Lowther, Manager, Regulatory Affairs, ENMAX Energy Marketing Inc., 141–50 Avenue, SE., Calagary, AB T2G 4S7 and Jerry L. Pfeffer, Skadden, Arps, Slate, Meagher, & Flom, LLP, 1440 New York Avenue, NW., Washington, DC 20005–2111

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy home page at *http://www.fe.de.gov*. Upon reaching the Fossil Energy home page, select "Electricity Regulation," and then "Pending Procedures" from the options menus.

Issued in Washington, DC, on April 19, 2004.

**Anthony J. Como,**

*Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.*

[FR Doc. 04–9244 Filed 4–22–04; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

**[Docket No. EA–290]**

## Application To Export Electric Energy; Ontario Power Generation, Inc.

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of application.

**SUMMARY:** Ontario Power Generation, Inc. (OPG) has applied for authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

**DATES:** Comments, protests or requests to intervene must be submitted on or before May 10, 2004.

**ADDRESSES:** Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0350 (FAX 202–287–5736).

**FOR FURTHER INFORMATION CONTACT:** Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–2793.

**SUPPLEMENTARY INFORMATION:** Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On March 15, 2004, the Office of Fossil Energy (FE) of the Department of Energy (DOE) received an application from OPG to transmit electric energy from the United States to Canada. OPG is a Canadian corporation having its principal place of business at Toronto, Ontario, Canada. OPG operates a number of power generation facilities in Ontario, some of which are owned by OPG and some by various subsidiary corporations. OPG does not own or control any transmission or distribution assets, nor does it have any franchised service area in the United States or Canada. OPG's generation assets previously were owned by Ontario Hydro, the former government-owned utility providing generation, transmission and certain distribution services in Ontario.

OPG proposes to arrange for the delivery of electric energy to Canada over the existing international transmission facilities owned by Basin Electric Power Cooperative, Boise Cascade, Bonneville Power Administration, Citizen Utilities, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, Northern States/Ecel, Vermont Electric Cooperative Inc., and Vermont Electric Transmission Company. The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by OPG, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

OPG has requested expedited processing of its application so that it may export power to Canada on the earliest possible date.

*Procedural Matters:* Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with § 385.211 or § 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the OPG application to export electric energy to Canada should be clearly marked with Docket EA–290. Additional copies are to be filed directly with Andrew Barrett, Vice President, Regulatory Affairs, Ontario Power Generation Inc., 700 University Avenue, Toronto, Ontario M5G 1X6 Canada and Jerry Pfeiffer, Energy Industries Advisor, Victor A. Contract, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, NW., Washington, DC 20005–2111.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://*

*www.fe.de.gov.* Upon reaching the Fossil Energy Home page, select "Electricity Regulation," and then "Pending Procedures" from the options menus.

Issued in Washington, DC, on April 20, 2004.

**Anthony J. Como,**

*Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.*

[FR Doc. 04–9245 Filed 4–22–04; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Energy Information Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Agency information collection activities: proposed collection; comment request.

**SUMMARY:** The EIA is soliciting comments on a proposed new Form EIA–914, "Monthly Natural Gas Production Report."

**DATES:** Comments must be filed by June 22, 2004. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

**ADDRESSES:** Send comments to Barry Yaffe. To ensure receipt of the comments by the due date, submission by FAX (202–586–9739) or e-mail (*barry.yaffe@EIA.doe.gov*) is recommended. The mailing address is Office of Oil and Gas, El–40, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Barry Yaffe may be contacted by telephone at 202–586–4412.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Barry Yaffe at the address listed above.

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Current Actions
III. Request for Comments

#### I. Background

The Federal Energy Administration Act of 1974 (Pub. L. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer-term domestic demand.

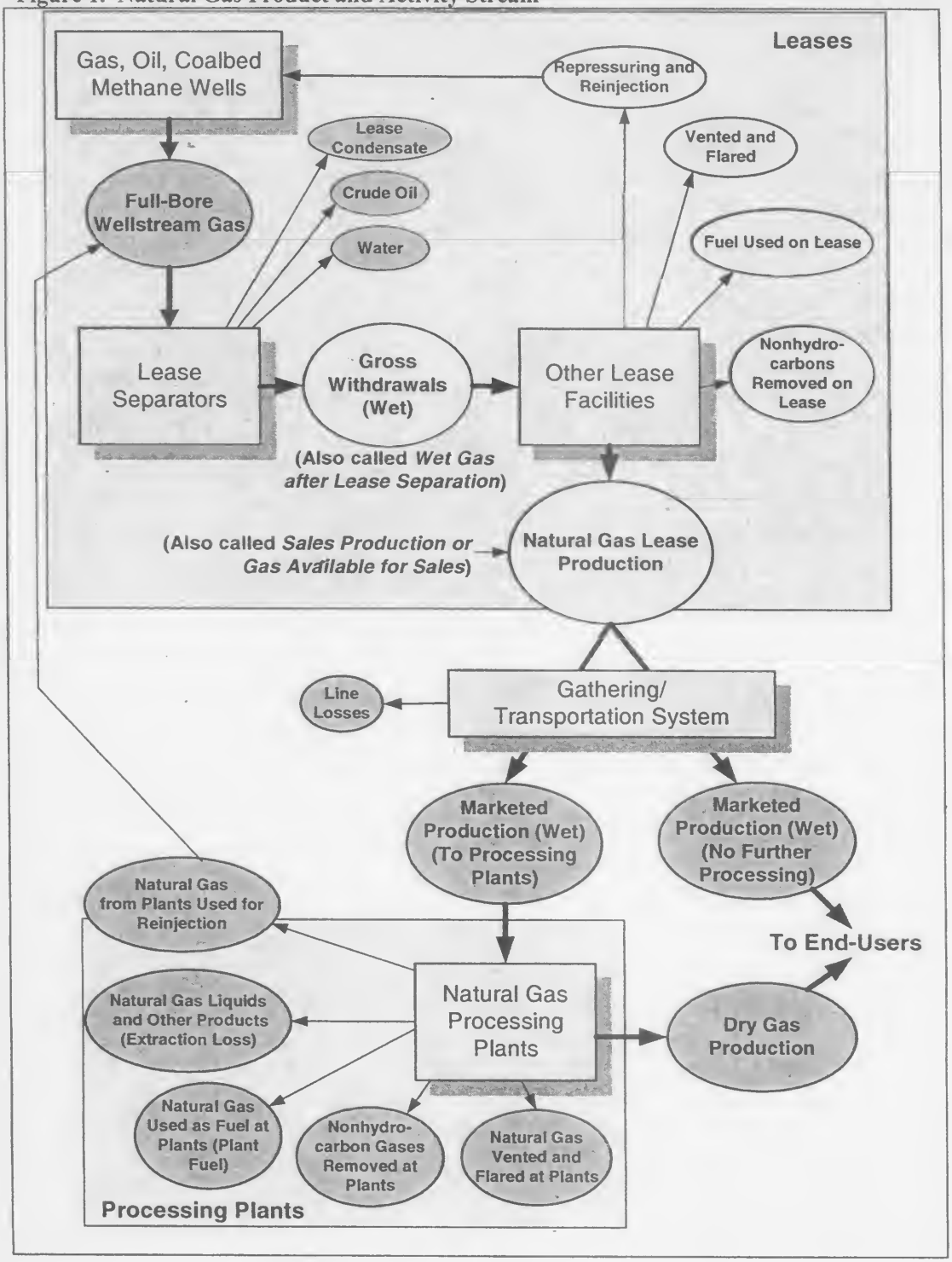
The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35), provides the public and government agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Any comments received help the EIA to prepare data requests that maximize the utility of the information collected and to assess the impact of collection requirements on the public. Later, the EIA plans to seek approval by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

EIA is proposing a new sample survey, Form EIA–914, "Monthly Natural Gas Production Report." Using Form EIA–914, EIA's ability to reliably estimate and disseminate timely monthly natural gas production data for the United States and its top producing areas would improve significantly. The applicable elements of the natural gas production activity stream are shown in Figure 1; the associated definitions are shown in Table 1.

The primary quantity to be measured by the survey is "natural gas lease production." Similar volumes are sometimes referred to as "sales production" or "gas available for sales." This quantity indicates the net amount of produced gas that leaves the lease, going either to natural gas processing plants or directly to end-users. Other quantities to be reported are "gross withdrawals (wet)" (*i.e.*, full-bore wellstream gas minus lease condensate, oil and water), gas used as fuel on leases, gas used for repressuring and reinjection, quantities vented and flared on leases, and nonhydrocarbons removed on leases. Gross withdrawals (wet) is sometimes referred to as "wet gas after lease separation." The proposed survey form and instructions are available at *http://www.eia.doe.gov/oil_gas/fwd/proposed.html.*

BILLING CODE 6450–01–P

**Figure 1. Natural Gas Product and Activity Stream**




BILLING CODE 6450–01–C

**Table 1. Definitions**

*Wellhead:* The point at which the natural gas exits the ground.

*Lease separation facility (lease separator):* A facility installed at the surface for the purpose of (a) separating gases from produced crude oil and water at the temperature and pressure conditions set by the separator and/or (b) separating gases from that portion of the produced natural gas stream that liquefies at the temperature and pressure conditions set by the separator.

*Natural gas processing plant:* A surface installation designed to separate and recover natural gas liquids from a stream of produced natural gas through the processes of condensation, absorption, adsorption, refrigeration, or other methods and to control the quality of natural gas marketed and/or returned to oil or gas reservoirs for pressure maintenance, repressuring, or cycling.

*Gross withdrawals (wet):* Full well stream volume, including all natural gas plant liquid and nonhydrocarbon gases, but excluding lease condensate, oil and water. Also includes amounts delivered as royalty payments or consumed in field operations.

*Lease condensate:* A mixture consisting primarily of pentanes and heavier hydrocarbons that is recovered as a liquid from natural gas in lease or field separation facilities. This category excludes natural gas plant liquids, such as butane and propane, which are recovered at natural gas processing plants or facilities.

*Wet natural gas:* A mixture of hydrocarbon compounds and small quantities of various nonhydrocarbons existing in the gaseous phase or in solution with crude oil in porous rock formations at reservoir conditions. The principal hydrocarbons normally contained in the mixture are methane, ethane, propane, butane, and pentane. Typical nonhydrocarbon gases that may be present in reservoir natural gas are water vapor, carbon dioxide, hydrogen sulfide, nitrogen and trace amounts of helium. Under reservoir conditions, natural gas and its associated liquefiable portions occur either in a single gaseous phase in the reservoir or in solution with crude oil and are not distinguishable at the time as separate substances. Note: The Securities and Exchange Commission and the Financial Accounting Standards Board refer to this product as natural gas.

*Dry natural gas:* Natural gas which remains after: (1) The liquefiable hydrocarbon portion has been removed from the gas stream (*i.e.*, gas after lease, field, and/or plant separation); and (2) any volumes of nonhydrocarbon gases have been removed where they occur in sufficient quantity to render the gas unmarketable. Note: Dry natural gas is also known as consumer-grade natural gas. The parameters for measurement are cubic feet at 60 degrees Fahrenheit and 14.73 pounds per square inch absolute.

*Repressuring and reinjection:* The injection of gas into oil or gas formations to effect greater ultimate recovery.

*Vented and flared:* Gas that is disposed of by releasing (venting) or burning (flaring).

*Extraction loss:* The reduction in volume of natural gas due to the removal of natural gas liquid constituents such as ethane, propane, and butane at natural gas processing plants.

*Nonhydrocarbon Gases:* Typical nonhydrocarbon gases that may be present in reservoir natural gas, such as carbon dioxide, hydrogen sulfide, helium, nitrogen and water vapor.

*Marketed production (wet):* Gross withdrawals (wet) less gas used for repressuring and reinjection, quantities vented and flared, nonhydrocarbon gases removed in treating or processing operations, and gas used as fuel on lease. Includes all dry natural gas plus quantities of gas consumed in lease and processing plant operations. Natural Gas Lease Production is equal to the sum of marketed wet production (to processing plants) and marketed wet production going directly to end-users (no further processing).

*A. EIA's Current Method to Generate Estimates of Natural Gas Production*

Currently the EIA publishes monthly estimates of natural gas production in the *Natural Gas Monthly* [by State, Gulf of Mexico and total United States] and the *Monthly Energy Review* [total United States], and annually in the *Natural Gas Annual* [by State, Gulf of Mexico and total United States] and *Annual Energy Review* [total United States]. EIA obtains data from the following sources:

(1) State-level natural gas production data submitted voluntarily by many producing States to the EIA on Form EIA–895, "Monthly and Annual Quantity and Value of Natural Gas Production Report,"

(2) Other State-level natural gas production information obtained from agencies in various States (directly or from their Web sites), and

(3) Information on offshore natural gas production collected and released by the Minerals Management Service (MMS) in the Department of Interior.

Although EIA obtains data from these sources, the data are subject to reporting lags and non-reporting. The incomplete nature of the more recent data causes EIA to have to create estimates for a substantial share of recent production activity.

The States and MMS gather natural gas production information for various reasons, often for revenue, taxing or conservation purposes. Most State and MMS production data for a given report month are not considered to be reliable for 12–18 months after the close of a report month and may not be considered "final" (*i.e.*, no further revisions) for 2–3 years. The EIA has developed estimation methodologies that operate on the preliminary data from the States with larger production volumes and on the data from MMS, and EIA uses statistical imputation techniques for the States with relatively less production. EIA generates estimates of monthly natural gas production that are considered adequate for release about 120 days after the close of a report month. These methodologies are described in the report, "How EIA Estimates Natural Gas Production," at *http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngprod/ngprod.pdf.*

*B. Other Alternatives to Generate Timely, Reliable and More Precise Estimates of Natural Gas Production*

The monthly natural gas production estimates that EIA publishes 120 days following the close of a report month have been found, on average, to match "final" values (no further revisions) to within 3% or less at the national level of aggregation. While a 120-day information lag is a vast improvement over the timeliness of the State and MMS-provided source data, it is still too long for the information to be useful in determining near and intermediate term supplies, especially during natural gas peak demand periods. Also, a 3% error band is too large to accurately discern if production has risen or declined in a given month, because the monthly production variations are sometimes within that order of magnitude. Consequently, EIA investigated alternative methods to determine if there are better ways to obtain timelier and more precise national and State-level monthly natural gas production data.

The alternatives considered were: (1) Use of Securities and Exchange Commission (SEC) 10–K and 10–Q submissions, (2) a survey of natural gas pipeline operators, (3) use of data from natural gas processors, and (4) a survey of well operators. The survey of well

operators was determined to be the only alternative that could satisfy EIA's requirement for more reliable and more timely natural gas production data.

1. SEC 10–K and 10–Q Submissions

Companies with more than $10 million in assets (whose securities are registered on a national securities exchange and are held by more than 500 owners) must file annual and other periodic financial and business reports with the SEC. SEC forms are easily accessible online through the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system. Because the data are publicly available, the EIA would not be required to obtain permission from any entity prior to publishing data from the SEC. Some industry analysts use the information that companies file with the SEC to assess natural gas production issues. The EIA investigated this approach as a way to obtain reliable monthly natural gas production information.

The SEC Forms 10–K and 10–Q are the two key SEC forms from which natural gas production volume information may be obtained. The annual 10–K is the principal document used by most public companies to disclose corporate information to shareholders. It is usually a "state-of-the-company" report containing financial data, results of continuing operations, market segment information, new product plans, subsidiary activities and research and development activities for future programs. In most cases, the 10–K is to be filed 90 days after the end of the fiscal year covered by the report. The EIA reviewed the SEC Form 10–Ks filed by a selection of natural gas producers, chosen based on their operator ranking in EIA's "U.S. Crude Oil, Natural Gas and Natural Gas Liquids Reserves 2002 Annual Report," (*http://www.eia.doe.gov/oil_gas/natural_gas/data_publications/crude_oil_natural_gas_reserves/cr.html*). While all of the selected producers reported a sales volume on their SEC 10–Ks, far fewer of the selected producers reported either production volume or provided a regional breakdown of the data on their Form 10–K, information that would be essential if used by the EIA to estimate total United States and regional natural gas production.

Additionally, even when sales volume information existed on the selected 10–Ks, not all data were comparable across producers because of inherent definitional differences. For example, production reported on the 10–Ks may be either gross withdrawals or marketed production. These volumes differ by more than 10 percent on average for the U.S. Reliable production estimates based on the 10–Ks would require resolution of definitional inconsistencies because of the significant impact they can have on accuracy of the results. Another problem in using the SEC data as a source for natural gas volume information is that the SEC respondents, as producers, report only their equity ownership portion of their natural gas production and sales, which in aggregate was only about 70 percent of the natural gas volumes for which they were operators. A problem related to the reporting of equity interests is that production changes between reports will reflect any action that changes a company's equity interests, including sales or purchases of producing reserves. Changes in these measures do not necessarily serve as a reliable proxy for changes in aggregate production. The quarterly SEC 10–Qs are another potential source of natural gas volume information, but the selected producers provided less information on production and sales on their 10–Qs than they did on their 10–Ks and the quarterly submission schedule doesn't provide the timely monthly data on natural gas production that are needed.

In summary, SEC information is not timely enough and poses a number of problems for estimation. The SEC allows companies to report volumes on the basis of sales or production. When production is reported, there are potential definitional differences. Volumes also are affected by changes in equity positions unrelated to exploration and development activities. For these reasons, the use of SEC 10–K and 10–Q submissions to estimate aggregate and regional production volumes in a timely fashion was determined not to be a viable alternative.

2. Survey of Natural Gas Pipeline Companies

EIA investigated surveying natural gas pipeline companies in lieu of well operators to obtain natural gas production information. There are about 60 major interstate pipelines, 30 non-major interstate pipelines and 113 intrastate pipelines operating in the United States, as compared to more than 15,000 active well operators. (Interstate pipeline counts are based on Federal Energy Regulatory Commission (FERC) information on companies that filed FERC Form 2 and Form 2A in 2002. Seventeen other companies are required to file a Form 2 or Form 2A, but they operated liquefied natural gas (LNG) or storage facilities, not pipelines. The intrastate count was based on company self-identification of primary business type in response to Form EIA–176, "Annual Report of Natural and Supplemental Gas Supply and Disposition.") In addition to these primary pipelines, there also are many gathering lines and connecting lines to interstate and intrastate pipelines that transport natural gas.

While pipeline companies do collect and maintain daily volumetric data on receipts and deliveries of natural gas, the EIA's review revealed that it would not be practical to use their information to generate timely and accurate estimates of natural gas production. The principal issues of concern include avoiding multiple counting of volumes, identifying the type or quality of gas being transported on the pipeline (see Table 1), identifying appropriate pipelines for the frame, identifying appropriate collection and reporting points on the pipeline, the large number of potential data measurement points, and assuring data quality and timeliness.

A serious problem to overcome in such a survey would be ensuring that the pipeline survey would collect only produced natural gas and would exclude volumes received from other pipeline systems, stored gas and other sources for which the gas may have been previously accounted for. A pipeline operator could not simply report on all volumes received or metered. It would be necessary to target those receipt points that are significantly closer to the producing fields because as pipelines receive natural gas further downstream from the point of production, there is an increasing number of interconnections with other pipelines, which increases the likelihood that the volumes received would include volumes previously recorded elsewhere.

As volumes are reported for points upstream on any given pipeline, the number of receipt points and, therefore, measurement points escalates. For example, according to EIA data, there are 1,107 receipt points within Texas associated with 20 major interstate pipelines. There are an additional 33 intrastate and non-major interstate pipelines in Texas for which EIA would have to collect receipt data in preparation for this survey. Further, either the respondent or EIA would have to differentiate among a pipeline's receipt points to identify those that are appropriate for the survey, and those for which reported volumes potentially are distorted by double-counting of production. Although the number of companies relevant to the proposed

pipeline survey might seem to be a reasonable count, the magnitude of the actual reporting burden would be relatively large because of the large number of data measurement points. The initial determination of the set of reporting points, along with maintenance of the proper reporting frame, represents a significant technical challenge.

Accuracy would become a serious problem because, while some pipeline companies have fairly accurate systems to measure and collect receipt volumes, other pipeline companies rely on the accuracy of the metering facilities of pipelines that they deliver natural gas to, and "back into" or balance volumetric receipts based on measured deliveries. This method could result in multiple volume allocation revisions over time and degrade the accuracy of monthly data. Also, while the pipelines would report flow information, it is likely they would not be able to identify the nature of the flow volumes with respect to the EIA definitions. The volumes reported likely would represent a mixture of gas at various stages of the supply process " gross withdrawals, or wet or dry marketed production. The lack of precision would degrade the accuracy of EIA's estimates of natural gas monthly production.

For the reasons presented above, a survey of pipeline operators was not determined to be a viable alternative for reliably estimating natural gas production.

3. Use of Data From Natural Gas Processors

In 2003 EIA began collecting monthly data from operators of natural gas processing plants on Form EIA–816 (Monthly Natural Gas Liquids Report). The form (*see http://www.eia.doe.gov/oil_gas/petroleum/survey_forms/pet_survey_forms.html*) collects information on the supply and disposition of natural gas liquids from operators of natural gas processing plants (which extract liquid hydrocarbons from a natural gas stream) and fractionators (which separate a liquid hydrocarbon stream into its component products.) The natural gas liquids information consists of beginning stocks, receipts, production, inputs, shipments, fuel use, losses, and ending stocks. Because the information collected includes the volumes of natural gas received during the month at all natural gas processing plants, EIA considered the use of these data to estimate monthly national and regional natural gas production.

Figure A1–2 in the report, "How EIA Estimates Natural Gas Production," (*http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngprod/ngprod.pdf*), shows that, in 2001, approximately two-thirds of the natural gas produced in the United States went through processing plants and the remaining one third was sold to end-users without processing. Thus the EIA–816 natural gas production information captures only a portion of total natural gas production. In the future, as the EIA–816 production data series begin to span several years, it may be possible to estimate total natural gas production using the EIA–816 monthly data and data from annual surveys. However currently and for the next few years, sufficient historical data for such estimates do not exist and estimates of the quantity of gas that doesn't go through processing plants based on the portion that does cannot be made.

On the other hand, a direct method to determine the quantity of natural gas not going through processing plants would be to survey those companies that have gas that is sold to end-users without further processing, but no method currently exists to identify these companies, which in 2001 accounted for almost a third of natural gas produced. For these reasons, using the new EIA–816 natural gas production data is not considered a viable method to estimate total natural gas production at this time.

4. Survey of Well Operators

Because natural gas may be bought and sold many times before it reaches the final point of consumption, EIA investigated collecting production information at a point "early in the supply chain" to minimize the possibilities of multiple counting. EIA found that it would be feasible to collect such information from companies operating producing wells, as opposed to the producers. While a producer can be defined as the owner (or partial owner) of the wells from which the natural gas is produced, an operator (who may also be an owner) can be defined as the entity that physically operates the producing wells and field facilities on behalf of all owners.

Potential survey respondents would be operators of wells in the United States that produce natural gas, including Federal and State offshore well operators. EIA estimates that approximately 250–350 respondents would be sufficient to develop volume estimates releasable at a national level (with a sampling error of about 1%) and for six areas (Texas, Louisiana—both including State offshore, New Mexico, Oklahoma, Wyoming and the Federal Gulf of Mexico) with a sampling error of less than 5%. Marketed production (wet) in 2002 was about 16,660 bcf (billion cubic feet) per month. In 2002, a 1% sampling error rate at the national level would have corresponded to an error band of plus or minus about 167 bcf of gas. This error band is considered precise enough to accurately discern monthly production variations.

Respondents would be selected from the survey frame for Form EIA–23, "Annual Survey of Domestic Oil and Gas Reserves," which contains more than 15,000 active oil and gas well operators. These operators already report monthly well or field-level production information to the States and to the MMS (for Federal offshore production). Respondents to the EIA–914 survey would report monthly production totals, not well or field-level data. The primary quantity to be measured by the survey is "natural gas lease production." Similar volumes are sometimes referred to as "sales production" or "gas available for sales." This quantity indicates the net amount of produced gas that leaves the lease, going either to natural gas processing plants or directly to end-users. Other quantities to be reported are "gross withdrawals (wet)" (*i.e.*, full-bore wellstream gas minus lease condensate, oil and water), gas used as fuel on leases, gas used for repressuring and reinjection, quantities vented and flared on leases, and nonhydrocarbons removed on leases. Gross withdrawals (wet) is sometimes referred to as "wet gas after lease separation." The proposed survey form and instructions are available at *http://www.eia.doe.gov/oil_gas/fwd/proposed.html*.

The survey would be mandatory pursuant to the Federal Energy Administration (FEA) Act of 1974, Public Law 93–275, and would be subject to the provisions of the Confidential Information Protection and Statistical Efficiency Act of 2002 (Public Law 107–347) (CIPSEA), ensuring the confidentiality of the data and that the data would only be used for exclusively statistical purposes unless respondents provided informed consent for other uses. Because of the vital need for timely data, respondents would be expected to submit their survey responses 30 days after the end of the report month. However, EIA recognizes that because some respondents may need some time to be able to meet this requirement, for the first three months of the survey, respondents would be allowed 45 days after the end of a report month to report. The 30-day response requirement would go into effect for the fourth data month. Data would be submitted to the EIA by email, facsimile, or Internet with the secure file

transfer (SFT) system. The aggregated data would appear in the EIA publications, *Natural Gas Annual, Monthly Energy Review* and *Natural Gas Monthly*, and on EIA's Web site *http://www.eia.doe.gov*. Data elements for the proposed survey of well operators are listed below.

*Data Elements for Form EIA–914*

1. Respondent identification data.
2. For Total United States, Texas (including State offshore), Louisiana (including State offshore), Oklahoma, New Mexico, Wyoming and Federal Gulf of Mexico offshore area:
a. Gross withdrawals (wet);
b. Gas used for repressuring and reinjection;
c. Gas vented and flared;
d. Gas used as fuel on leases;
e. Nonhydrocarbons removed on lease;
f. Natural gas lease production.
3. Quantities would be expressed in million cubic feet (MMCF).
4. Pressure base at which all volumes are reported is 14.73 psia at 60 degrees Fahrenheit.
5. Comments.

The proposed survey form and instructions are available at *http://www.eia.doe.gov/oil_gas/fwd/proposed.html*. Using information reported on Form EIA–914, EIA would publish monthly and annual natural gas production estimates for the United States, Texas (including State offshore), Louisiana (including State offshore), New Mexico, Oklahoma, Wyoming, the Federal Gulf of Mexico, and remaining States, to the extent that confidentiality for company-specific information allows.

**II. Current Actions**

EIA estimates that a sample-based monthly survey of 250–350 well operators reporting to EIA within 30 days after the end of a report month would be needed for EIA to be able to publish reliable national and regional natural gas production information within 60 days after the end of a report month. The EIA plans to request approval from the Office of Management and Budget (OMB) to conduct this monthly information collection program using Form EIA–914, "Monthly Natural Gas Production Report." The potential survey respondents would be all operators of producing wells in the United States that produce natural gas, including offshore wells. Respondents would be selected from the survey frame for Form EIA–23, "Annual Survey of Domestic Oil and Gas Reserves" (more than 15,000 active well operators) according to a statistical sampling methodology.

This collection is essential to the mission of the DOE in general and the EIA in particular. Currently there is no timely source of monthly natural gas production in the United States precise enough to discern critical monthly production variations, information which is crucial for informed decision and policy making before and during peak demand periods. The information collected through this survey is expected to be used widely by Federal and State agencies, industry analysts and the general public to monitor natural gas supplies and by the Congress to inform legislative debate.

**III. Request for Comments**

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments.

*General Issues*

A. Is the proposed collection and dissemination of information necessary for the proper performance of the functions of the agency and does the information have practical utility? Practical utility is defined as the actual usefulness of information to or for an agency and its customers, taking into account its accuracy, adequacy, reliability, timeliness, and the agency's ability to process the information it collects.

B. What enhancements can be made to the quality, utility, and clarity of the information to be collected?

*As a Potential Respondent to the Request for Information*

A. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information to be collected?

B. The EIA is interested in collecting production data on a consistent basis to avoid the need for adjustments after collection that may distort the resulting estimates.

(1) Can well operators provide reliable measures of gross withdrawals (wet), [also called "wet gas after lease separation"] by State or area?

(2) Can operators provide reliable measures of natural gas lease production [also called "sales production," "marketed production after lease separation," or "natural gas available for sales"] by State or area?

(3) Can operators provide reliable measures of gas used for reinjection, gas vented and flared, nonhydrocarbons removed, and gas used as fuel on leases, by State or area?

(4) Are there other measures that could be reported more reliably?

(5) Can the information be submitted by the due date (30 days after the close of the report month)?

C. Public reporting burden for this collection is estimated to average 3 hours per respondent monthly. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

D. The EIA estimates that the only cost to a respondent is for the time it would take to complete the collection. Will a respondent incur any start-up costs for reporting or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

E. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

F. Does any other Federal, State, or local agency (other than those mentioned above) collect similar information? If so, specify the agency, the data element(s), the methods of collection, and the accuracy and timeliness of results.

G. The EIA–914 survey will be conducted under CIPSEA. Any agency granted access to the EIA–914 information would be required to sign a document agreeing to maintain the confidentiality of the information and to use the information for statistical purposes unless respondents consent to nonstatistical uses. Would your company sign an informed consent agreement allowing EIA to release your EIA–914 information to other Federal agencies for use in defined emergency situations?

*As a Potential User of the Information To Be Collected*

A. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

B. Is the information useful at the levels of detail to be collected?

C. For what purpose(s) would the information be used? Please be as specific as possible.

D. Are there alternate sources for the information and are they useful? If so, what are they and what are their weaknesses and/or strengths?

Comments submitted in response to this notice would be summarized and/or included in the request for OMB approval of the form. They also would become a matter of public record.

**Statutory Authority:** Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

Issued in Washington, DC, April 20, 2004.

**Jay H. Casselberry,**

*Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.*

[FR Doc. 04–9246 Filed 4–22–04; 8:45 am]

BILLING CODE 6450–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–6650–6]**

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 2, 2004 (69 FR 17403).

**Draft EISs**

ERP No. D–COE–E36182–KY Rating LO, Pike County (Levisa Fork) Section 202 Flood Damage Reduction Project, Design, Construction and Implementation, Flood Damage Reduction Measures, Appalachian Mountain, Big Sandy River, Pike County, KY.

*Summary:* EPA has no objections to the construction of the flood protection measures.

ERP No. D–FHW–G40181–AR Rating LO, Conway Western Arterial Loop, Construct from South and West sides of Conway, Faulkner County, AR.

*Summary:* EPA has no objections to the proposed action.

ERP No. D–FHW–H40181–00 Rating LO, South Omaha Veterans Memorial Bridge Improvements, Across the Missouri River for Highway US–275 between the Cities of Omaha, Nebraska and Council Bluffs, Iowa, NPDES and US Army COE Section 404 Permit, NE and IA.

*Summary:* EPA has no objections to the proposed project.

ERP No. D–USA–E11052–GA Rating EC1, Digital Multi-Purpose Range Complex at Fort Benning, Construction, Operation and Maintenance, Gunnery Training Facilities for the Bradley Fighting Vehicle (BFV) and the Abrams M1A1 Tank System (Tank), Fort Benning, GA.

*Summary:* EPA expressed concerns regarding noise impacts that are expected to increase beyond the boundaries of the Fort Benning reservation. EPA requested monitoring of noise to ensure that episodes do not increase in degree and scope.

**Final EISs**

ERP No. F–CGD–L59001–WA Seattle Monorail Project (SMP), Green Line 14-Mile Monorail Transit System Construction and Operation, Reviewing a Water Crossing at the Lake Washington Ship Canal Bridge and Duwamish Waterway Bridge Modification, USCG Bridge, Endangered Species Act Section 7 and U.S. Army COE Section 404 Permits Issuance, City of Seattle, WA.

*Summary:* No formal comment letter was sent to the preparing agency.

ERP No. F–COE–H34028–00 Missouri River Master Water Plan Operation, Multipurpose Project, SD, NE, IA, MO.

*Summary:* EPA recommended that the Corps work closely with the U.S. Fish and Wildlife Service to comply with the requirements of the Endangered Species Act, with a particular emphasis on measures needed to protect the pallid sturgeon. EPA also expressed continued concerns on impacts to water quality and tribal cultural resources.

ERP No. F–FTA–K54028–CA Transbay Terminal/Caltrain Development Downtown Extension/ Redevelopment Project, New Multi-Modal Terminal Construction, Peninsula Corridor Service Extension and Establishment of a Redevelopment Plan, Funding, San Francisco, San Mateo and Santa Clara Counties, CA.

*Summary:* EPA believes that the document adequately discusses the environmental impacts of the proposed project and has no objections to the action as proposed.

ERP No. F–TVA–E39062–00 Programmatic EIS—Tennessee Valley Authority Reservoir Operations Study, Implementation, TN, AL, KY, GA, MS, NC and VA.

*Summary:* EPA expressed concerns regarding the overall operating uncertainties of the new reservoir operation system, as well as whether the proposed water flows and volumes will be adequate for compliance with relevant water permits, water quality criteria and statutes.

Dated: April 20, 2004.

**Ken Mittelholtz,**

*Environmental Protection Agency, Office of Federal Activities.*

[FR Doc. 04–9290 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–6650–5]**

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed April 12, 2004, through April 16, 2004

Pursuant to 40 CFR 1506.9.

EIS No. 040173, DRAFT EIS, FHW, MD, MD–3 Transportation Corridor Study, Address Existing and Projected Operational and Safety Issues, Along MD–3 from North of US–50 to South of MD–32, Funding, NPDES Permit and U.S. Army COE Section 404 Permit, Anne Arundel and Prince George Counties, MD, Comment Period Ends: July 8, 2004, Contact: Caryn Brookman (410) 779–7146.

EIS No. 040174, FINAL EIS, AFS, OR, Juncrock Timber Sale Project, Treat Forest Vegetation, MT. Hood National Forest, Barlow Ranger District, Wasco County, OR, Wait Period Ends: May 24, 2004, Contact: Becky Nelson (541) 467–2291. This document is available on the Internet at: *http://www.fs.fed.us/r6/mthood.*

EIS No. 040175, FINAL EIS, FHW, NY, Cumberland Head Connector Road Construction, County Road 57 between U.S. 9 and the Peninsula (known as the Parkway), Funding, Town of Plattsburg, Clinton County, NY, Wait Period Ends: May 24, 2004, Contact: Robert Arnold (518) 431–4127.

EIS No. 040176, DRAFT EIS, AFS, MT, Sheep Creek Salvage Project, Moving Current Resource Conditions and Trends Toward Desired Future Conditions, Beaverhead-Deerlodge National Forest, Beaverhead County, MT, Comment Period Ends: June 7, 2004, Contact: Jeffrey L. Trejo (406) 832–3178.

EIS No. 040177, FINAL EIS, FHW, MN, Trunk Highway (TH) 53 Project, Transportation Improvements, from 1.2 km (3/4 mile) South of St. Louis County Road 307 to the South City Limits of Cook, NPDES Permit, COE

Section 10 and 404 Permits, St. Louis County, MN, Wait Period Ends: May 24, 2004, Contact: Cheryl Martin (651) 291–6120.

EIS No. 040178, FINAL EIS, USN, CA, Tertiary Treatment Plant and Associated Facilities Construction and Operation, Implementation, Marine Corps Base Camp Pendleton, San Diego County, CA, Wait Period Ends: May 24, 2004, Contact: Lisa Seneca (619) 532–4744.

EIS No. 040179, DRAFT EIS, FAA, IN, Gary/Chicago International Airport Master Plan Development Including Runway Safety Area Enhancement/ Extension of Runway 12–30, Funding, Lake County, IN, Comment Period Ends: June 7, 2004, Contact: Prescott C. Snyder (847) 294–9538.

EIS No. 240180, DRAFT EIS, NAS, Programmatic EIS—Mars Exploration Program (MEP) Implementation, Comment Period Ends: June 7, 2004, Contact: Kenneth M. Kumor (202) 358–1112.

EIS No. 040181, DRAFT EIS, COE, MO, Howard Bend Floodplain Area Study, Improvements to Future Land, Future Road and Stormwater Management, US Army COE Section 10 and 404 Permits, Missouri Flood Plain Developments, Cities of Maryland Heights and Chesterfield, St. Louis County, MO, Comment Period Ends: June 7, 2004, Contact: Danny McClendon (314) 331–8574.

EIS No. 040182, FINAL EIS, NOA, PR, VI, Generic Essential Fish Habitat Amendment To: Spiny Lobster, Queen Conch, Reef Fish and Coral Fishery Management Plans, Implementation, U.S. Caribbean, Extending to U.S. Exclusive Economic Zone (EEZ), Virgin Islands and Puerto Rico, Wait Period Ends: May 24, 2004, Contact: David Dale (727) 570–5317.

**EIS No. 040183, FINAL EIS, AFS, KY, Daniel Boone National Forest Land and Resource Management Plan Revision, Implementation, Winchester, several counties, KY, Wait Period Ends: May 24, 2004, Contact: Kevin Lawrence (859) 745–3151. This document is available on the Internet at:** *http://www.southernregion.fs.fed.us/r6/boone.*

EIS No. 040184, FINAL EIS, USA, Programmatic EIS—Army Transformation of the 172rd Infantry Brigade (Separate) to a Stryker Brigade Combat Team (SBCT), Propose Location Forts Wainwright and Richardson, AK, Wait Period Ends: May 24, 2004, Contact: Kevin Gardner (907) 384–3331. This document is available on the Internet at: *http//www.cemml.colostate.edu/AlaskaEIS/.*

EIS No. 040185, FINAL EIS, HUD, NY, Generic EIS—World Trade Center Memorial and Redevelopment Plan, To Remember, Rebuild and Renew what was lost on September 11, 2001, Construction in the Borough of Manhattan, New York County, NY, Wait Period Ends: May 24, 2004, Contact: William H. Kelly (212) 962–2300. This document is available on the Internet at: *http://www.renewnyc.com/plan dev/from comments.asp.*

Dated: April 20, 2004.

**Ken Mittelholtz,**

*Environmental Protection Specialist, Office of Federal Activities.*

[FR Doc. 04–9289 Filed 4–22–04; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7653–3]**

### Great Lakes National Program Office Request for Initial Proposals for the Operation of the Integrated Atmospheric Deposition Network

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of funding availability.

**SUMMARY:** The U.S. Environmental Protection Agency Great Lakes National Program Office (GLNPO) is requesting Initial Proposals for the management and operation (including field sampling and laboratory analysis) of the Integrated Atmospheric Deposition Network (IADN). IADN is a cooperative effort between the U.S. EPA and Environment Canada and assesses atmospheric deposition of persistent bioaccumulative toxic (PBT) substances to the Great Lakes. This Request for Initial Proposals (RFIP) addresses network management and operation including field sampling and sample analysis corresponding to a sample collection period of five years from September 1, 2004 to August 30, 2009 for the five currently operating U.S. sites and other sites as determined by program needs. This RFIP is for a cooperative agreement totaling up to $3,560,000 over five years.

**DATES:** The deadline for all Initial Proposals is 5 pm Central time, Monday evening, June 7, 2004.

**ADDRESSES:** The Funding Guidance is available on the Internet at *http://www.epa.gov/glnpo/fund/rfp/iadnrfpip2004.html.* It is also available from Melissa Hulting (312–886–2265/ *hulting.melissa@epa.gov*).

**FOR FURTHER INFORMATION CONTACT:** Melissa Hulting, EPA–GLNPO, G–17J, 77 West Jackson Blvd., Chicago, IL 60604 (312–886–2265/ *hulting.melissa@epa.gov*).

**SUPPLEMENTARY INFORMATION:** Assistance is available pursuant to Clean Water Act section 104(b)(3) for activities in the Great Lakes Basin and in support of the Great Lakes Water Quality Agreement. State pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, and organizations are eligible to apply.

Dated: April 13, 2004.

**Gary V. Gulezian,**

*Director, Great Lakes National Program Office.*

[FR Doc. 04–9288 Filed 4–22–04; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7652–7]**

### Board of Scientific Counselors, Executive Committee Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of an Executive Committee Meeting of the Board of Scientific Counselors (BOSC).

**DATES:** The meeting will be held on Thursday, May 13, 2004, from 8:45 a.m. to 4:30 p.m., and on Friday, May 14, 2004, from 8:30 a.m. to 3:30 p.m. All times noted are eastern time. The meeting may adjourn early on Friday if all business is finished.

**ADDRESSES:** The meeting will be held at the EPA Research Triangle Park (RTP) Campus, in Room C–113, located at 109 T.W. Alexander Drive, Research Triangle Park, NC 27711.

**Document Availability**

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting should contact Lorelei Kowalski, Designated Federal Officer, by mail at Office of Research and Development (Mail Code 8104–R), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at *kowalski.lorelei@epa.gov*, or by telephone at (202) 564–3408. In general, each individual making an oral presentation will be limited to a total of three minutes. Requests for the draft agenda or for making oral presentations

at the meeting will be accepted up to 1 business day before the meeting date. The draft agenda can also be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

### Submitting Comments

Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section. Written comments will be accepted up to 1 business day before the meeting date.

**FOR FURTHER INFORMATION CONTACT:** Lorelei Kowalski, Designated Federal Officer, Environmental Protection Agency, Office of Research and Development, Office of Science Policy (Mail Code 8104–R), 1200 Pennsylvania Avenue, NW., Washington, DC 20460 at (202) 564–3408.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

Proposed agenda items for the meeting include, but are not limited to: Briefings on ORD's numerical modeling/grid computing, the Council on Regulatory and Environmental Modeling (CREM), and Program Assessment Rating Tool (PART); update on review committees for mercury, computational toxicology, endocrine disruptors, and global change; discussion of ORD's Biotechnology Research Strategy; update on EPA's Science Advisory Board activities; and discussion of BOSC future issues and plans (including risk assessment, public health outcomes, interagency relationships, and homeland security). The meeting is open to the public.

Information on Services for the Handicapped: Individuals requiring special accommodations at this meeting should contact Lorelei Kowalski, Designated Federal Officer, at (202) 564–3408, at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation.

*A. How Can I Get Copies of Related Information?*

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. ORD–2004–0006. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy of the draft agenda may be viewed at Board of Scientific Counselors, Executive Committee Meeting Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket.

*B. How and to Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EDOCKET.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EDOCKET at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EDOCKET. Once in the system, select "search," and then key in Docket ID No. ORD–2004–0006. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to *ORD.Docket@epa.gov,* Attention Docket ID No. ORD–2004–0006. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that

you mail to the mailing address identified in Unit I.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. ORD–2004–0006.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2004–0006 (Note: this is not a mailing address). Such deliveries are only accepted during the Docket's normal hours of operation as identified in Unit I.A.1.

Dated: April 16, 2004.

**Kevin Y. Teichman,**

*Director, Office of Science Policy.*

[FR Doc. 04–9287 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7650–8]**

### Draft Federal Guidance on the Use of Off-Site and Out-of-Kind Compensatory Mitigation Under Section 404 of the Clean Water Act

**AGENCY:** Environmental Protection Agency (EPA); National Oceanic and Atmospheric Administration (NOAA), Commerce; U.S. Army Corps of Engineers (USACE), Defense; U.S. Fish and Wildlife Service (USFWS), Interior; Natural Resources Conservation Service (NRCS), Agriculture; Department of Transportation.

**ACTION:** Notice of availability to review and comment.

**SUMMARY:** In accordance with the National Mitigation Action Plan signed in December of 2002 by the Environmental Protection Agency, Department of Commerce, Department of Defense, Department of the Interior, Department of Agriculture, and Department of Transportation, the Federal Interagency Mitigation Workgroup (FIMW) has prepared Draft Federal Guidance on the Use of Off-Site and Out-of-Kind Compensatory Mitigation Under Section 404 of the Clean Water Act (Site/Kind Guidance). The Site/Kind Guidance provides direction for the application of existing regulations and policies to decisions about the appropriate use of off-site and out-of-kind compensatory mitigation within the context of the Clean Water Act Section 404 permitting program.

**DATES:** In order to be considered, comments must be postmarked or e-mailed on or before May 24, 2004.

**ADDRESSES:** Comments may be submitted electronically, by mail, or by hand delivery/courier. E-mail comments to *sitekind.guidance@noaa.gov.* Please put "Site/Kind Comments" in the Subject Line and *include your comments as an attachment to the e-mail* in either Word or Wordperfect format. Mail or hand deliver/courier comments to: Susan-Marie Stedman, F/HC Room 14102, NOAA Fisheries, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Mitigation Action Plan Web site at *http://www.mitigationactionplan.gov* or contact either Palmer Hough, U.S. Environmental Protection Agency, Wetlands Division (4502T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, phone: (202) 566–1374, e-mail: *Hough.Palmer@epa.gov,* Alan Miller, U.S. Army Corps of Engineers, 441 G Street, NW., Washington, DC 20314–1000, phone: (202) 761–7763, e-mail: *Alan.J.Miller@hq02.usace.army.mil,* or Susan-Marie Stedman, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, phone: (301) 713–2325, e-mail: *susan.stedman@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** Reports published in 2001 by the National Academy of Sciences (NAS) and the General Accounting Office (GAO) provided a critical evaluation of the effectiveness of wetlands compensatory mitigation for authorized losses of wetlands and other waters under Section 404 of the CWA. Section 404 regulates discharges of dredged and fill materials into waters of the United States and requires compensatory mitigation for unavoidable impacts. The independent analyses and other commentaries highlighted a number of shortfalls and identified a variety of technical, programmatic, and policy recommendations for the Federal agencies, States, and other involved parties.

An interagency team drafted the National Mitigation Action Plan endorsing the goal of no net loss of wetlands and outlining specific action items that address the concerns of the NAS, GAO, and other independent evaluations. The 17 actions, with various agency leads, address areas of concern, including collection and availability of data, clarifying performance standards, improving accountability, and integrating mitigation into the watershed approach. Development of Site/Kind Guidance is one of these action items. A preliminary draft of the Site/Kind Guidance was reviewed by participants at a July 2003 stakeholder forum held in Portland, Oregon, that brought together a diverse group of individuals representing the regulated community, environmental organizations, academia, non-governmental organizations, and mitigation providers. The preliminary draft has been revised based on comments received at that stakeholder forum. The FIMW is seeking additional public review before finalizing the guidance. Please note that comments, including names and street addresses of respondents, are available for public review in a docket.

Copies of the Draft Site/Kind Guidance are available at the Mitigation Action Plan Web site at *http://www.mitigationactionplan.gov* (click on "Status of Action Items" and locate and click on "On-site/Off-site and In-kind/Out-of-kind Draft Guidance" in the summary table). A printed copy of the draft guidance can be obtained by contacting: Susan-Marie Stedman, F/HC Room 14102, NOAA Fisheries, 1315 East-West Highway, Silver Spring MD 20910.

Dated: April 15, 2004.

**Benjamin H. Grumbles,**

*Acting Assistant Administrator for Water.*

[FR Doc. 04–9046 Filed 4–22–04; 8:45 am]

BILLING CODE 6560–50–P

## EXPORT-IMPORT BANK OF THE UNITED STATES

### Sunshine Act Meeting

**ACTION:** Notice of a partially open meeting of the Board of Directors of the Export-Import Bank of the United States.

**TIME AND PLACE:** Tuesday, April 27, 2004, at 2 p.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

**OPEN AGENDA ITEMS:**

(1) Medical Equipment Initiative;

(2) Amendment to Working Capital Guarantee Program Fast Track Application Processing; and

(3) Co-Guarantee Pilot Program with the Small Business Administration.

**PUBLIC PARTICIPATION:** The meeting will be open to public participation for Items No. 1–3 only.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Tele. No. 202–565–3957)

**Peter B. Saba,**

*General Counsel.*

[FR Doc. 04–9480 Filed 4–21–04; 3:19 pm]

**BILLING CODE 6690–01–M**

## FARM CREDIT ADMINISTRATION

### Farm Credit Administration Board; Amendment to Sunshine Act Meeting

**AGENCY:** Farm Credit Administration.

**SUMMARY:** Pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), the Farm Credit Administration gave notice on April 20, 2004 (69 FR 21098) of the regular meeting of the Farm Credit Administration Board (Board) scheduled for April 22, 2004. This notice is to amend the agenda by adding an item to the open session of that meeting.

**FOR FURTHER INFORMATION CONTACT:** Jeanette C. Brinkley, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

**SUPPLEMENTARY INFORMATION:** This meeting of the Board was open to the public (limited space available). In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The agenda for April 22, 2004, is amended by adding the following item to the open session as follows:

**Open Session**

A. *Approval of Minutes.*

2. April 20, 2004 (Closed)

Dated: April 20, 2004.

**Jeanette C. Brinkley,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 04–9417 Filed 4–21–04; 12:29 pm]

**BILLING CODE 6705–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[CC Docket No. 96–45; DA 04–999]**

### Parties Are Invited to Update the Record Pertaining to Pending Petitions for Eligible Telecommunications Carrier Designations

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; solicitation of comments.

**SUMMARY:** In this document, interested parties are invited to update the record pertaining to pending petitions for designation as eligible telecommunications carriers (ETCs) filed pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).

**DATES:** Supplemental Petitions are due on or before May 14, 2004. Comments are due on or before May 28, 2004. Reply comments are due on or before June 4, 2004.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for further filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Thomas Buckley, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7400, TTY (202) 418-0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of public notice, CC Docket No. 96–45, DA 04–999, released April 12, 2004. On January 22, 2004, the Commission released the *Virginia Cellular Order*, 69 FR 8958, February 26, 2004, which granted in part and denied in part, the petition of Virginia Cellular, LLC to be designated as an ETC throughout its licensed service area in the Commonwealth of Virginia. In that Order, the Commission utilized a new public interest analysis for ETC designations and imposed ongoing conditions and reporting requirements on Virginia Cellular. The Commission further stated that the framework enunciated in the *Virginia Cellular Order* would apply to all ETC designations for rural areas pending further action by the Commission.

Following the framework established in the *Virginia Cellular Order*, on April 12, 2004, the Commission released the *Highland Cellular Order*, FCC 04–37, April 12, 2004, which granted in part and denied in part the petition of Highland Cellular, Inc. to be designated as an ETC in portions of its licensed service area in the Commonwealth of Virginia. In the *Highland Cellular Order*, the Commission concluded, among other things, that a telephone company in a rural study area may not be designated as a competitive ETC below the wire center level.

In light of the new standards and requirements set forth in the *Virginia Cellular Order* and the *Highland Cellular Order*, parties seeking ETC designation may wish to supplement previously filed pending ETC petitions, petitions for redefinition of service areas, and applications for review related to ETC designations. For this reason, parties that have pending petitions for ETC designation and petitions concerning related proceedings are asked to supplement their petitions with any new information or arguments they believe relevant. If applicable, parties should also demonstrate how they satisfy the Commission's requirements with regard to non-rural areas in which they seek ETC designation, as well as how they satisfy the Commission's requirements with regard to rural areas in which they seek ETC designation. The refreshed record will facilitate appropriate consideration of pending ETC petitions and related proceedings in light of the *Virginia Cellular Order* and *Highland Cellular Order*. A list of currently pending ETC petitions and related proceedings are set forth in the attached appendix.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, parties may supplement their petitions and applications as follows: supplemental petitions are due on or before May 14, 2004. This initial round is solely for the purpose of allowing parties to supplement their own petitions and applications. Comments are due on or before May 28, 2004, and reply comments are due on or before June 4, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998. Parties should clearly specify in the caption of all filings the petition(s) and application(s) to which their filing relates.

Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In

completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other then U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

Parties also must send three paper copies of their filing to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–B540, Washington, DC 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054.

Pursuant to § 1.1206 of the Commission's rules, 47 CFR 1.1206, this proceeding will be conducted as a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure.

Federal Communications Commission.

**Anita Cheng,**

*Assistant Chief, Wireline Competition Bureau, Telecommunications Access Policy Division.*

## Appendix

| | Date Filed |
|---|---|
| **ETC Petitions** | |
| Smith Bagley, Inc. (Navajo Reservation, UT) | 5/24/02 |
| Louisiana Unwired, LLC (AL) | 1/29/03 |
| ALLTEL Communications, Inc. (AL)* | 4/14/03 |
| ALLTEL Communications, Inc. (VA)* | 4/14/03 |
| Corr Wireless Communications, LLC (AL) | 5/13/03 |
| ALLTEL Communications, Inc. (GA)* | 8/26/03 |
| ALLTEL Communications, Inc. (NC)* | 8/26/03 |
| Sprint Corporation (VA) | 8/29/03 |
| Sprint Corporation (NY) | 9/2/03 |
| Sprint Corporation (TN) | 9/3/03 |
| Sprint Corporation (PA) | 9/4/03 |
| Sprint Corporation (AL) | 9/5/03 |
| Sprint Corporation (GA) | 9/8/03 |
| Public Service Cellular, Inc. (AL) | 9/12/03 |
| Public Service Cellular, Inc. (GA) | 9/24/03 |
| Sprint Corporation (FL) | 10/10/03 |
| Sprint Corporation (NC) | 11/5/03 |
| Virginia PCS Alliance, L.C. and Richmond 20 MHz, LLC d/b/a NTELOS (VA) | 11/17/03 |
| ALLTEL Communications, Inc. (FL)* | 11/20/03 |
| AT&T Wireless Services, Inc. (AL) | 1/5/04 |
| **Petitions for Redefinition of Service Areas** | |
| Public Utilities Commission of Colorado (Delta County Tele-Comm, Inc. Service Area in CO) | 8/12/02 |
| Public Utilities Commission of Colorado (redefinition of Wiggins Telephone Association Service Area in CO) | 5/30/03 |
| RCC Minnesota, Inc. (ME) | 6/24/03 |
| Minnesota Public Utilities Commission (MN) | 8/7/03 |
| ALLTEL Communications, Inc. (WI) | 11/21/03 |
| ALLTEL Communications, Inc. (MI) | 12/17/03 |
| **Pending Applications for Review or Petitions for Reconsideration** | |
| CenturyTel of Eagle, Inc. Application for Review, or Alternatively, Petition for Reconsideration of the Commission's Approval of the Redefinition of the Service Area of CenturyTel, Inc. Pursuant to 47 CFR 54.207 (CO) | 12/17/02 |
| Alabama Rural Local Exchange Carriers Application for Review of the Commission's Decision to Designate RCC Holdings, Inc. as an ETC Throughout its Licensed Service Area (AL) | 12/23/02 |
| Alabama Rural Local Exchange Carriers Application for Review of the Commission's Decision to Designate Cellular South License, Inc. as an ETC Throughout its Licensed Service Area (AL) | 2/30/02 |

*This Public Notice only applies to ALLTEL's pending petitions with respect to ETC designations in areas served by non-rural carriers. ALLTEL previously bifurcated its pending ETC petitions into separate requests for ETC designation in non-rural and rural service areas.

[FR Doc. 04–9294 Filed 4–22–04; 8:45 am]
BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

**[CC Docket No. 96–45; DA 04–998]**

## Parties Are Invited to Comment on Supplemented Petitions for Eligible Telecommunications Carrier Designations

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; solicitation of comments.

**SUMMARY:** In this document, interested parties are invited to comment on supplemented petitions by certain wireless telecommunications carriers seeking designation as eligible telecommunications carriers (ETCs) pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).

**DATES:** Comments are due on or before May 7, 2004. Reply comments are due on or before May 14, 2004.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for further filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Thomas Buckley, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7400, TTY (202) 418–0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of public notice, CC Docket No. 96–45, DA 04–998, released April 12, 2004. On January 22, 2004, the Commission released the *Virginia Cellular Order*, 69 FR 8958, February 26, 2004, which granted in part and denied in part, the petition of Virginia Cellular, LLC to be designated as an ETC throughout its licensed service area in the Commonwealth of Virginia. In that Order, the Commission utilized a new public interest analysis for ETC designations and imposed ongoing conditions and reporting requirements on Virginia Cellular. The Commission further stated that the framework enunciated in the *Virginia Cellular Order* would apply to all ETC designations for rural areas pending further action by the Commission.

Following the framework established in the *Virginia Cellular Order*, on April 12, 2004, the Commission released the *Highland Cellular Order*, FCC 04–37, April 12, 2004, which granted in part and denied in part the petition of Highland Cellular, Inc. to be designated as an ETC in portions of its licensed service area in the Commonwealth of Virginia. In the *Highland Cellular Order*, the Commission concluded, among other things, that a telephone company in a rural study area may not be designated as a competitive ETC below the wire center level.

In light of the new standards and requirements set forth in the *Virginia Cellular Order*, certain wireless telecommunications carriers have supplemented previously filed ETC petitions. These carriers are listed in the attached appendix. Interested parties are invited to comment on these supplemented petitions.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments as follows: comments are due on or before May 7, 2004, and reply comments are due on or before May 14, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998. Parties should clearly specify in the caption of all filings the petition(s) and application(s) to which the filing relates.

Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other then U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

Parties also must send three paper copies of their filing to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–B540, Washington, DC 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054.

Pursuant to § 1.1206 of the Commission's rules, 47 CFR 1.1206, this proceeding will be conducted as a permit-but-disclose proceeding in which ex parte communications are permitted subject to disclosure.

Federal Communications Commission.

**Anita Cheng,**

*Assistant Chief, Wireline Competition Bureau, Telecommunications Access Policy Division.*

### Appendix

| ETC Petitions[1] | Date petition filed | Date supplement filed |
|---|---|---|
| Guam Cellular and Paging, Inc. d/b/a Saipancell (CNMI) | 2/19/02 | 3/9/04 |
| NCPR, Inc. d/b/a Nextel Partners (NY) | 4/03/03 | 3/24/04 |

| ETC Petitions[1] | Date petition filed | Date supplement filed |
|---|---|---|
| NCPR, Inc. d/b/a Nextel Partners (PA) | 4/03/03 | 3.24.04 |
| NCPR, Inc. d/b/a Nextel Partners (AL) | 4/04/03 | 3/24/04 |
| ALLTEL Communications, Inc. (AL)* | 4/14/03 | 3/1/04 |
| ALLTEL Communications, Inc. (VA)* | 4/14/03 | 3/1/04 |
| NCPR, Inc. d/b/a Nextel Partners (VA) | 4/23/03 | 3/24/04 |
| Advantage Cellular Systems, Inc. (TN) | 5/9/03 | 2/17/04 |
| NCPR, Inc. d/b/a Nextel Partners (TN) | 6/12/03 | 3/24/04 |
| NCPR, Inc. d/b/a Nextel Partners (GA) | 7/10/03 | 3/24/04 |
| ALLTEL Communications, Inc. (GA)* | 8/26/03 | 3/1/04 |
| ALLTEL Communications, Inc. (NC)* | 8/26/03 | 3/1/04 |
| NCPR, Inc. d/b/a Nextel Partners (FL) | 9/16/03 | 3/24/04 |
| ALLTEL Communications, Inc. (FL)* | 11/20/03 | 3/1/04 |

* This Public Notice only applies to ALLTEL's pending petitions with respect to ETC designations in areas served by non-rural carriers. ALLTEL previously bifurcated its pending ETC petitions into separate requests for ETC designation in non-rural and rural service areas.

[FR Doc. 04–9296 Filed 4–22–04; 8:45 am]
BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

**[WT Docket No. 04–111; FCC 04–38]**

## Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of inquiry.

**SUMMARY:** This document solicits data and information on the status of competition in the CMRS industry for our Ninth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (Ninth Report). The Ninth Report will provide an assessment of the current state of competition and changes in the CMRS competitive environment.

**DATES:** Comments are due on or before April 26, 2004, and reply comments are due on or before May 10, 2004.

**ADDRESSES:** All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties also should send four (4) paper copies of their filings to Rachel Kazan, Federal Communications Commission, Room 6126, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for comment and reply comment filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Rachel Kazan at (202) 418–0651 or Susan Singer at (202) 418–1340.

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Notice of Inquiry* released on March 24, 2004. The complete text of the *Notice of Inquiry*, including statements, is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Notice of Inquiry* may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

### I. Introduction

1. In 1993, Congress created the statutory classification of Commercial Mobile Services to promote the consistent regulation of similar mobile radio services. At the same time, Congress established the promotion of competition as a fundamental goal for Commercial Mobile Radio Services (CMRS) policy formation and regulation. To measure progress toward this goal, Congress required the Commission to submit annual reports (*CMRS Reports*) that analyze competitive conditions in the industry. The *Notice of Inquiry* (*NOI*) solicits data and information in order to evaluate the state of competition among providers of CMRS for its Ninth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (*Ninth Report*). The statute requiring the Commission to submit annual reports providing an analysis of competitive market conditions with respect to CMRS stipulates that this analysis shall include, among other things, "an analysis of whether or not there is effective competition." To this end, previous *CMRS Reports* have presented a variety of standard indicators commonly used for the assessment of competitive market conditions, including the number of market participants, developments in carriers' pricing plans, service offerings, technology deployment, consumer churn, pricing data, subscriber growth, usage, and the diffusion of product innovations. For the *Ninth Report* the Commission proposes to enhance its analysis by restructuring the presentation of the various indicators of the status of competition to conform to a framework that groups such indicators into four distinct categories (A) Market Structure, (B) Carrier Conduct, (C) Consumer Behavior, and (D) Market Performance. The analysis of market performance will evaluate competitive conditions in the CMRS industry from the consumer's point of view, including both personal and business users. In particular, the analysis of market performance will focus on the benefits to consumers of effective competition such as lower prices, higher quality, greater variety, and more rapid innovation. A key premise of the proposed framework is that market structure, carrier conduct, consumer behavior and the interrelationships among these categories are important determinants of consumer outcomes.

2. Based on an overall assessment of the indicators that the Commission considered, the *Eighth Report*, 68 FR 730, January 7, 2003 concluded that there is effective competition in the CMRS market. These indicators included the nature and number of market participants, the geographic extent of service deployment, technological improvements and upgrades, price competition, investment, usage patterns, churn, subscriber growth, and product innovations, among other things. The *Eighth Report* stated that 95 percent of the U.S. population has three or more different operators offering mobile telephone service in the counties in which they live and 83 percent have a choice of 5 mobile telephone providers. Further, the Commission found that the

price consumers pay for mobile telephony service continued to fall, while subscribership increased. In addition, innovative and enhanced services such as advanced wireless services and larger digital footprints were introduced. These metrics were the basis of the Report indicating that CMRS carriers have no guarantee of maintaining their market share, and that customers are able to change providers if a carrier attempts to raise rates or diminish service quality.

3. In this proceeding, the Commission seeks to update the indicators of competition for its next report to Congress and to assist in determining if there is still effective competition in the CMRS market. In its ongoing effort to improve its information gathering and competitive analysis, the Commission issues the *NOI* to solicit detailed, comprehensive, and independent data for the *Ninth Report* and to augment information from the Commission and publicly available sources. The Commission requests data that will allow us to evaluate the interrelationships among market structure, carrier conduct, consumer behavior, and market performance in order to determine whether there is still "effective competition" among providers of CMRS. The Commission invites comment on the new analytic framework proposed to assess the state of competition among providers of CMRS in the *Ninth Report*. As will be discussed in more detail later in the *NOI*, the Commission seeks the following data and ask commenters to address the following general questions:

- The Commission asks for comment on "what is effective competition?" and which indicators are useful to determine whether there is effective competition among providers of CMRS.
- The Commission seeks comment on what metrics are available that will give us greater insight into the performance of the CMRS industry. The Commission is particularly interested in gathering accurate and reliable information on the number of subscribers, penetration rates, usage, average price per minute, quality of service, pricing trends, and profits, and whether these metrics vary between urban and rural areas as well as among different demographic groups.
- The Commission seeks comment on how the metrics pertaining to the CMRS industry's structure, carrier conduct, consumer behavior, and market performance vary across different geographic areas, in particular between rural and urban areas? If so, how?
- The Commission seeks comment on how barriers to entry (*e.g.* access to sufficient spectrum, cost of capital, first mover advantages and siting cell towers) affect the industry's market structure. The Commission seeks comment on which entities compete to provide CMRS services, the extent of deployment of CMRS services, and whether the same types of services are available in all of a carrier's service areas.
- The Commission seeks comment on the most significant changes or developments in pricing plans, advertising and marketing, capital expenditures, and new technology deployment during the past year.
- The Commission seeks comment on significant changes and developments have occurred in the provision of wireless data and Internet services, both mobile and nomadic, since the publication of the *Eighth Report*.
- The Commission seeks data on current and prospective deployment and usage of wireless high-speed internet access services through mobile and portable computing devices using Wi-Fi and similar technologies and how such data should be considered in assessing the competitive conditions of the CMRS market.
- The Commission seeks comment on how competitive conditions and performance in the CMRS industry in the United States compare to that in other countries, including data on key industry performance metrics, such as subscribership, penetration rates, usage, pricing, quality of service, and service availability.

4. In addition, The Commission seeks comment on the Commission's market-oriented policies, including those that promote facilities-based competition among providers of CMRS and that the Commission believes have provided important benefits to consumers. For example, the Commission's policy to let market forces determine the number of providers operating in a given geographic area, subject to antitrust restrictions and other appropriate limits, has allowed providers to operate at a competitive and efficient scale of operation. This policy enables these providers to serve consumers at prices that reflect the cost savings of efficient operation among other factors. Over the past decade, with respect to broadband personal communications services (PCS) and other mobile radio services, the Commission has adopted a licensing model in which licensees have "exclusive and transferable flexible rights" to the use of specified spectrum within a defined geographic area, with spectrum use rights that are governed primarily by technical rules to protect against harmful interference. The Commission seeks further input on how, for purposes of assessing and comparing competitive market conditions, this approach leads to the deployment of the spectrum for its highest and most valued use, and how, in turn these trends have facilitated the provision of services that are tailored to the preferences of consumers.

5. The Commission seeks comment on how the market structure in this industry has evolved due to specific actions by the Commission, especially the application of the above-referenced spectrum usage model for CMRS and other market-oriented policies. What other effects have resulted from these policies? Are these effects the same in urban and rural areas? If not, how do they differ, and why? Do these effects vary among CMRS providers? If so, why? Are there other policies that the Commission could adopt that would enhance competition in the mobile telecommunications industry?

6. Industry members, members of the public, and other interested parties should submit information, comments, and analyses regarding competition in the provision of CMRS services. Commenters desiring confidential treatment of their submissions should request that their submission, or a specific part thereof, be withheld from public inspection. In order to facilitate its analysis of competitive trends over time, the Commission requests that parties submit current data as well as historic data that are comparable over time. In addition to the comments submitted in this proceeding, the *Ninth Report*, as all past *CMRS Reports*, will also include information from publicly-available and Commission sources.

## II. Matters on Which Comment Is Requested

7. In prior *CMRS Reports*, mobile telecommunications have been divided into two sectors: (i) Mobile voice; and (ii) mobile data. As noted in the *Eighth Report*, however, mobile voice and mobile data services are no longer clearly separate services in the CMRS industry. Many mobile voice operators also offer mobile data services using the same spectrum, network facilities, and customer equipment. Furthermore, many United States mobile carriers have integrated the marketing of mobile voice and data services. Therefore, for purposes of the *NOI*, the Commission inquires about a single mobile telecommunications sector that includes interconnected mobile voice and mobile data services provided on the same handset, as well as providers that offer only mobile data services. Providers of mobile telecommunications services primarily use cellular radiotelephone,

broadband Personal Communications Services (PCS), and Specialized Mobile Radio (SMR) licenses. Because these licensees offer mobile telecommunications services that are essentially indistinguishable by most consumers, they are discussed in the *NOI* as a single industry sector. Resellers and satellite operators also offer mobile telecommunications services. In addition, in an effort to continue to provide the most complete picture of competition among providers of CMRS to Congress, the *Ninth Report* will also look at mobile wireless service offerings outside the umbrella of "services" specifically designated as CMRS by the Commission. Because providers of these services may compete now or in the future with CMRS providers, the Commission believes it is important to consider them in its analysis and collect information on mobile wireless services regardless of their regulatory classification. The Commission asks if there are other providers that compete in this market. If so, to what extent are these providers creating competition in the mobile telecommunications industry?

*A. Mobile Telecommunications Market Structure*

8. The analysis of market structure will focus on the current level of concentration and the ease or difficulty with which new operators can enter the mobile telecommunications market. Examples of key metrics collected in the past that assisted in the determination of market structure include: The current number of operators per county; planned spectrum auctions that may enable the entry of additional operators; and consolidation and exit of operators from the mobile telecommunications market. The sources of data and analysis of these and other metrics. The Commission invites commenters to address whether there are other metrics that should be used to evaluate the market structure of the mobile telecommunications market? Are data for these metrics available on a national and/or sub-national level?

i. Geographic Market Definition and Service Availability

9. *Defining Geographic Markets.* In order to analyze the structure of the mobile telecommunications market, it is necessary to accurately define the relevant product and geographic markets, and to identify the number of carriers providing service in those markets. Defining the relevant geographic market requires, among other things, the identification of a geographic area within which customers face similar competitive choices. Defining geographic markets is complicated and time consuming due to the large number of mobile operators, the wide variation in their geographic footprints, and the resulting patchwork of numerous and relatively small geographic areas in which consumers face the same choices of mobile telecommunications providers.

10. The Commission seeks comment on how best to define geographic markets to analyze the structure of the mobile telecommunications market for the *Ninth Report.* The Commission also requests comment on how to improve the methodology the Commission uses to determine the number of carriers serving a defined geographic area. The methodology used in prior reports inherently includes some undetermined degree of overcounting. Do commenters believe that this degree of overcounting is significant and materially affects the determination of mobile telecommunications service availability and market structure? Is there an alternate methodology that could be used to estimate service availability more accurately?

11. *Service Availability by Billing Address.* In conducting its analysis of service availability and market structure, the Commission seeks information about the extent to which consumers are able to, and do, purchase service plans from carriers whose networks do not cover their residential location or billing address. Carriers frequently query potential subscribers about the zip code of their billing address. Should this be taken as an indication that carriers do not provide service to consumers whose billing address zip codes are outside the range of the carriers' network coverage areas, even if such consumers wish to purchase service plans in order to use their phones inside the coverage areas? To what extent are mobile telecommunications subscribers' residential locations or billing addresses located outside of their carrier's network coverage area? To what degree would an analysis of the population of smaller geographic areas that underlie carriers' network coverage boundaries undercount those subscribers? Furthermore, would the use of other, smaller geographic areas in addition to or in place of counties be appropriate in analyzing service availability? If so, which areas would be appropriate? Do such data currently exist?

12. *Rural Markets.* Since the release of the *Sixth Report,* the Commission has attempted to obtain a better understanding of the state of competition below the national level, and particularly in rural areas. In order to analyze the mobile telecommunications market structure in rural areas, it is necessary first to define "rural areas." The federal government has multiple ways of defining rural, reflecting the multiple purposes for which the definitions are used. In the *Eighth Report,* the Commission analyzed service availability in rural areas using three different proxy definitions, and similar results were obtained for each definition. The Commission compared the number of competitors in: (i) Rural Statistical Areas (*RSA*) counties versus Metropolitan Statistical Areas (*MSA*) counties; (ii) non-nodal Economic Areas (EA) counties versus nodal EA counties; and (iii) counties with population densities below 100 persons per square mile versus those with population densities above 100 persons per square mile. In addition, the Commission recently released a *Notice of Proposed Rulemaking* (Rural NPRM), 68 FR 64050, November 12, 2003, to examine ways to promote the rapid and efficient deployment of spectrum-based services in rural areas. The Commission requests comment on how the Commission should define "rural areas" for purposes of the *Ninth Report.* Should there be a single distinction between rural and non-rural areas, or should rural and non-rural be defined on a continuum, for example by looking at different population densities? Should the Commission adopt one of the proposed definitions in the *Rural NPRM,* or some combination of the elements contained in those proposed definitions, for the *Ninth Report?*

13. *Service Deployment and Coverage Maps.* In order to improve the accuracy of its analysis and to reduce overcounting in the *Ninth Report,* the Commission asks service providers to submit as part of their comments to the Commission, in electronic format, the coverage maps that they already make available to the public. Specifically, the Commission requests carriers to submit as part of their comments the maps they employ to advertise their coverage areas in brochures and on their web sites in a geo-referenced, mapable format, such as MapInfo table (.tab), Tagged Image Format (.TIF), or Shapefile (.shp) files. The Commission requested this data in last year's NOI and no carrier responded. Besides requesting the information in an NOI, how else could the Commission obtain this information? Would signatories to Cellular Telecommunications and Internet Association (CTIA) Voluntary Consumer Code be willing to submit

their coverage maps to the Commission in one of the aforementioned electronic formats? In the alternative, the Commission asks carriers to provide a list of counties where they provide facilities-based services. The Commission has used the contours filed by 800 MHz cellular licensees to estimate the availability of analog mobile telephone service, and therefore does not require additional maps showing analog coverage from cellular licensees. However, the Commission requests that cellular licensees submit, as part of their comments, their publicly available maps in the aforementioned formats showing where they offer reliable digital service, or else supply lists of counties in which the service is offered. In addition to employing more accurate coverage maps, The Commission seeks comment on other ways its analysis of service availability can be improved?

14. In order to continue to improve the accuracy of its analysis, the Commission seeks information on whether carriers market service to new customers in all of the geographic areas in which they have coverage. Do carriers provide coverage in certain areas, such as near major roads, where they do not also market service to residents of those areas? If this is true, could the Commission's analysis be further improved if carriers indicated the parts of their coverage areas in which they compete to offer new service and the parts that are used only to provide coverage to traveling subscribers based in other locations? Also, in what respect do infrastructure sharing agreements, such as those between carriers along highways in low-population areas, affect service availability in rural areas? Do such agreements effectively increase the number of competitors in those areas? Do these arrangements increase wireless usage in areas adjacent to such areas?

15. *Mobile Data Deployment.* The Commission also seeks comment on deployment of next-generation network technologies such as 1X and GPRS, which will bridge the gap between second and third generation technologies. The Commission is particularly interested in changes that have occurred in such deployment since the *Eighth Report.* For example, in what portion of their license and network footprints have carriers deployed these technologies, and what advanced wireless applications are being offered using these technologies? Are the same types of advanced services available in all areas, and in particular, does the availability of advanced services vary between urban and rural areas? Specifically, the Commission requests carriers to submit as part of their comments the maps they employ to advertise their mobile data coverage areas in brochures and on their web sites in a geo-referenced, mapable format, such as MapInfo table (.tab), Tagged Image Format (.TIF), or Shapefile (.shp) files including the type of mobile data services being offered there. In the alternative, the Commission asks carriers to provide a list of counties where they provide these mobile data services.

16. *Reliability of Data.* The Commission's service availability analysis relies on information reported by service providers, including their news releases, filings with the Security and Exchange Commission (SEC), web site coverage maps, and network buildout notifications filed with the Commission. In addition, there are independent web sites and public reports that include some information about service coverage and dead zones. The Commission seeks comment on the advantages and disadvantages to this approach, including the potential biases arising from relying exclusively on data supplied by parties that may have a financial interest in the use of such data as part of Commission decisions. Since the Commission, in some cases, reports on information supplied only by one or two sources, the Commission also seeks comment on ways of obtaining independent verification of competition information provided for the *Ninth Report.* Which independent sources can be reliably used to verify carrier-supplied coverage information? Do commenters believe such verification is necessary in analyzing service availability and competition?

17. *Resale Providers.* Resellers offer service to consumers by purchasing airtime at wholesale rates from facilities-based providers and reselling it at retail prices. According to information provided to the Commission in its ongoing local competition and broadband data gathering program, the resale sector accounted for approximately 5 percent of all mobile telephone subscribers as of December 2002. To what extent are resellers creating competitive pressures in the mobile telephone sector? Who are the major resellers in the United Sates? How many subscribers do they have? From the consumer's perspective, what are the benefits of buying from a reseller versus a facilities-based provider? Are resellers selling to specific demographic segments? The Commission also seeks comment on the impact of the November 24, 2002 sunset of the CMRS resale rule on the extent and vigor of resale activity. The *Eighth Report* discusses "mobile virtual network operators" (MVNOs) as a type of reseller focusing on brand development, with the intent to offer a niche product and to have better customer retention. The Commission asks for comment on how this resale model has affected the provision of resale services. The Commission also asks for information about companies employing the MVNO resale model since the *Eighth Report.*

18. *Satellite Providers.* Certain satellite services are by definition CMRS. At least four satellite carriers currently provide mobile satellite services (MSS) in the United States: Globalstar Telecommunications LTD, Iridium Satellite LLC, Inmarsat Limited, and Mobile Satellite Ventures. The Commission requests carriers to submit as part of their comments information detailing the geographic areas of the United States in which they provide coverage as well as those areas in which they offer service to new customers. Taking into account such information on MSS service availability, The Commission seeks comment on the extent of competition among MSS providers. To what extent do MSS providers compete with terrestrial-based mobile telecommunications providers? Are MSS services substitutes for terrestrial-based mobile voice and data services?

ii. Horizontal Concentration and Vertical Integration

19. Concentration measures based on output metrics, such as market share of subscribers or revenues, are common tools used to assess market structure. Previous CMRS reports have not provided concentration measures, in part because of the difficulty in defining geographic markets and limitations on available output data. Can the use of concentration measures, such as the Herfindahl-Hirshman Index (HHI), give additional insight into whether effective competition exists as well as into whether a service provider has a dominant share of the market? The Commission requests comment on whether concentration measures should be included in the *Ninth Report.* Commenters who recommend that the Commission include concentration measure(s) in the *Ninth Report* are requested to provide comments on various concentration measures and how these metrics may enhance its analysis of market structure. The *DOJ/FTC Guidelines* provide HHI thresholds that indicate concentrated markets. If HHIs are employed, what should constitute a high degree of concentration for the mobile telecommunications market? One

possible HHI threshold level would be those listed in the DOJ/FTC merger guidelines. Are these appropriate to use when looking at whether there is effective competition in the mobile telecommunications market?

20. One possible data source that could be used to calculate output market concentration statistics is the Numbering Resource Utilization/ Forecast (NRUF) data that are submitted to the Commission on a rate center basis. Rate center boundaries are much smaller than, and not coextensive with, mobile telecommunications license boundaries such as Cellular Market Areas (CMAs), Metropolitan Trading Areas (MTAs), or Basic Trading Areas (BTAs). Due to their relatively small size, rate centers are not necessarily indicative of where a mobile telecommunications subscriber lives, works, or uses a mobile telecommunications device. In addition, in order to protect the confidentiality of the companies submitting NRUF data, the Commission does not report the number of subscribers for geographic areas in which there are three or fewer carriers.

21. If concentration measures are included in the *Ninth Report*, given the caveats discussed above, are the NRUF data a reasonable proxy for output in the mobile telecommunications market? Also, the Commission seeks comment on how to determine which geographic area or areas should be used to calculate mobile telecommunications concentration measures. In particular, the Commission seeks comment on the appropriateness of various geographic market delineations given the limitations of the NRUF data.

22. In addition to the issue of horizontal concentration in the relevant end-user service market, the Commission also seeks information on the extent of, and the factors giving rise to, vertical integration and disintegration in the CMRS industry. In other words, under what circumstances and for what reasons do CMRS providers employ their own inputs rather than purchasing them from outside vendors? The Commission seeks comment and information on the vertical structure of the CMRS industry. How prevalent is vertical integration or disintegration with respect to the different elements of physical network infrastructure, spectrum, and content, and are there any discernible trends toward vertical integration or disintegration with respect to any of these inputs? What considerations shape the decisions of CMRS providers to make or buy their inputs? What is the actual or potential impact of vertical integration or disintegration, if any, on competition among providers of CMRS, the cost of providing service, or other aspects of the performance of the CMRS industry?

iii. Consolidation and Exit

23. Consolidation and exit of service providers, whether through secondary market transactions or bankruptcy, may affect the structure of the mobile telecommunications market. For example, a reduction in the number of service providers may increase the market power of any given service provider which could lead to higher prices, fewer services, and/or less innovation. The Commission seeks comment on the effects of consolidation in the mobile telecommunications market. Are the effects of consolidation different for mergers and acquisitions, swaps, joint ventures, and bankruptcies? Has consolidation affected mobile data services differently than mobile telephone services? Has consolidation affected rural areas differently than urban areas? Among the policies potentially affecting consolidation in this market, the Commission eliminated, effective January 1, 2003 a rule limiting the amount of spectrum a CMRS licensee could own or control in a given licensed area. The Commission seeks comment on how consolidation of spectrum and facilities has affected the mobile telecommunications market structure since the sunset of the Commission's CMRS Spectrum Aggregation Rule.

iv. Barriers to Entry

24. If entry into a market is easy, then entry or the threat of entry may prevent incumbent operators from exercising market power, either collectively or unilaterally, even in highly concentrated markets. The ease or difficulty of entry generally depends on the nature and significance of entry barriers. Barriers to entry in the mobile telecommunications market may include first-mover advantages, large sunk costs, and access to spectrum. The Commission seeks comment on these and other types and level of barriers to entry in the mobile telecommunications market. What are the most significant barriers to entry in the mobile telecommunications market? Are barriers to entry different in rural and urban areas?

25. *Access to Spectrum.* The Commission seeks comment on whether there is access to sufficient spectrum, either through Commission auctions or through secondary market transactions, to prevent spectrum from becoming a significant barrier to entry in the CMRS industry. Are existing service providers spectrum constrained? If so, in which geographic markets are carriers most likely to be constrained? Have these carriers become more spectrum constrained after rolling out next generation services? Do potential entrants have sufficient opportunities to access spectrum? As advanced wireless technologies become more prevalent, will potential entrants have more or fewer opportunities to access spectrum?

26. The Commission's recent action to facilitate leasing and other transactions via secondary markets addressed the question of spectrum access in a number of services. In the *Secondary Markets R&O*, 69 FR 5711, February 6, 2004 the Commission allowed licensees in the Wireless Radio Services, including CMRS, to lease all or a portion of their spectrum usage rights, for any length of time within the license term, and over any geographic area encompassed by the license. The Commission seeks comment on whether this new policy to facilitate spectrum leasing, combined with future spectrum auctions such as that for Advanced Wireless Services, will provide sufficient opportunities both for existing carriers to expand their operations and for new mobile telecommunications providers to enter the market. Are there other barriers that limit access to spectrum?

27. The Commission requests comment from licensees and potential spectrum lessees regarding their experience exploring possible spectrum leases following Commission adoption of the *Secondary Markets R&O*. Are licensees and potential spectrum lessees able to identify potential spectrum leasing partners? What considerations are driving negotiations regarding spectrum leases? Are there impediments to leasing, and if so, what is the nature of these impediments? Are pricing considerations, either the price sought by licensees or the amount the lessees are willing to pay, acting as an impediment? Are there other considerations, such as high transaction costs, that may affect the willingness of either licensees or potential lessees to undertake spectrum leasing negotiations? What types of leasing arrangements are being sought by both licensees and potential spectrum lessees? Are the spectrum leasing negotiations targeted at providing additional spectrum to meet the needs of an existing licensee in the geographic area encompassed by the lease, or aiding an existing licensee to fill out its footprint, or providing spectrum access to a new entrant, or to achieve some other objective?

28. *Other Barriers to Entry.* The Commission also seeks comment on other market conditions that may present barriers to entry in the CMRS market. For example, the Commission recognizes that cellular licensees, like early entrants in other industries, have benefited from a first-mover advantage. Do cellular licensees continue to benefit from this advantage, and if so, to what extent and in which markets? In addition, might access to capital create a barrier to entry in the mobile telecommunications market? To what degree do mobile telecommunications providers face capital market constraints in financing the purchase of spectrum licenses, or the leasing of spectrum rights, or the construction of facilities? Do the nationwide carriers face a different capital market than do smaller regional and local providers? The Commission seeks comment on the height of scale economy barriers in mobile telecommunications. Finally, The Commission seeks comment on the extent to which the ability to site cell towers in a carrier's licensed market area creates a barrier to entry. Some carriers have reported problems obtaining permission to site cell towers in certain geographic markets. How widespread is this problem? Is this a greater problem in certain regions of the country?

*B. Carrier Conduct in the Mobile Telecommunications Market*

29. Whether there is effective competition in the mobile telecommunications market also depends on the conduct and interaction of the carriers in the market. For example, while coordinated interaction and unilateral effects may lessen competition, such conduct may be averted by the presence of one or more carriers who have the ability and incentive to expand sales by offering innovative service packages, undercutting the prices of rivals, and/or engaging in extensive advertising and promotional campaigns. The Commission asks for information on the degree and extent of (i) price rivalry and (ii) non-price rivalry. Are there other indicators related to carrier conduct that the Commission should examine?

i. Price Rivalry

30. Past *CMRS Reports* examined new types of pricing plans in order to report on major developments in the industry and to assess the new plans' impact on competition. This information is relevant in determining the intensity and degree of price rivalry in the mobile telecommunications market. To what extent do new types of pricing plans reflect price rivalry among the providers? What are the major innovations that have occurred with pricing plans since the *Eighth Report*? Have these pricing innovations spread throughout the mobile telecommunications market or have they been limited to a subset of carriers? In addition, The Commission seeks comment on the extent to which carriers in their pricing plans differentiate between data services offered over 2G networks and those offered over newer generation technologies such as 1X and GPRS networks. Have past pricing innovations been more widely adopted in the last year?

31. The Commission seeks information on which carriers offer nationwide pricing plans, particularly those that are not typically described as being nationwide operators, and request descriptions of the terms of such plans. The Commission asks carriers that offer nationwide pricing plans whether they offer the same rates and terms to consumers throughout all parts of the country where they offer such plans, including Alaska and Hawaii as well as the U.S. Territories. Furthermore, do carriers charge different prices (monthly and per minute) or offer different terms for their local and regional plans across the various areas that they serve, for example, between rural and urban areas? If so, are these geographic variations substantial, and what are the major reasons for such variations? If there are no geographic variations, why not?

32. Are there patterns where certain demographic groups subscribe to similar pricing plans? For example, do subscribers with lower personal or household incomes tend to purchase local or regional plans rather than national plans? Are particular plans associated with teenagers, college students or seniors? Are prepaid services used by a group of consumers with similar characteristics? Also, the Commission seeks information on the existence and the extent of contracts with terms and prices other than those that are widely advertised. Are these types of contracts associated with or targeted to a certain type of demographic group? Do consumers that use specific types of mobile telecommunication services such as mobile data services have similar demographic characteristics? Have the introduction of new types of pricing plans increased mobile telephone penetration among specific demographic groups or in certain geographic areas?

ii. Non-Price Rivalry

33. Service providers in the mobile telecommunications market also compete on non-price characteristics such as coverage, quality of service, and ancillary services. Non-price competition is a response to consumer preferences and demand. Indicators of non-price rivalry include advertising and marketing, capital expenditures, technology deployment and upgrades, and the provision of ancillary services. The Commission seeks information on non-price rivalry.

34. *Advertising and Marketing.* Firms may engage in advertising and marketing either to inform consumers of available products or services or to increase sales by changing consumer preferences. Mobile telecommunications service is an "experience good," and in general, advertising for an experience good tends to be persuasive rather than informational in nature. What type of advertising do mobile telecommunications carriers engage in? Do they utilize promotional or informational advertising or a mix of both? Does the type of advertising vary with the medium? Are there studies on the national or sub-national level that provide data and/or analysis of advertising by mobile telecommunications firms? The Commission also seeks comment on the extent to which CMRS providers' efforts to brand their services through advertising and marketing cultivate brand loyalty.

35. *Capital Expenditures.* Capital expenditures are funds spent during a particular period to acquire or improve long-term assets such as property, plant, or equipment. In the mobile telecommunications market, capital expenditures consist primarily of spending to expand and improve the geographic coverage of networks, to increase the capacity of existing networks to serve more customers, and to improve the capabilities of networks (by allowing for higher transmission speeds, for example). Have capital expenditures by mobile telecommunications providers increased or decreased since the *Eighth Report?* What are the underlying reasons for the change? Are there any studies or analyst reports on the capital expenditures of nationwide carriers versus regional/local providers? Does data exist on capital expenditures by geographic region?

36. *Technology Deployment and Upgrades.* Mobile telecommunications carriers have been deploying next-generation network technologies, which offer mobile data services at higher data

transfer speeds than earlier versions. The *Eighth Report* discussed the progress of nationwide and regional carriers in deploying these technologies. For the *Ninth Report*, the Commission requests information on the extent to which mobile telecommunications carriers are continuing to upgrade, or plan to upgrade their networks to these advanced services and/or even more advanced technologies—such as EDGE, WCDMA, and 1xEV–DO. Specifically, do carriers plan to deploy more advanced technologies? If yes, how extensively are carriers planning these deployments to be (*e.g.*, will carriers focus on urban areas only, or will they deploy these technologies in rural areas as well)? With regard to GSM-based carriers, the Commission asks whether carriers are planning to upgrade their GPRS systems. If yes, are they planning to upgrade to EDGE, WCDMA or some other technology? With regard to CDMA-based carriers, to what extent are they planning to upgrade their networks to include 1xEV–DO technology? Are there other new wireless technologies that will improve wireless providers' coverage, capacity and/or service offerings for mobile telecommunication services?

37. As discussed in the *Eighth Report*, most of the major mobile telecommunications carriers have introduced the capability to exchange text messages with subscribers on other carriers' networks. The Commission seeks information on the extent to which this intercarrier interoperability has affected Short Messaging Service (SMS) adoption rates.

38. The Commission requests information on the number of users of SMS and the volume of SMS traffic. In addition, the Commission requests comment as to the actual data transfer speeds that are being experienced with GPRS and 1X systems (as well as EDGE and 1xEV–DO systems, where those technologies have been deployed) and the degree to which individual users' data speeds vary with the number of subscribers concurrently operating on these systems within a given area.

39. There are a growing number of service providers that offer data-only services. These providers include traditional one-way paging service providers as well as two-way, data-only service providers. For example, as discussed in the *Eighth Report*, Monet Mobile offers data-only service using CDMA1xEV–DO technology and broadband PCS spectrum. Two other carriers, Cingular Wireless and Motient Corp. operate two-way data networks using the 900 MHz SMR and 800 MHz SMR spectrum bands, respectively. The Commission asks for information on carriers providing one-way and two-way data-only services, including deployment, technology employed, data speeds, pricing, number of subscribers and usage.

40. The Commission asks for comment on new or enhanced mobile data services and devices that have been introduced since the *Eighth Report* such as new or enhanced location-based services, games, digital photo and video technologies, and downloadable music. To what extent do providers bundle different mobile data services with each other and/or with voice service? The Commission asks for information on the types of devices upon which these services are offered; how they are priced (*e.g.*, bundled or stand-alone, bulk or per usage); where the services are available; and the usage and subscribership levels?

41. The Commission also asks for comment on the availability of mobile Internet services. Do providers offer mobile Internet services throughout their entire licensed service areas, or only in areas that have been upgraded to next generation technologies, such as GPRS and 1X? Which types of devices are used most for mobile Internet access? Do any of the features of mobile data devices—such as battery life, data storage capacity, and screen size—constrain the ability of users to access mobile Internet services, and therefore limit the demand for these services? To what extent are users of wireless high-speed Internet access services getting this access through mobile and portable computing devices using Wi-Fi and similar technologies? How does such use, whether on a subscription or non-subscription basis, compare to Internet access services using licensed spectrum? To the extent that mobile service providers are integrating Wi-Fi technology into their devices, how is this affecting the use of mobile Internet services? In how many locations is Wi-Fi and similar technologies currently available and in which types of locations do most users establish high-speed connections to the Internet (*e.g.*, airports, coffee shops, community networking)? Are those locations part of a retail or wholesale network, or independent stand-alone locations? What data transfer speeds do most users experience with the various unlicensed technologies and other standards? How are subscription-based offerings priced to consumers? Is service offered as part of a bundled package, an add-on or as a stand-alone product? Are voice services available using these connections and if so, by whom, where and how are they priced?

42. *Provision of Ancillary Services and Promotional Offers.* Mobile telecommunications providers offer ancillary services and promotions such as caller ID, voice mail, call forwarding, long distance, push-to-talk, free or reduced priced handsets, and free night and weekend minutes. The cost of these services is either included in the monthly charge or billed separately. Carriers use ancillary services and promotional offers to differentiate their products from those of their competitors. They compete not only in terms of the monthly charge, but also with the price and scope of ancillary services and promotions. The Commission seeks comment on whether carriers offer different ancillary services or promotional products and services in different geographic markets. What are these differences and why do they occur?

iii. Absence of Coordinated Interaction and Unilateral Effects

43. Anti-competitive outcomes may result from two distinct types of firm conduct—coordinated interaction (both tacit and explicit collusion) among two or more competitors, or the unilateral actions of a single firm. In order to fully evaluate carrier conduct in the mobile telecommunications market, the Commission seeks comments on the potential for and likelihood of coordinated interaction and unilateral effects. Are coordinated effects likely in the mobile telecommunications market? If so, why? Do conditions in the mobile telecommunications market make unilateral price increases or other non-price unilateral effects likely? Also, the Commission seeks comment on any instances of potential coordinated interaction or unilateral effects in the United States' mobile telecommunications market.

iv. Consumer Behavior in the Mobile Telecommunications Market

44. The ability and inclination of consumers to purchase a product or service or to change firms may influence market structure, carrier conduct, and market performance. When initially purchasing a product or service or changing providers, consumers may incur transactions costs in doing so. These transactions costs may in some instances make the initial purchase or subsequent switching of firms prohibitively expensive. The level of these costs may affect concentration measures, marketing and advertising, pricing plans, and penetration rates, among other metrics. Therefore, for the *Ninth Report*, the Commission intends to analyze and collect information on

these consumer costs as they relate to the market structure, firm conduct, and market performance.

v. Access to Information on Mobile Telecommunications Services

45. It is apparent that wireless consumers are demanding more information on the availability and quality of mobile telecommunications services, and that numerous third parties have been responding to this demand by compiling and reporting such information. There are considerable sources of information available to consumers, including publications such as *Consumer Reports*, trade associations, marketing and consulting firms, and several Web sites dedicated to giving consumers an overview and comparison of the mobile telephone services available in their area. The Commission seeks comment on the development of consumer information sources for the mobile telecommunications market. Are there new avenues for consumers to gain information, such as retailers providing on-line and in-store comparisons of pricing plans, services, and handsets? Also, are consumers demanding information on mobile data services such as SMS, email, and Internet access? If so, are any sources providing consumers with this information?

vi. Consumer Ability to Switch Service Providers

46. *Churn.* The Commission seeks comment on the use of churn rates as a tool in its analysis of consumer behavior in the mobile telecommunications market. Churn refers to the number of customers an operator loses over a given period of time. Carriers may calculate churn using different methodologies. For example, when a customer moves from New York to Los Angeles, changes numbers but keeps the same provider, do any companies count this as churn? When a customer's service contract expires and the customer signs up for a new plan with the same provider, do any companies count this as churn? The Commission asks carriers to submit descriptions of how they calculate churn. Do the differences in how churn is calculated prohibit a meaningful comparison of churn figures across the wireless industry? In the *Eighth Report*, the Commission found that most carriers report company-wide churn rates between 1.5 and 3 percent per month. How reliable are these churn estimates? Are there other sources of churn data available that should be included in the *Ninth Report*? Further, the Commission seeks sub-national or regional churn data, and churn data by demographic groups.

47. The Commission noted in the *Eighth Report* that customers have consistently indicated cost and network quality as the main reasons for changing providers. Have the reasons consumers churn remained the same? If not, what are the reasons for consumer churn? The Commission also found that average monthly churn rates for mobile telephone service have remained fairly constant over the past three years. Since the *Eighth Report*, has there been a change in the churn rate? If there has been a change, what is the magnitude of this change?

48. *Local Number Portability.* As of November 24, 2003, wireless carriers in the top 100 markets were required to permit subscribers to take their phone numbers with them to a new carrier in the same market area. This process, called local number portability (LNP), is expected to make it easier for wireless subscribers to change carriers by eliminating some of the cost and inconvenience of having to change their phone numbers whenever they change to a different wireless carrier. Having to change to a new telephone number upon subscribing to a new wireless service provider can involve both direct and indirect switching costs. The wireless subscriber may have to change business cards and stationery, and must give the new number by whom he or she wishes to be reached in the future. Such costs make some subscribers more reluctant to switch carriers. The LNP requirement will expand beyond the top 100 markets beginning in May 2004 as wireless carriers in those markets make formal requests to other wireless carriers to provide this capability. The Commission seeks comment on the effects of LNP on wireless competition and consumer behavior. Has wireless LNP caused wireless carriers to offer new services or features or to adjust their pricing strategies, either to attract new customers interested in porting their numbers from competing carriers or to induce their existing customers to stay? Has LNP affected wireless customer churn rates in the top 100 markets? If so, has the effect been significant?

*C. Mobile Telecommunications Market Performance*

49. The structural and behavioral characteristics of a competitive market identified above are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality, and greater choice of services. Such consumer outcomes are the ultimate test of effective competition. In order to determine if these goals are met and whether there is still effective competition in the market, the Commission intends to analyze various metrics including pricing levels and trends, subscriber growth and penetration, Minutes of Use (MOU), innovation and diffusion of services, and quality of service. Are there any other metrics that would add to its analysis of the mobile telecommunications market? Are these metrics available on a national or sub-national level?

i. Pricing Levels and Trends

50. *Pricing Trends.* The *Eighth Report* contained pricing data from a variety of sources, all of which indicated that the average price of mobile telephone service has been decreasing over time. The *Eighth Report* cited information from the United States Department of Labor's Bureau of Labor Statistics (BLS), Econ One, and trends based on CTIA data. BLS began reporting a cellular telephone component of the Consumer Price Index (CPI) in December 1997 (cellular CPI). In addition, using CTIA data, the Commission calculated a national average Revenue per Minute (RPM) by dividing the Average Revenue per Unit (ARPU) by MOUs. The Commission used this RPM figure as an estimate of the average price per minute of mobile telephone service. In contrast to the Commission's estimate of RPM and BLS's cellular CPI, which attempt to capture national pricing trends, Econ One analyzes pricing plans for the top 25 United States' cities. The firm also calculates the average price of service across four different monthly usage levels and derives an average for all users.

51. The Commission seeks comment on the use of these various pricing estimates as a tool in its analysis of the mobile telecommunications market, including to what extent price decreases are evidence of effective competition. The Commission asks for feedback on the sources of the pricing data used in the *Eighth Report* and request additional national and sub-national pricing data for the *Ninth Report*. Are there additional analyses that can be performed or conclusions that can be drawn from new or existing pricing data? The Commission also seeks comment on pricing trends for mobile data services offered by mobile telecommunications providers. Are there data on these services available on a national or sub-national level? Have prices of mobile data services fallen since their introduction? Are most data pricing plans based on the amount of

minutes used, or do they offer a flat rate for unlimited use? How are new or enhanced mobile data services such as location-based services, games, digital photos and downloadable music priced? Are there any reports or analyses that discuss pricing trends of mobile data services?

52. *Pricing in Rural Areas.* The Commission has identified a study by Econ One that compares mobile telephone pricing in urban versus rural areas. Are commenters aware of other pricing studies that look at urban versus rural or other sub-national mobile telecommunications pricing? Econ One completed a study that compared pricing in the 25 largest United States' cities (with an average population of 4.4 million) with 25 randomly-selected towns or cities (with an average population of 95,611) located in RSAs. The Commission asks for additional information on whether there are meaningful pricing differences between urban and rural areas. To the extent that such differences exist, what are the reasons for such differences? Should additional analyses on the differences between urban and rural mobile telecommunications pricing be performed? What additional conclusions can be drawn, and what are the limitations of those conclusions?

53. Given the scarcity of studies that provide direct information on pricing, the Commission is interested in finding alternative ways of determining whether pricing in rural areas conform to national pricing plans. Are there other ways of studying this issue? Can an economic model be constructed that provides answers to this question in the absence of direct data on rural pricing? Are there existing studies or data sets that would give us the ability to explore this issue?

54. *Cost.* Since price changes may reflect corresponding changes in underlying costs rather than a change in the competitive environment, pricing data and trends can be a misleading indicator of the status of competition. One way to evaluate the connection between prices and costs is the Price-Cost margin. In theory, a relatively narrow Price-Cost margin would be an indicator of effective competition. The Commission invites comments on the use of the Price-Cost margin to analyze the connection between prices and costs in the mobile telecommunications market. Are there other measures that the Commission should consider in evaluating the relationship between prices and costs in the mobile telecommunications market?

55. One possible estimate for the price component of the Price-Cost margin is RPM. The Commission seeks comment on the use of RPM as a proxy for pricing of mobile telecommunications services for the purpose of estimating the Price-Cost margin. The Commission also invites suggestions on alternative pricing metrics and sources of associated data that could be used for the purpose of providing a price-cost comparison. The Commission asks for submissions of RPM estimates for mobile data services or for mobile voice and data services combined.

56. Available cost studies for the mobile voice market that the Commission has identified focus narrowly on estimating the cost of terminating calls on mobile networks. If, as one study concludes, there are no significant cost differences between origination and termination of calls on a mobile network in terms of network elements used, then estimates of the cost of mobile call termination could be used to approximate the network costs of mobile voice services; however, since call termination is a wholesale activity, estimates of the cost of call termination generally do not include certain non-network retailing costs such as customer billing costs and advertising and marketing expenses. The Commission seeks comment on the adjustments that should be made to the network cost estimates to take into account non-network costs. Does the provision of mobile data services affect network and non-network costs, and, if so, how? The Commission also invites estimates of the impact of the deployment of next generation advanced technologies on the per-minute cost of mobile telecommunications traffic.

57. *Roaming.* The Commission also seeks data on the availability of roaming for wireless customers. To what extent do carriers have agreements that enable their customers to use automatic roaming throughout the United States? Are there geographic areas in which some carriers do not have automatic roaming agreements? If so, where are those areas and is there any correlation to the number of wireless providers operating in those areas? Are rural customers more affected than non-rural customers? How many customers use manual roaming? Where are those customers located when they use manual roaming, and how frequent is their usage? How has the deployment of mobile data services affected the provision of roaming service? Are consumers able to access mobile data services when roaming?

58. *Average Revenue Per Unit.* Average monthly revenue per subscriber is another key metric presented in past *CMRS Reports.* One source of this metric is the industry-wide ARPU figure reported by CTIA in its semi-annual mobile telephone survey. In addition, many carriers report their individual ARPU figures periodically in their SEC filings. The Commission seeks comment on the use of ARPU as a metric in its analysis of the mobile telecommunications industry. Are additional ARPU data available that should be considered, in particular data depicting whether and how ARPU varies by region and/or demographic group? Are there additional analyses that can be performed or conclusions that can be drawn in the *Ninth Report* from new or existing data?

59. CTIA reported that ARPU declined almost continuously from 1987 to 1998, going from a peak of $98.02 in December 1988 to a low of $39.43 in December 1998. However, since 1999, ARPU has been increasing, rising to $48.40 in December 2002. The *Eighth Report* stated that the growth in ARPU might be the result of a variety of factors, including increased usage offsetting per-minute price declines, as well as the selection of higher-priced monthly calling plans by consumers. The Commission requests from commenters additional input on the possible causes for the recent rise in ARPU, as well as additional data that may support various hypotheses. What role, if any, do changes in ARPU have on competition?

ii. Quantity of Services Purchased

60. *Subscriber Growth.* Since the *Seventh Report*, (information not published in the **Federal Register**), the Commission has estimated the number of United States' subscribers using NRUF data. The Commission estimates the total number of mobile telephone subscribers by using assigned telephone numbers in the NRUF data as a proxy for subscribers. In the *Eighth Report*, the Commission estimated that there were 141.8 million subscribers in the United States as of December 31, 2002. NRUF data, however, do not include information on the actual subscribers. Therefore, the Commission requests information on subscribers that would assist in a greater understanding of the mobile telecommunications inventory, such as penetration rates by age groups and/or household penetration rates.

61. Prior to the *Seventh Report*, the Commission relied on estimated national subscribership data from a semi-annual survey, started in 1985, conducted by CTIA. The CTIA estimate for December 31, 2002 was 140.8 million subscribers, less than a 1.0% difference from the Commission's NRUF estimate. The Commission had reported

CTIA's semi-annual estimates in order to present time series information on subscribership growth. The Commission asks for comment whether to continue to present these data.

62. *Sub-National Penetration Rates.* For purposes of the *Eighth Report*, the Commission chose to use EAs as the geographic unit for its sub-national subscribership analysis using NRUF data. EAs, which are defined by the United States Department of Commerce, consist of one or more economic nodes and the surrounding areas that are economically related to the node. The main factor in determining the economic relationship between the economic node(s) and the surrounding areas is commuting patterns, so that each EA includes, as far as possible, the place of work and the place of residence of its labor force. While wireless carriers have considerable discretion in how they assign telephone numbers across the rate centers in their operating areas, they generally assign numbers to subscribers from rate centers in the same EAs in which the subscribers live.

63. The Commission asks for comment on how to determine which geographic area or areas should be used to calculate mobile telecommunications subscribership and penetration rates for the *Ninth Report*. The Commission requests comment on the appropriateness of using EAs for such calculations. Would other geographic areas be appropriate to use in place of or in addition to EAs, such as states, MTAs, BTAs, CMAs, or counties, noting the limitations of the NRUF data? In addition, are there other ways to interpret existing national and sub-national subscribership data for purposes of the *Ninth Report*? Also, are there data on either a national or sub-national basis on the number of mobile telecommunications customers that use mobile data services?

64. *Minutes of Use.* To analyze mobile telecommunications usage, the Commission has used MOUs as a key metric in previous *CMRS Reports*. The *Eighth Report* includes MOU estimates from CTIA, Paul Kagan and Associates, and J.D. Powers & Associates. All of these sources showed MOUs increasing substantially during 2001. The Commission seeks comment on the use of MOUs as an indicator of the demand for mobile telecommunications services. For purposes of the *Ninth Report*, the Commission asks for comment on the sources of the MOU data presented in the *Eighth Report* and request additional MOU data. In addition, should the Commission perform other analyses or draw additional conclusions from new or existing data? All of the MOU sources presented in the *Eighth Report* estimate MOUs on a national basis. In order to increase the granularity of its analysis for the *Ninth Report*, the Commission requests data on MOUs on a sub-national basis and/or broken down by various demographic groups.

iii. Variety, Innovation, and Diffusion of Service Offerings

65. The Commission observed in the *Eighth Report* that the continued rollout of differentiated service offerings indicated a competitive marketplace. In the mobile telephone sector, the Commission is able to observe independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various available handsets and policies on handset pricing. AT&T Wireless's Digital One Rate (DOR) plan, introduced in May 1998, is one notable example of an independent pricing action that altered the market and benefited consumers. Today, all of the nationwide operators offer some version of DOR pricing plan in which customers can purchase a bucket of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges. Another trend in mobile telephone pricing has been the introduction of on-network, or "on-net," national pricing plans. These plans are similar to DOR plans, with the exception that subscribers incur roaming charges when they use their phones off the carrier's network (off-net). In addition, some mobile wireless carriers offer service plans designed to compete directly with wireline local telephone service. As reported in the *Eighth Report*, the largest of such providers, Leap, under its "Cricket" brand, offers mobile telephone service in 40 markets in 20 states. Leap's service allows subscribers to make unlimited local calls and receive calls from anywhere for about $30 per month. Since the *Eighth Report*, have providers introduced new pricing plans and/or services to differentiate themselves? What other sorts of plans are being used to distinguish service providers and/or serve particular market segments?

iv. Quality of Service

66. In addition to competing on price, in a competitive market firms also compete on the basis of service quality. Mobile telecommunications service is an experience good, and therefore the quality of the product is unknown until the consumer actually uses it. Further, service quality in this market is dependent on when and where the service is used. The Commission found in the *Eighth Report* that carriers have been aggressively building and upgrading their networks with digital technology. This has resulted in improved voice quality and additional calling features to consumers, as well as higher capacity for operators, thereby allowing more customers to access the network and use their phones at the same time. However, some reports indicate that consumers perceive that there is a problem with service quality. Service quality issues may be a result of market structure or carrier conduct. In some cases, however, service quality issues may be due to factors that are not under a firm's control or influence.

67. In order to analyze quality of service in the mobile telecommunications market, specific service problems need to be identified. However, information on service issues—whether from consumer surveys, marketing reports, or other sources—generally convey only what the existing problems are and do not in themselves indicate non-competitive behavior. Quality of service data must be analyzed along with the metrics for market structure, carrier conduct, consumer behavior, and market performance in order to evaluate the underlying causes, their significance, and whether the current level of service quality has an impact on competition in the market.

68. The Commission seeks comment on service quality in the mobile telecommunications market. Does objective data on quality of service exist? Are there any consumer surveys on service quality in the mobile telecommunications market? How reliable are the data collected from these consumer surveys? Also, what other sources provide information on service quality in the mobile telecommunications market, and how reliable are these sources? How do market structure and carrier conduct affect service quality? Are there other metrics that should be used to analyze service quality as it relates to competitive behavior? In addition, The Commission seeks comment on whether LNP affects the quality of services offered by wireless telecommunication providers.

v. Wireless—Wireline Competition

69. In the Eighth Report, the Commission noted that there is evidence that consumers are substituting wireless service for traditional wireline communications. However, it appears that only a small percent of wireless customers use their wireless phones as their only phone, and that relatively few wireless

customers have "cut the cord" in the sense of canceling their subscription to wireline telephone service. The Eighth Report also discussed the effects of mobile telephone service on the operational and financial results of companies that offer wireline services. Such effects include a decrease in the number of residential access lines, a drop in long distance revenues, and a decline in payphone profits. More recently, the Commission has affirmed that the LNP rules that went into effect on November 24, 2003 require "intermodal" number porting between wireline and wireless carriers, thus enabling a wireline customer to port his or her telephone number to a wireless carrier serving the customer's local calling area. Given these developments, the Commission asks for comment on the extent to which mobile telephone service competes with wireline service. Has the introduction of intermodal LNP affected consumer behavior or had any impact on wireless-wireline competition? Are there any other new developments in wireless-wireline competition that have occurred since the *Eighth Report*? What are the major reasons for these developments? What effect have they had on the provision of telecommunications services other than wireless?

70. In order to track and analyze competition between mobile telecommunications and wireline services more effectively, the Commission requests data on: (i) The number of mobile telecommunications subscribers who do not subscribe to residential wireline service; (ii) the percentage of consumers' total monthly voice communication minutes that are made from mobile phones; (iii) the percentage of consumers' total monthly long distance minutes that are made from mobile phones; (iv) the percentage of mobile telecommunications subscribers' calls and minutes that occur in their homes using their mobile phones; (v) the percentage of both mobile telecommunications and wireline calls and minutes that terminate on mobile phones; and (vi) demographic data on which groups of consumers have allocated a substantial portion of their voice communications to mobile telecommunications service. Should the Commission gather additional data, perform additional analyses, or draw new conclusions on wireless-wireline competition?

*D. International Comparisons of Mobile Telecommunications*

71. The *Eighth Report* compared the mobile telephone sectors in the United States, Western Europe, and parts of the Asia-Pacific by examining a number of performance measures, including penetration levels, subscriber growth, MOUs, and pricing. The scope of international comparisons in the *Eighth Report* and previous *CMRS Reports* has been constrained by the availability of comparable international data. For the purposes of the *Ninth Report,* The Commission seeks data to update and possibly expand upon these international comparisons. The international comparisons in the *Eighth Report* were based on various sources of data that were generally current as of the second half of 2002. The Commission requests suggestions on sources of data for updating international comparisons of penetration levels, subscriber growth, and usage for the year 2003. The Commission also invites suggestions on additional performance measures and associated data sources for comparing mobile telecommunications sectors in the United States and other countries.

**III. Procedural Matters**

*A. Ex Parte Presentations*

72. This is an exempt proceeding in which *ex parte* presentations are permitted (except during the Sunshine Agenda period) and need not be disclosed.

*B. Filing of Comments and Reply Comments*

73. The Commission invites comment on the issues and questions set forth above. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before April 26, 2004, and reply comments on or before May 10, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998.

74. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, United States Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet email. To get filing instructions for email comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message: "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four (4) copies of each filing. Parties choosing to submit, as part of their comments, map files in response to requests in ¶¶ 13 through 14, ¶, *supra,* should submit a CD (compact disc) containing one copy of the maps of their service areas, with the various distinctions described above, in one of the following formats: MapInfo table (.tab), Tagged Image Format (.TIF), or Shaped file (.shp). If you have questions about submitting map files, please contact Benjamin Freeman at (202) 418–0628. Paper filings and CDs containing map files can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight United States Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than United States Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. United States Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties also should send four (4) paper copies of their filings to Rachel Kazan, Federal Communications Commission, Room 6126, 445 12th Street, SW., Washington, DC 20554.

**IV. Ordering Clauses**

75. Accordingly, it is ordered that, pursuant to the authority contained in sections 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, the *Notice of Inquiry* is adopted.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 04–9295 Filed 4–22–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of information collections to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

**SUMMARY:** In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC hereby gives notice that it plans to submit to the Office of Management and Budget (OMB) a request for OMB review and approval of the information collection system described below.

**DATES:** Comments must be submitted on or before May 24, 2004.

**ADDRESSES:** Interested parties are invited to submit written comments to Steve Hanft, Paperwork Clearance Officer, (202) 898–3907, Legal Division, Room MB–3064, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to the OMB control number. Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. [FAX number (202) 898–3838].

A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Steve Hanft, at the address identified above.

**SUPPLEMENTARY INFORMATION:** Proposal to renew the following currently approved collection of information:

1. *Title:* Occasional Qualitative Surveys.

*OMB Number:* 3064–0127.

*Frequency of Response:* On occasion.

*Affected Public:* Financial institutions, their customers, and members of the public generally.

*Estimated Number of Respondents:* 5,000.

*Estimated Time per Response:* 1 hours.

*Total Annual Burden:* 5,000 hours.

*General Description of Collection:* This collection involves the occasional use of qualitative surveys to gather anecdotal information about regulatory burden, bank customer satisfaction, problems or successes in the bank supervisory process (both safety-and-soundness and consumer related), and similar concerns. In general, these surveys would not involve more than 500 respondents, would not require more than one hour per respondent, and would be completely voluntary. It is not contemplated that more than ten such surveys would be completed in any given year.

*Request for Comment*

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 15th day of April, 2004.

**Federal Deposit Insurance Corporation.**

*Robert E. Feldman, Executive Secretary.*

[FR Doc. 04–9227 Filed 4–22–04; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 17, 2004.

**A. Federal Reserve Bank of New York** (Jay Bernstein, Bank Supervision Officer) 33 Liberty Street, New York, New York 10045–0001:

*1. Hilltop Community Bancorp, Inc.*, Summit, New Jersey; to become a bank holding company by acquiring 100 percent of the voting shares of Hilltop Community Bank, Summit, New Jersey.

**B. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

*1. Schuyler County Bancshares Inc.*, Kirksville, Missouri; to acquire 100 percent of the voting shares of La Plata Bancshares, Inc., La Plata, Missouri, and thereby indirectly acquire voting shares of La Plata State Bank, La Plata, Missouri.

Board of Governors of the Federal Reserve System, April 19, 2004.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 04–9205 Filed 4–22–04; 8:45 am]

BILLING CODE 6210–01–S

## GENERAL SERVICES ADMINISTRATION

### Notice of Intent To Prepare an Environmental Impact Statement: Los Angeles, CA

**AGENCY:** General Services Administration; Pacific Rim Region.

**ACTION:** Notice of public meeting.

**SUMMARY:** The General Services Administration, Portfolio Management Division (9PT), intends to prepare an Environmental Impact Statement (EIS) on the following project: New Federal Building at 11000 Wilshire Boulevard, Los Angeles, California.

The Federal Bureau of Investigation (FBI) requires new facilities in the Los Angeles area to consolidate current facilities from various locations, provide facilities with a higher level of security than currently provided in existing

spaces, and provide for growth associated with the increase in demand for staff and infrastructure.

**DATES:** A scoping meeting will be held on May 20, 2004, from 4:30 p.m. to 7:30 p.m. Interested parties should submit written comments on or before May 25, 2004.

**ADDRESSES:** The meeting will be held in the Cafeteria Building on the federal office complex located at 11000 Wilshire Boulevard, Los Angeles, California.

**FOR FURTHER INFORMATION CONTACT:** Mr. Javad Soltani, General Services Administration, Public Buildings Service, Portfolio Management Division (9PT), at (415) 522–3493; fax at (415) 522–3215; or e-mail at *javad.soltani@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** The Notice of Intent is as follows:

**Notice of Intent To Prepare an Environmental Impact Statement**

The United States General Services Administration intends to prepare an Environmental Impact Statement (EIS) on the following project: New Federal Building at 11000 Wilshire Boulevard, Los Angeles, California.

*Proposed Action*

The Federal Bureau of Investigation (FBI) requires new facilities in the Los Angeles area to consolidate current facilities from various locations, provide facilities with a higher level of security than currently provided in existing spaces, and provide for growth associated with the increase in demand for staff and infrastructure on a twenty-year planning horizon. To meet these needs, the United States General Services Administration is planning the construction of a new federal building on the existing 28-acre site of the current Federal office complex at 11000 Wilshire Blvd., Los Angeles, California. The building and adjoining facilities will house the Federal Bureau of Investigation offices and related facilities and that are currently located in the 17-floor Federal office building and garage located on the site. The existing 17-floor federal building will remain on site for the foreseeable future and receive federal agencies that require additional space or will be relocated from other locations in the region that are currently leased. The proposed new Federal facilities will provide approximately 937,000 gross square feet of space plus 1,200 secured parking stalls. It is anticipated that the proposed development will occur in two phases over a 10-year period and ultimately include office space, an automobile/radio maintenance facility, and a parking garage.

Alternatives to the proposed action include:

A. *Renovate and Expand Existing Facility Alternative:* This alternative would leave the Federal Bureau of Investigation in the current 17-floor building on the 11000 Wilshire Boulevard site and modify the building to the extent possible to meet security requirements and short-term space needs of the Federal Bureau of Investigation. Other current tenants in the building would be required to relocate to other facilities.

B. *Lease Build-to-Suit Alternative:* This would provide a building for lease to the General Services Administration that is constructed to meet the needs and requirements of the Federal Bureau of Investigation. The building would be located in the northwest area of Los Angeles.

C. *No Action Alternative:* This would require the operation of the Federal Bureau of Investigation facilities at separate locations in the area and the associated inherent operational inefficiencies. The existing Government facilities will not be sufficient to accommodate future growth and security requirements.

The public is cordially invited to participate in the scoping process. A scoping meeting will be held in the Cafeteria Building on the federal office complex located at 11000 Wilshire Boulevard, Los Angeles, California, on May 20, 2004, from 4:30 p.m. to 7:30 p.m. At the scoping meeting, the public will be requested to identify issues that they believe should be analyzed in the Environmental Impact Statement. The public is invited to submit any written comments to the address below by May 25, 2004.

Dated: April 19, 2004.

**Javad Soltani,**

*Regional Environmental Quality Advisor.*

[FR Doc. 04–9314 Filed 4–22–04; 8:45 am]

**BILLING CODE 6820–23–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Agency for Healthcare Research and Quality, HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) allow the proposed information collection project: "CAHPS II Reports Laboratory Experiment". This experiment will assess the impact of improved data displays on consumers' understanding and use of reports of health care quality. In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on February 19, 2004 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

**DATES:** Comments on this notice must be received by June 22, 2004.

**ADDRESSES:** Written comments should be submitted to: Cynthia D. McMichael, Reports Clearance Officer, AHRQ, 5640 Gaither Road, Suite 5022, Rockville, MD 20850.

**FOR FURTHER INFORMATION CONTACT:** Cynthia D. McMichael, AHRQ, Reports Clearance Officer, (301) 427–1651.

**SUPPLEMENTARY INFORMATION:**

**Proposed Project "CAHPS II Reports Laboratory Experiment"**

CAHPS II Reports Laboratory Experiment is designed to assess the impact of improved data displays on consumers' understanding and use of reports of health care quality and tests the impact of alternative design features.

Getting consumers to pay attention to and use comparative quality information continues to be a major challenge to CAHPS and other quality reporting efforts, including efforts by the Centers for Medicare & Medicaid Services (CMS) and the National Committee for Quality Assurance (NCQA), and others. We need to learn more about ways to maximize the likelihood that consumers of health services will look at and pay attention to quality information, understand and interpret it accurately, use the information appropriate, and make "effective" choices based on the information.

This study will test the impact of alternative design features on user comprehension of available health care quality information and on its saliency to user decision-making. The study will assess ease of navigation of alternative approaches and consumers' stated preferences among the choices offered.

Study participants will be persons between 25–70 years old who have health insurance and have had a visit to a doctor in the last 12 months. The quality information presented to study participants in this laboratory experiment evaluating design alternatives will consist of mock data on consumers' assessments of the care provided by their physicians. The quality information will contain measures of physician performance, with candidate measures including how well the doctor scored on (1) listening carefully to patients; (2) giving explanations that are easy to understand; (3) spending enough time with patients; and (4) treating patients with courtesy and respect. The quality information also will include ratings of doctor's staff, for example, office staff that are as helpful as they should be and office staff who treat patients with courtesy and respect.

Finally, the quality information will include measures of access to care, such as being able to make appointments as soon as needed, a reasonable amount of time waiting in the doctor's office, and access to extended hours of service. The exact quality measures on which we will present information will be determined during preliminary testing.

**Data Confidentiality Provisions**

To protect subject confidentiality, the following procedures will be employed:

- Upon arriving at the testing location and prior to participation, each subject will receive and sign the consent form, approved by the grantee's Institutional Review Boards, that contains information about their rights as a subject and the measures being taken to safeguard confidentiality. A test administrator will verbally repeat and explain the information in the form at the beginning of the testing session. Subjects will be informed that their participation is voluntary and that they have the right to refuse to answer any questions or to stop participating at any point during the testing session.
- All subject materials will be marked with a unique ID number, rather than the subject's names. Subjects' names will never be linked with their individual answers. Any information linking subject names and ID numbers will be kept in a secure location and will be accessible only to members of the project team. Subject names will not be shares with anyone outside of the project team.
- All information will be aggregated and reported at the group, rather than the individual, level.
- During portions of the testing session that will be video-taped (*i.e.*, the taping of the "choose a doctor" and comprehension questions to gather timing data), we will refer to the subjects by first name only. The videotapes will be marked with subject ID numbers and will be stored in a secure location. The tapes will be used only for analysis purposes by project team members.
- Subjects will be informed that participation is voluntary.
- All completed subject materials (*e.g.*, recruitment screeners, questionnaires, tapes, consent forms, incentive receipt forms) will be kept in a secure location accessible only to members of the project team.
- All completed questionnaires, video tapes and other subject materials will be destroyed no later than 12 months following the end of the CAHPS II project.

**Methods of Collection**

The data will be collected using a pencil and paper.

**Estimated Annual Respondent Burden**

| Survey | Number of respondents | Estimated time per respondent hours | Estimated total burden hours | Estimated annual cost to the government |
|---|---|---|---|---|
| A. Potential participants who did not enroll in study | 100 | .10 | 10 | $1000 |
| B. Potential participants who did enroll in study | 350 | .25 | 62.5 | 6250 |
| C. Actual number of participants in laboratory experiment (subset of B) | 210 | 2.0 | 420 | 39500 |
| Total (A+B) | 350 | 1.4 | 492.5 | 46,750 |

**Request for Comments**

In accordance with the above cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of functions of AHRQ, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including ours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 2, 2004.

**Carolyn M. Clancy,**

*Director*

[FR Doc. 04–9191 Filed 4–22–04; 8:45 am]

BILLING CODE 4160–90–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

### Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Section 1013: Suggest Priority Topics for Research

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Notice to suggest priority topics for research.

**SUMMARY:** AHRQ, on behalf of the Department of Health and Human Services, invites suggestions from interested organizations and knowledgeable individuals regarding the highest priorities for research, demonstration, and evaluation projects to support and improve the Medicare, Medicaid, and State Children Health Insurance (SCHIP) programs.

**DATES:** The statutory deadline for development of the initial priority list and the need to consider the FY 2006 priority list during this summer's budget development process requires expedited timelines for formulation of the initial and FY 2006 priority lists. Research recommendations must be received by May 7, 2004, to be considered for the initial priority list and by July 1, 2004,

to be considered for the FY 2006 priority list.

**ADDRESSES:** Recommendations for consideration and possible inclusion in the initial priority list and/or the FY 2006 priority list may be submitted to the Department through the U.S. Food and Drug Administration (FDA) Dockets Management Division at: *http://www.fda.gov/dockets/ecomments.*

The Docket ID for this request is 2004S–0170 Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Section 1013: Suggest Priority Topics for Research.

**FOR FURTHER INFORMATION CONTACT:** Questions about the comment process should go to the FDA Dockets Management Division, (301) 827–6860. Hours are 9 a.m. to 4 p.m., Eastern Time, Monday through Friday.

Copies of E-Comments received through the FDA Dockets system are available on the FDA Web site at: *http://www.fda.gov/ohrms/dockets/dockets/dockets.htm.*

**SUPPLEMENTARY INFORMATION:**

**1. Background**

Section 1013 of Medicare Prescription Drug, Improvement, and Modernization Act of 2003 authorizes research, demonstrations, and evaluations to improve the quality, effectiveness, and efficiency of the Federally administered Medicare program and of two programs for which funding and administration is shared with the States: Medicaid and SCHIP.

The research and other activities undertaken and authorized by this provision may address:

(1) The outcomes, comparative clinical effectiveness, and appropriateness of health care items and services (including prescription drugs); and

(2) Strategies for improving the efficiency and effectiveness of Medicare, Medicaid, and SCHIP programs, including the ways in which health care items and services are organized, managed, and delivered under such programs.

The statute:

(a) Requires the establishment of a priority setting process for identifying the most important topics to address,

(b) Establishes a timetable for development of an initial priority list and completion of the research, and

(c) Requires ongoing consultation with relevant stakeholders.

To review the text of section 1013, "Research on outcomes of health care items and services," go to: *http://www.medicare.gov/MedicareReform/108s1013.pdf.*

**2. The Priority Setting Process**

Recommendations for research that are made by the Centers for Medicare & Medicaid Services (CMS), the States, and other stakeholders will be reviewed and prioritized by a steering committee composed of representatives from the following components of the U.S. Department of Health and Human Services:

- Office of [the] Assistant Secretary for Budget, Technology, and Finance (ASBTF),
- Office of [the] Assistant Secretary for Planning and Evaluation (ASPE),
- Agency for Healthcare Research and Quality (AHRQ, the agency designated by the statute to carry out the research);
- Centers for Medicare & Medicaid Services (CMS);
- Food and Drug Administration (FDA); and,
- Other components of the Office of the Secretary.

If issues arise for which the expertise of other components of the U.S. Department of Health and Human Services or other Federal departments would be helpful in prioritizing suggested research topics, representatives from those entities will be added to, or consulted by the steering committee as warranted.

Steering committee staff will prepare a preliminary ranking of suggested topics for study, taking into consideration factors suggested by the terms of section 1013(a)(2)(C): *i.e.,* health care items or services that impose high costs on Medicare, Medicaid or SCHIP programs, those which may be underutilized or overutilized and those which may significantly improve the prevention, treatment or cure of diseases and conditions which impose high direct or indirect costs on patients or society.

**3. Timetable**

Section 1013 requires the development of an initial priority list six months after enactment of the legislation (June 2004) and completion of the initial research syntheses 18 months thereafter (December 2005), one month before the effective date of the prescription drug benefit.

The statute does not establish timetables for priority-setting after the initial list or the completion of subsequent research. Because the statute requires annual appropriations for funding the research and other activities authorized by this section, the Department will link the timetable for the priority-setting process for FY 2006 and subsequent years to its process for development of the Department's budget.

**4. Stakeholder Consultation**

The statute requires a broad, ongoing process of consultation with relevant stakeholders. Because two of the programs addressed by the statute are administered by the States, the Department will work with the States to develop an effective process for identifying their priority recommendations for research.

To meet the requirement for ongoing consultation with other stakeholders, the Department will issue a specific solicitation for research recommendations every year, will permit stakeholders to submit research recommendations throughout the year, and will host a series of listening sessions with different sectors of the health care community to provide additional opportunities for submitting recommendations. Information regarding the initial "listening sessions" will be announced shortly.

**5. Requirements**

*Scope of recommendations:* While the statute does not limit the scope of the initial priority list, recent congressional activity suggests that the initial priority list should be directed toward evaluating existing evidence regarding the comparative clinical effectiveness of prescription drugs in anticipation of the Medicare prescription drug benefit. Therefore, the Department requests that recommendations for the initial priority list focus on prescription drugs, although all recommendations will be considered. Submissions for the FY 2006 priority list may address other health care items or services as well, or program improvement strategies for organizing, managing, or delivering those items or services.

*Justification:* Because section 1013 is intended to fund research to improve the "quality, effectiveness, and efficiency" of the Medicare, Medicaid, and SCHIP programs, each submission must justify and explain how each recommended research project will contribute to that goal and why it should be considered a "priority." With respect to research suggestions regarding prescription drugs, recommendations should include a rationale regarding potential impact of the research and might also address the most useful approaches for analyzing and presenting that evidence (*e.g.,* by disease or condition or by drug class and, if so, under which drug classification system).

*Identification of affiliation:* Individuals who are submitting recommendations on behalf of a "stakeholder organization," such as a

provider, purchaser, supplier, or insurer of health care items or services, or those receiving services under the Medicare, Medicaid or SCHIP programs are invited to identify their organizational affiliation. This will enable the Department of assess the effectiveness of its efforts to ensure broad consultation with relevant stakeholders.

Dated: April 16, 2004.

**Carolyn M. Clancy,**

*Director.*

[FR Doc. 04–9190 Filed 4–22–04; 8:45 am]

BILLING CODE 4160–90–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60 Day–04–44]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

**Proposed Project**

*Evaluation of Efficacy of Household Water Filtration/Treatment Devices in Households with Private Wells—New*—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Approximately 42.4 million people in the United States are served by private wells. Unlike community water systems, private wells are not regulated by the U.S Environmental Protection Agency's (EPA) Safe Drinking Water Act (SDWA). Under the SDWA, EPA sets maximum contaminant levels (MCLs) for contaminants in drinking water. A 1997 U.S. General Accounting Office (GAO) report on drinking water concluded that users of private wells may face higher exposure levels to groundwater contaminants than users of community water systems. Increasingly, the public is concerned about drinking water quality, and the public's use of water treatment devices rose from 27% in 1995 to 41% in 2001 (*Water Quality Association, 2001 National Consumer Water Quality Survey*). Studies evaluating the efficacy of water treatment devices on removal of pathogens and other contaminants have assessed the efficacy of different treatment technologies.

The purpose of the proposed study is to evaluate how water treatment device efficacy is affected by user behaviors such as maintenance and selection of appropriate technologies. Working with public health authorities in Florida, Colorado, Maine, Missouri, Nebraska, New Jersey, and Wisconsin, NCEH will recruit 600 households to participate in a study to determine whether people using water treatment devices are protected from exposure to contaminants found in their well water. We plan to recruit households that own private wells and use filtration/treatment devices to treat their tap water for cooking and drinking. Study participants will be selected from geographical areas of each state where groundwater is known or suspected to contain contaminants of public health concern. We will administer a questionnaire at each household to obtain information on selection of water treatment type, adherence to suggested maintenance, and reasons for use of treatment device. We will also obtain samples of treated water and untreated well water at each household to analyze for contaminants of public health concern. There is no cost to respondents.

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response (in hrs.) | Total burden (in hrs.) |
|---|---|---|---|---|
| Participant Solicitation Telephone Questionnaire | 1200 | 1 | 5/60 | 100 |
| Household Questionnaire | 600 | 1 | 20/60 | 200 |
| Total | | | | 300 |

Dated: April 13, 2004.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9211 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–04–45]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the

agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

**Proposed Project**

Environmental Monitoring of Persistent Organic Pollutants and Metals: A Multi-Center Study to Determine Population Exposure to Environmental Toxins in North America—New—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Persistent organic pollutants (POPs) are a group of man-made chemicals that can stay in the environment for long periods of time and can be transported long distances in the environment. Heavy metals such as lead and mercury are naturally found substances that can also be released into the environment as a result of human activities (*e.g.*, smelting). Exposure to these contaminants, even at low levels, may lead to adverse health effects, particularly in high-risk groups such as the unborn child. However, before we attempt to determine if these contaminants are associated with health effects, we have to find out if these contaminants are present in our blood and in what amounts. The Arctic Monitoring and Assessment Program (AMAP), established in 1991 under the Arctic Environmental Protection Strategy (AEPS), has the responsibility to monitor levels and assess effects of selected pollutants (*i.e.*, POPs and heavy metals) in all Arctic locations. To our knowledge, a similar integrated program for monitoring exposure to POPs and metals does not exist in North America.

The proposed program will monitor levels of POPs and heavy metals in first-time pregnant women. The program will help determine geographical and temporal trends of these exposures in selected cities within the United States, Canada, and Mexico. CDC will be responsible for the investigation in the United States; Canada and Mexico will be responsible for the investigation in their countries. The findings will inform first-time pregnant women in the vicinity of the study sites of their exposure to selected POPs and heavy metals. This program will also provide unique information regarding accumulation of POPs and heavy metals in relation to dietary patterns, and will allow assessment of trends in diet, which is critical public health information. Biomonitoring for POPs and metals will enhance awareness among this vulnerable population of the risks posed by these chemicals in various regions of North America and help identify ways to reduce exposure. The program will enroll 25 pregnant women (20–25 years of age) per site (United States: 5 sites; Canada: 5 sites; Mexico: 10 sites). Data from previous projects in the United States and Canada will be used for comparing results of the current project. As there has been little national or regional monitoring in Mexico, more sites will be selected in Mexico than in the United States and Canada.

In collaboration with obstetricians at the local sites, study participants will be recruited during their prenatal clinic visit, after their 36th week of pregnancy but prior to delivery. One person from the study team will approach the mother during a routine prenatal visit, explain the project, and obtain signed consent if the mother is willing to participate. The study will involve administering an exposure questionnaire and collection of blood and urine samples during the 3rd trimester of the pregnancy. This is only a one-time study; blood collection and administration of the questionnaire will only be done once. All samples will be analyzed at a single laboratory in each country, and the results will be distributed to the study participants and their physicians prior to publication. There are no costs to respondents.

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response (in hrs.) | Total burden (in hrs.) |
|---|---|---|---|---|
| U.S. Primiparous Pregnant Women | 125 | 1 | 30/60 | 63 |
| Total | | | | 63 |

Dated: April 13, 2004.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9212 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–04–46]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Sandra

Gambescia, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

**Proposed Project**

*Work-Related Stress Among Coal Miners—New*—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Work-related stress appears to increase the risk of atherosclerotic heart disease, musculoskeletal disorders such as back pain and carpal tunnel syndrome, and clinical depression. The mechanism by which stress increases the risk of chronic disease states is unknown, but is thought to involve abnormal communication between the brain and the endocrine system. Dysfunction of this communication system, called the Hypothalamic-Pituitary-Adrenal (HPA) axis, is found in a number of chronic diseases, including coronary heart disease, diabetes, and rheumatoid arthritis. In a healthy individual, there is flexible communication between the hypothalamus and pituitary, both located in the brain, and the adrenal gland, located above the kidneys. When stresses occur throughout the day, cortisol is released from the adrenal gland in response to signals from the brain. Cortisol prepares the body to respond to stress, after which cortisol levels return to normal. Chronic stress, with protracted or repeated challenge to the HPA axis, may lead to inappropriate levels of cortisol, further decline of HPA axis function, and increased risk of chronic disease.

This study will investigate the relationship between workplace stress and function of the HPA axis among a sample population of coal miners. Coal miners experience a number of work-related stresses, such as long hours of work, heavy workloads, shift work, and concerns about stability of employment. Miners will be asked to complete a 25-minute survey which asks about traditional job stressors including shift schedule and rotation, workload, and degree of control over work. The survey also addresses stressors not typically examined in work stress surveys, including time spent in second jobs, commuting time to work, and responsibilities for care of children and the elderly.

Function of the HPA axis will be assessed by obtaining a series of cortisol samples from subjects right after they wake up in the morning. Recent studies have shown that the response of cortisol to awakening, measured in saliva, serves as a good marker of HPA axis function. Miners will be asked to obtain saliva samples at home, and send them to the NIOSH Morgantown laboratory for analysis.

Analyses will examine the relationship between the cortisol response to awakening, an indicator of HPA axis function, and measures of workplace stress. Data collected in this study will help NIOSH determine if workplace stress results in HPA axis dysfunction, which has been linked to a number of chronic disease conditions. There is no cost to respondents.

| Respondents | No. of respondents | No. of responses per respondent | Average burden per respondent (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Coal Miners | 400 | 1 | 25/60 | 167 |
| Total | | | | 167 |

Dated: April 13, 2004.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9213 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–25–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

*Proposed Project:* Online Evaluation Of A GIS Map Server Project With The Migrant Clinicians Network—New—Agency for Toxic Substances and Disease Registry (ATSDR).

In 2001, ATSDR began working with the Migrant Clinicians Network (MCN) on a national project to use an internet-based mapping service to help decrease disparities by improving health care services for migrant workers through a resource, information, consultation and reporting Geographic Information Systems (GIS) mapping application for the health care providers within the MCN. The GIS Web site will be available at *http://gis.cdc.gov/mcnarcims.*

As part of the implementation of the Web site, MCN and ATSDR are proposing to include an online evaluation survey to ensure that the mapping service is meeting the needs of the health care clinicians providing services to migrant populations. The survey will provide both MCN and ATSDR valuable immediate opportunities to configure the Web site to the practical needs of the physicians and other health care providers using the GIS Web site for clinical care to prevent, intervene, and treat environmental exposures for migrant farm workers and their families.

The evaluation survey will be included on the main access page of the Web site, *http://gis.cdc.gov/mcnarcims.* The feedback survey will be completely voluntary and will assess the following: (1) Ease of navigating the Web site; (2) ease of locating information within the site; (3) content of the Web site; (4) technology issues (*e.g.*, loading, links, printing); and, (5) utility of the Web site to health care practice and environmental health prevention, practice and intervention. An additional question will ascertain the respondent's job category to determine the type of person accessing the Web site which will help ATSDR and MCN update and modify the content of the Web site to better fit the actual site user.

It is anticipated that the feedback survey will provide critical information

to enable ATSDR to provide ongoing continuing improvement of the site to meet the needs of the MCN clinician. This will also provide ATSDR and MCN with benchmarks to meet agency performance standards. The feedback survey will be at no financial cost to the participant and will be located on the ATSDR GIS map server Web site. The estimated annualized burden is 41 hours.

| Respondents | Number of respondents | Responses per respondent | Average burden per response (in hours) |
|---|---|---|---|
| MCN Health Care Members | 400 | 1 | 5/60 |
| General Public | 100 | 1 | 5/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9230 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–43–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

*Proposed Project: National Hospital Ambulatory Medical Care Survey (NHAMCS) 2005–2006 (OMB No. 0920–0278)—Revision*—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

The National Hospital Ambulatory Medical Care Survey (NHAMCS) is managed by CDC, NCHS, Division of Health Care Statistics. This survey has been conducted annually since 1992. The purpose of NHAMCS is to meet the needs and demands for statistical information about the provision of ambulatory medical care services in the United States. Ambulatory services are rendered in a wide variety of settings, including physicians' offices and hospital outpatient and emergency departments. The targeted population for NHAMCS will consist of in-person visits made to outpatient departments and emergency departments that are non-Federal, short-stay hospitals (hospitals with an average length of stay of less than 30 days) or those whose specialty is general (medical or surgical) or children's general. NHAMCS was initiated to complement the National Ambulatory Medical Care Survey (NAMCS, OMB No. 0920–0234) which provides similar data concerning patient visits to physicians' offices.

NHAMCS provides a range of baseline data on the characteristics of the users and providers of ambulatory medical care. Data collected include patients' demographic characteristics and reason(s) for visit, and the physicians' diagnosis, diagnostic services, medications, and disposition. In addition to the annual statistics normally collected, a key focus of the 2005/06 survey will be on the prevention and treatment of selected chronic conditions. These data, together with trend data, may be used to monitor the effects of change in the health care system, for the planning of health services, improving medical education, and assessing the health status of the population.

Users of NHAMCS data include, but are not limited to, congressional offices, Federal agencies, state and local governments, schools of public health, researchers, administrators, and health planners. Data collection will continue through 2005 to 2006. The estimated annualized burden is 8,960 hours.

| Respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per respondent |
|---|---|---|---|---|
| Hospital Chief Medical Officer | Hospital Induction (NHAMCS–101) | | | |
| | Ineligible | 50 | 1 | 15/60 |
| | Eligible | 440 | 1 | 1 |
| Ancillary Service Executive | Ambulatory Unit Induction (ED) (NHAMCS–101/U). | 380 | 1 | 1 |
| Ancillary Service Executive | Ambulatory Unit Induction (OPD) (NHAMCS–101/U). | 240 | 4 | 4 |
| Registered Nurse/Medical Record Clerk | ED Patient Record Form | 830 | 100 | 5/60 |
| Registered Nurse/Medical Record Clerk | OPD Patient Record Form | 240 | | |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9231 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–41–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

*Proposed Project: Cross-sectional Outcome Survey for Evaluation of the CDC Youth Media Campaign—New*—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

In FY 2001, Congress established the Youth Media Campaign at the Centers for Disease Control and Prevention (CDC). Specifically, the House Appropriations Language said: "The Committee believes that, if we are to have a positive impact on the future health of the American population, we must change the behaviors of our children and young adults by reaching them with important health messages". CDC, working in collaboration with federal partners, coordinated an effort to plan, implement, and evaluate a campaign designed to clearly communicate messages that will help youth develop habits that foster good health over a lifetime. The campaign is based on principles that have been shown to enhance success, including: Designing messages based on research; testing messages with the intended audiences; involving young people in all aspects of campaign planning and implementation; enlisting the involvement and support of parents and other influencers; refining the messages based on research; and measuring the effect of the campaign on the target audiences.

To measure the effect of the campaign on the target audiences, CDC is using a longitudinal design with a telephone survey of tween and parent dyads (Children's Youth Media Survey and Parents' Youth Media Survey, OMB No. 0920–0587) that assesses aspects of the knowledge, attitudes, beliefs, and levels of involvement in positive and physical activities. The baseline survey was conducted prior to the launch of the campaign from April through 2002. Three thousand parent/child dyads (from a nationally representative sample) and 3000 parent/child dyads from the six "high dose" communities were interviewed, for a total of 12,000 respondents. To measure the first year's effects of the campaign, a follow up survey was administered to the baseline respondents April to June 2003. The same respondents will be re-surveyed in April to June 2004.

In addition to the follow-up survey, a new national cross-sectional sample will be included in the outcome evaluation for spring 2004. The cross-sectional sample will serve as a bridge to future years of the outcome survey design, which transfers from a longitudinal to a cross-sectional design. Use of a concurrent cross-sectional survey will address important design problems related to recontact respondent bias that can affect the results of a longitudinal survey. Thus, a telephone survey will be administered in spring 2004 to 2,400 parent/youth dyads in the new national cross-sectional sample using RDD (random digital dialing) methodology. This survey will occur concurrently with the Year-2 Follow-up Survey, and the survey instrument will be the same as the Year-2 Follow-up Survey. In years subsequent to 2004, YMC will continue to conduct cross-sectional surveys of approximately 2400 parent/child dyads. The estimated annualized burden is 1,548 hours.

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response |
|---|---|---|---|
| Screener 2004 | 21,052 | 1 | 1/60 |
| YMC Cross-sectional Child 2004 | 2,400 | 1 | 15/60 |
| YMC Cross-sectional Parent 2004 | 2,388 | 1 | 15/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9232 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–44–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project: National Ambulatory Medical Care Survey (NAMCS) 2005–2006 (OMB No. 0920–0234)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

The National Ambulatory Medical Care Survey (NAMCS) was conducted

annually from 1973 to 1981, again in 1985, and resumed as an annual survey in 1989. The survey is directed by CDC, National Center for Health Statistics, Division of Health Care Statistics. The purpose of NAMCS is to meet the needs and demands for statistical information about the provision of ambulatory medical care services in the United States. Ambulatory services are rendered in a wide variety of settings, including physicians' offices and hospital outpatient and emergency departments. The NAMCS target population consists of all office visits made by ambulatory patients to non-Federal office-based physicians (excluding those in the specialties of anesthesiology, radiology, and pathology) who are engaged in direct patient care. To complement these data, NCHS initiated the National Hospital Ambulatory Medical Care Survey (NHAMCS, OMB No. 0920–0278) to provide data concerning patient visits to hospital outpatient and emergency departments.

The NAMCS provides a range of baseline data on the characteristics of the users and providers of ambulatory medical care. Data collected include the patients' demographic characteristics, reason(s) for visit, physicians' diagnosis, diagnostic services, medications and visit disposition. In addition to the annual statistics normally collected, a key focus of the 2005–2006 survey will be on the prevention and treatment of selected chronic conditions. These data, together with trend data, may be used to monitor the effects of change in the health care system, provide new insights into ambulatory medical care, and stimulate further research on the use, organization, and delivery of ambulatory care.

Users of NAMCS data include, but are not limited to, congressional and other federal government agencies, state and local governments, medical schools, schools of public health, researchers, administrators, and health planners. NAMCS plans to extend its data collection into 2005 and 2006. To calculate the burden hours the number of respondents for NAMCS is based on a sample of 3,000 physicians with a 50 percent participation rate (this includes physicians who are out-of-scope as well as those who refuse). The estimated annualized burden is 5,875 hours.

| Respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response |
|---|---|---|---|---|
| Physician Eligible | Induction Interview-eligible Physician | 2,250 | 1 | 35/60 |
| Physician Ineligible | Induction Interview-ineligible Physician | 750 | 1 | 5/60 |
| Physician/Non-physician Staff | Patient Record Form | 2,250 | 30 | 4/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office Centers for Disease Control And Prevention.*

[FR Doc. 04–9233 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–42–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

*Proposed Project:* Delayed Symptoms Associated with the Convalescent Period of a Dengue Infection—New—National Center for Infectious Diseases (NCID), Centers for Disease Control and Prevention (CDC). Dengue is a vector-borne febrile disease of the tropics transmitted most often by the mosquito Aedes aegypti. Symptoms of the acute disease include fever, headache, rash, retro-orbital pain, myalgias, arthralgias, vomiting, abdominal pain and hemorrhagic manifestations.

Many symptoms are mentioned in the medical literature as associated with the convalescent period (three-eight weeks) after dengue infection, including depression, dementia, loss of sensation, paralysis of lower and upper extremities and larynx, epilepsy, tremors, manic psychosis, amnesia, loss of visual acuity, hair loss, and peeling of skin. No epidemiologic study has been conducted to define the timing, frequency, and risk factors for these symptoms. The objective of this study is to examine the incidence and characteristics of mental health disorders and other delayed complications associated with dengue infection and convalescence. The study will be conducted in Puerto Rico, where dengue is endemic and causes severe sporadic epidemics. Laboratory positive confirmed cases of dengue, laboratory negative suspected dengue cases, and neighborhood controls will be prospectively enrolled in the study. Person-to-person interviews with adults (age 18 years or greater), will be conducted and information will be collected regarding symptoms experienced during the convalescent phase of the infection. The estimated annualized burden is 400 hours

| Respondents | Number of respondents | Number of responses per respondent | Averge burden per response (in hrs.) |
|---|---|---|---|
| Laboratory positive confirmed dengue | 200 | 2 | 20/60 |
| Dengue negative control | 200 | 2 | 20/60 |
| Neighborhood control | 200 | 2 | 20/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office Centers for Disease Control And Prevention.*

[FR Doc. 04–9234 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–45–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project: Coal Workers' X-ray Surveillance Program (CWXSP), OMB No. 0920–0020—Extension—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

**Background**

The CWXSP is a federally mandated program under the Federal Mine Safety and Health Act of 1977, PL–95–164. The Act provides the regulatory authority for the administration of the CWXSP, a surveillance program to protect the health and safety of underground coal miners. This Program requires the gathering of information from coal mine operators, participating miners, participating x-ray facilities, and participating physicians. The Appalachian Laboratory for Occupational Safety and Health (ALOSH), located in Morgantown, WV, is charged with administration of this Program. The estimated annualized burden is 1246 hours.

| Respondents | Form name and no. | Number of respondents | Number of responses/respondent | Average burden/response (in hrs) |
|---|---|---|---|---|
| Physicians (B Readers) | Roentgen graphic Interpretation Form CDC/NIOSH (M)2.8. | 5,000 | 1 | 3/60 |
| Miners | Miner Identification Document CDC/NIOSH (M)2.9. | 2,500 | 1 | 20/60 |
| Coal Miners Operators | Coal Mine Operator's Plan-CDC/NIOSH (M)2.10. | 200 | 1 | 30/60 |
| Supervisors at X-ray Facilities | Facility Certifications Document-CDC/NIOSH (M)2.11. | 25 | 1 | 30/60 |
| Physicians (B Readers) | Interpreting Phisician Certification Document CDC/NIOSH (M)2.12. | 300 | 1 | 10/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control And Prevention.*

[FR Doc. 04–9235 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–40–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

*Proposed Project:* Travelers' Health Survey, OMB No. 0920–0519—Reinstatement—National Center for Infectious Diseases (NCID), Centers for Disease Control and Prevention (CDC). Approximately 58 million Americans travel abroad each year, and over a third travel to developing countries where the risk is greater for contracting infectious diseases. Many of these diseases are preventable through vaccines, drugs, and other preventive measures. According to surveillance data from the CDC, over 99% of malaria, 72% of typhoid, and 7% of hepatitis A cases in the U.S. are acquired abroad. Information on preventing illness during travel is available free or at little cost through public health departments, a CDC toll-free fax system, and the Internet. However, many travelers may be unaware of the health risks they face when traveling because they either lack access to pre-travel health services or do not understand the measures necessary to avoid health risks. Evidence shows first- and second-generation U.S. immigrants that travel to their countries of origin to visit friends and relatives may be at a greater risk for contracting infectious diseases.

The objectives of this project are to determine: (i) Whether travelers seek pre-travel health information; (ii) where they access this information; (iii) travelers' baseline knowledge of prevention measures for diseases commonly associated with travel; and (iv) whether specific groups of travelers (*i.e.* first- and second-generation immigrants) lack information on or access to pre-travel health recommendations and services. To accomplish these objectives, in partnership with Delta Airlines, CDC proposes to conduct voluntary, self-administered, anonymous, in-flight surveys of U.S. citizens and residents traveling abroad to areas where malaria, typhoid fever, and hepatitis A are endemic.

This preliminary project will focus on first- and second-generation U.S. immigrants from India visiting friends and relatives in India, where all three diseases are endemic. A study period of 2 to 3 months is estimated. Data from this project will fulfill Healthy People

2010 objectives for travelers. In addition, it will enable CDC to develop appropriate educational interventions for high-risk travelers and to gain a better understanding of the role of travel in emerging infectious diseases. The survey tool will take approximately 15 to 20 minutes to complete. Delta Airlines has agreed to cover all costs for printing the surveys. The estimated annualized burden is 1,400 hours.

| Respondents | Number of respondents | Number of responses/ respondent | Average burden/response (in hrs) |
|---|---|---|---|
| Travelers (Delta Airline International Flight Passengers) | 5,600 | 1 | 15/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9236 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–36–04]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

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) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project: Thyroid Disease in Persons Exposed to Radioactive Fallout from Atomic Weapons Testing at the Nevada Test Site: Phase III (OMB No. 0920–0504)—Extension—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

In 1997, the National Cancer Institute (NCI) released a report entitled, "Estimated Exposures and Thyroid Doses Received by the American People from I–131 in Fallout Following Nevada Nuclear Bomb Test." This report provided county-level estimates of the potential radiation doses to the thyroid gland of American citizens resulting from atmospheric nuclear weapons testing at the Nevada Test Site (NTS) in the 1950s and 1960s. The Institute of Medicine (IOM) conducted a formal peer review of the report at the request of the Department of Health and Human Services. In the review, IOM noted that the public might desire an assessment of the potential health impact of nuclear weapons testing on American populations. The IOM also suggested that further studies of the Utah residents who have participated in previous studies of radiation exposure and thyroid disease might provide this information.

CDC, National Center for Environmental Health proposes to conduct a study of the relation between exposure to radioactive fallout from atomic weapons testing and the occurrence of thyroid disease on an extension of a cohort study previously conducted by the University of Utah, Salt Lake City, Utah. This study is designed as a follow-up to a retrospective cohort study begun in 1965. This is the third examination (hence Phase III) of a cohort of individuals comprised of persons who were children living in Washington County, Utah, and Lincoln County, Nevada, in 1965 (Phase I) and who were presumably exposed to fallout from above-ground nuclear weapons testing at the Nevada Test Site in the 1950s. The cohort also includes a control group comprised of persons who were children living in Graham County, Arizona, in 1966 and presumably unexposed to fallout.

The study headquarters will be at the University of Utah in Salt Lake City, Utah. The field teams will spend the majority of their time in the urban areas nearest the original counties if the same pattern of migration holds same as that was found in Phase II. These urban areas include: St. George, Utah; the Wasatch Front in Utah; Las Vegas, Nevada; Phoenix/Tucson, Arizona; and Denver, Colorado. In addition, some time will be spent in California as a number of subjects were relocated there during the time of Phase II. The purpose of Phase III is three-fold. First, the participants in Phase II will be re-examined for occurrence of thyroid neoplasia and other diseases since 1986, and residents of the three counties who moved before they could be included in the original cohort will be located and examined. Second, disease incidence will be analyzed in addition to period prevalence as used in the Phase II analysis, and incidence analysis will allow for greater power to detect increased risk of disease in the exposed population through the use of person-time. Third, disease specific mortality rates for Washington County, Utah, and a control county, Cache County, Utah, will be compared to people who lived in these two counties during the time of above-ground testing. This comparison will determine if the risk of mortality in Washington County (the exposed group) is significantly greater than Cache County (the control group). CDC, NCEH is requesting a three-year clearance. The estimated annualized burden is 3,368 hours.

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|
| Telephone Location Script | 1,200 | 1 | 5/60 |
| Telephone Location Script (return letter) | 67 | 1 | 5/60 |
| Refusal Telephone Script | 50 | 1 | 5/60 |
| Recruitment Next of Kin Telephone Script | 75 | 1 | 5/60 |
| Recruitment & Appointment Script | 960 | 1 | 5/60 |
| Broken Appointment Telephone Script | 40 | 1 | 5/60 |
| Exposure Questionnaire | 167 | 1 | 90/60 |

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|
| Questionnaire Preparation Booklet | 960 | 1 | 30/60 |
| Group Member Information | 960 | 1 | 5/60 |
| Consent Forms | 960 | 1 | 5/60 |
| Interview Booklet | 167 | 1 | 30/60 |
| Medical History Questionnaire (male) | 520 | 1 | 2 |
| Medical History Questionnaire (female) | 520 | 1 | 2 |
| Medical Records Release Telephone Script | 40 | 1 | 5/60 |
| Thyroid Exam | 520 | 1 | 1 |
| Travel Form | 80 | 1 | 20/60 |
| Residence History | 167 | 1 | 5/60 |
| Refusal Questionnaire | 8 | 1 | 5/60 |

Dated: April 16, 2004.

**Bill J. Atkinson,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9237 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[Program Announcement 04084]**

### Development and Testing of New Antimalarial Drugs; Notice of Intent To Fund Single Eligibility Award

**A. Purpose**

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2004 funds for a cooperative agreement program to support research projects to develop and test new antimalarial drugs. The Catalog of Federal Domestic Assistance number for this program is 93.283.

**B. Eligible Applicant**

Assistance will be provided only to the University of Mississippi. The FY 2000 United States Senate Labor-Health and Human Services Appropriations Report: Report 106–166 (S 1650), recognized the unique qualifications of the consortium headed by the University of Mississippi School of Pharmacy, that includes the Department of Medicinal Chemistry the Laboratory for Applied Drug Design and Synthesis, the Thad Cochran Center for Natural Products, the Tulane University Center for Infectious Diseases and the Tulane National Primate Research Center for carrying out the activities specified in this cooperative agreement and directed CDC to provide research funding to the consortium. These organizations in the past three years have worked in a unique partnership through a CDC cooperative agreement to analyze and use natural products as antimalarial agents, set-up state of the art chemical synthesis and organic product laboratories, refine lead drug candidates and target molecules, conduct and organize phase I and II clinical trials, and conduct *in-vitro* and *in-vivo* therapeutic evaluations of drug activities and efficacies. No other consortia of this type or identity as headed by the University of Mississippi School of Pharmacy exists at this time in the public/academic realm that has all these elements working together as a unit, which is necessary to conduct rationale drug development. House Report 108–401 directed the continuation of this work in FY 2004. The project supports the ongoing activities of CDC in the global control and prevention of malaria and the goals to protect Americans from infectious diseases and reduce the spread of anti-microbial resistance.

**C. Funding**

Approximately $5,000,000 is available in FY 2004 to fund this award. It is expected that the award will begin on or before August 1, 2004, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

**D. Where To Obtain Additional Information**

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2700.

For technical questions about this program, contact: John W. Barnwell, Ph.D., MPH, Project Officer, 4770 Buford Highway, Atlanta, GA 30341, telephone: 770–488–4528, e-mail: *wzb3@cdc.gov*.

Dated: April 19, 2004.

**William P. Nichols,**

*Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9239 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Steps to a HealthierUS: National Organization Partnerships; Notice of Availability of Funds

*Announcement Type:* New.

*Funding Opportunity Number:* 04134.

*Catalog of Federal Domestic Assistance Number:* 93.283.

*Key Dates:*

*Letter of Intent Deadline:* May 14, 2004.

*Application Deadline:* June 8, 2004.

*Executive Summary:* In June 2002, the President of the United States launched his HealthierUS initiative, which highlights the influence that healthy lifestyles and behaviors—such as making healthful nutritional choices, being physically active, and avoiding tobacco use and exposure—have in achieving and maintaining good health for persons of all ages. In response, the Secretary of the Department of Health and Human Services created the Steps to a HealthierUS Initiative (hereafter referred to as the Steps Initiative). Steps Initiative activities include national roundtables, conferences, publications, and public-private partnership opportunities.

The centerpiece of the Steps Initiative is a five-year cooperative agreement program (hereafter referred to as the Steps Community Program or Steps Communities). This program funds communities to improve the lives of Americans through innovative and effective community-based health

promotion and chronic disease prevention and control programs. Steps Communities work through public-private partnerships to support community-driven programs enabling persons to adopt healthy lifestyles that contribute directly to the prevention, delay, and mitigation of the consequences of diabetes, asthma, and obesity. Steps Communities are implementing community action plans that target diverse populations including: Border populations, Hispanics and Latinos, Native Americans, African-Americans, Asians, immigrants, low-income populations, people with disabilities, children and youth, senior citizens, people who are uninsured/underinsured and people at high risk or diagnosed with obesity, diabetes, and asthma. Funded communities under the Steps initiative are incorporating multiple activities within their communities. Examples of community activities include, but are not limited to: The development of a multifaceted promotional campaign on the "5 A Day for Better Health Program"; conducting diabetes education and self-management classes at community sites; implementation of school policies on tobacco use and tribal school nutrition programs.

The Centers for Disease Control, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP) is charged by the Department of Health and Human Services (DHHS) to implement the Steps Community Program in collaboration with all relevant HHS agencies and staff divisions. The relevant HHS agencies and offices include, but are not limited to, the Administration for Children and Families, Administration on Aging, Agency for Healthcare Research and Quality, CDC, Centers for Medicare and Medicaid Services, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, Office of Disease Prevention and Health Promotion, and the Substance Abuse and Mental Health Services Administration hereafter referred to as "HHS agencies".

## I. Funding Opportunity Description

**Authority:** This program is authorized under section 301(a) and 317(k)(2) of the Public Health Service Act, (42 U.S.C. sections 241(a) and 247b(k)(2)), as amended.

*Purpose:* The purpose of the program is to fund one or more national organizations to develop and implement strategies for effective collaborative action, program development and policy education to supplement the President of the United States' Initiative for Americans entitled HealthierUS and the Secretary of Health and Human Services' initiative for Americans entitled Steps to a HealthierUS. The national organization(s) will assist Steps Communities in support of their efforts to aid Americans in living longer, better, and healthier lives by reducing the burden of diabetes, obesity, and asthma and addressing three related risk factors—physical inactivity, poor nutrition, and tobacco use.

Measurable outcomes of the program will be in alignment with one or more of the performance goal(s) for the Steps initiative's goals:

- Prevent 75,000 to 100,000 Americans from developing diabetes;
- Prevent 100,000 to 150,000 Americans from developing obesity;
- Prevent 50,000 Americans from being hospitalized for asthma.

The performance goal for this cooperative agreement is to enhance the capacity of Steps Communities to successfully implement their Community Action Plan within these larger initiative goals.

*Grantee Activities*

Awardee activities for this program are as follows: Awardee(s) shall undertake one of the following priority areas each year of a four-year program period:

*Priority 1:* Policy Academies.

- Conduct four regional policy academies for Steps Communities. The national organization(s) will develop and conduct one regional policy academy each year of the project period (total of 4 academies). The academies will focus on the development and implementation of community-level strategies to support public actions that encourage and support healthier living. Awardee(s) must coordinate with state, local and other groups conducting similar activities for which funds are awarded.
- The Policy Academy will offer funded communities a role in a shared learning system that will provide the foundation for public policy innovation that fosters improved performance. The Policy Academy will provide technical assistance and workshops to aid communities with their Community Action Plans. Examples of what participants in the Policy Academy will accomplish are: narrowing their priorities, defining outcomes that will move their priorities forward, formulating sustainable plans to achieve outcomes, and aiding in the implementation and measurement of their plans. The primary audiences for participation in the academies are the funded Steps Communities. Additional communities in the region can be invited as space and resources allow.

*Priority 2:* Support Local Chapters in Steps Communities.

- Support the national organizations' local chapters/affiliates in Steps Communities to participate fully in the local Steps Action Plan. The funded organization(s) should collaborate with other organizations and partners in the Steps Communities to support the established Steps Action Plan. The organization should solicit letters of support from currently funded Steps Communities (Appendix A).
- The national organization will provide capacity building assistance to the local chapters/affiliates to improve the Steps Program's ability to encourage community members to become more active, and eat better.
- The organization will be responsible for collaborating with partners that include but are not limited to: Community-based organizations, faith-based organizations, and educational institutions to promote active lifestyles and create awareness to address factors contributing to obesity, asthma, and diabetes. These activities should include but not be limited to community programs that focus on improved fitness and health promotion and/or after-school programs.
- Applicants must provide plans for program coordination with the existing Steps Community Programs. Such coordination must include definition of roles at the community level, actions to integrate the program into the existing activities of the Steps Community Program and avoid duplication with state health agencies. Additionally, the applicant must provide a management plan, which describes the local organizational structure, the range of programs available, targeting strategies, and efforts to sustain the programs. All recipient activities in this section must be done in full coordination and collaboration with the local Steps Community Coalition and Leadership Team. Examples of the types of activities that the funded organization might choose to develop within the Steps communities include:
- Develop, implement, and evaluate an innovative program that addresses identified need(s) within the communities funded under the Steps initiative.
- Develop and implement an effective strategy for marketing services to increase public awareness of the Steps Community Program.
- Implement a quality assurance strategy that ensures the delivery of high quality prevention services for one or

more elements of the Steps Community Action Plan.

• Develop and implement effective community polices, or facilitate their development and implementation.

• Convene forums or town hall meetings or events for public education and outreach.

• Develop educational materials for local Steps Community activities.

• Provide after school physical activity and health education programs.

In addition to one of the above priorities, the funded organization must conduct all of the following activities:

• Collaborate with CDC, key partners and other entities to plan and deliver appropriate activities consistent with science-based evidence.

• Conduct both process and outcome evaluation to determine if annual action plan objectives were met to measure effectiveness of major activities.

• Provide at least one full-time employee(s) to direct and coordinate proposed activities and additional staff as needed.

In a cooperative agreement, HHS staff is substantially involved in the program activities, above and beyond routine grant monitoring. Thus, HHS Activities for this program are as follows:

• Advise the funded organization of priorities to be considered at the annual regional policy academies.

• Provide consultation and technical assistance in the planning, implementation and evaluation of program activities.

• Provide up-to-date information that includes diffusion of best practices and current research and data related to the Steps initiative.

• Facilitate communication and activities among organizations including holding meetings, conferences and conference calls.

• Assist in planning workshops, trainings and skill building to increase capacity to understand and address issues and implement program activities.

• Support the development and maintenance of communications and foster the transfer of information and successful program models between the funded Steps Communities and the funded National Partner Organizations.

## II. Award Information

*Type of Award:* Cooperative Agreement. CDC involvement in this program is listed in the Activities Section.

*Fiscal Year Funds:* 2004.

*Approximate Total Funding:* $500,000.

*Approximate Number of Awards:* 1–2.

*Approximate Average Award:* $500,000 (This amount is for the first 12-month budget period, and includes both direct and indirect costs).

*Floor of Award Range:* None.

*Ceiling of Award Range:* $500,000 (This ceiling is for the first 12-month budget period. If additional funding becomes available in future years, this ceiling may increase for years two, three, and four.)

*Anticipated Award Date:* September 1, 2004.

*Budget Period Length:* 12 months.

*Project Period Length:* 4 years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

## III. Eligibility Information

### *III.1. Eligible Applicants*

Applications may be submitted by public and private nonprofit organizations with a national reach such as:

- Public nonprofit organizations;
- Private nonprofit organizations;
- Community-based organizations;
- Faith-based organizations.

### *III.2. Cost Sharing or Matching*

Matching funds are not required for this program.

### *III.3. Other Eligibility Requirements*

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Applicant organization(s) must submit evidence that they can operate a nationally recognized program focusing on one or more of the six focus areas of Steps (diabetes, obesity, asthma, physical activity, nutrition, or tobacco). Eligible applicant organizations must be able to operate at local levels, as evidenced by having chapters or affiliates in at least 85% of states and at least 1500 communities nationwide.

**Note:** Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code (Title 26) that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

## IV. Application and Submission Information

### *IV.1. Address To Request Application Package*

To apply for this funding opportunity use application form CDC 1246 or PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.* If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 700–488–2700. Application forms can be mailed to you.

### *IV.2. Content and Form of Submission*

*Letter of Intent (LOI):* Your LOI must be written in the following format:

- Maximum number of pages: 1.
- Font size: 12-point unreduced.
- Single spaced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Written in English, avoid jargon.

Your LOI must contain the following information:

- Name of national organization.
- Number of local chapters/affiliates.
- Number of currently funded Steps Communities with a local chapter of your organization.
- Contact person and information for organization.

*Application:* You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 35.
- Font size: 12 point unreduced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Double spaced.
- Held together only by rubber bands or metal clips; not bound in any other way.

Your narrative should address activities to be conducted over the entire project period (4 years), and must include the following items in order listed:

1. Executive Summary. The Executive Summary should briefly describe the project, include relevant information from other sections, and the total budget amount requested. The Executive Summary should be no more than 2 pages.

2. Background information. This should include a description of the

national and local organizational structure, the relationship between the national and local organizations, the types of activities conducted by the national and local organizations, and any other information that will assist reviewers in understanding the mission, reach and activities of the organization.

3. Understanding. Applicant should include information indicating an understanding of the Steps Initiative, the Steps Community Program, and the potential relationship of the national organization and its local chapters/affiliates to the Steps Community Program.

4. Objectives. Include budget period and project period objectives for your proposed plan.

5. Detailed plan for required activities. Include details of how your organization will accomplish the requirements described in this announcement. Include specific details about when and where national or regional meetings will occur, proposed curricula/agenda, proposed technical assistance activities, etc. Applicant should address Priority 1 or Priority 2 in addition to all required activities.

6. Timeline. Include a detailed timeline of activities corresponding to the proposed action plan.

7. Program Evaluation Plan. Identify methods for documenting progress toward achieving program goals and objectives, and monitoring activities consistent with budget, project period and workplan. The evaluation plan should include key evaluation questions, measurable objectives linked to program activities, quantitative and/or qualitative assessment mechanisms; the specific outcomes expected; the minimum information to be collected and the system(s) for reporting the information. The plan should follow the CDC's Framework for Program Evaluation in Public Health (*http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/rr4811a1.htm*) and highlight strategies for including program stakeholders in the evaluation process. Moreover, evaluation activities should be coordinated with performance measurement activities to be specified by funded Steps communities.

8. Budget Justification. Budget Narrative and Justification will be counted in the stated page limit. If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

The following types of additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. Information included in appendices is limited to:

- Curriculum Vitae;
- Resumes;
- Organizational Charts;
- Letters of Support.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunaandbradstreet.com or call 1–866–705–5711.*

For more information, *see* the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.* If your application form does not have a DUNS number field please write your DUNS number at the top of the first page of your application, and/or included your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section "V1.2. Administrative and National Policy Requirements".

*IV.3. Submission Dates and Times*

*LOI Deadline Date:* May 14, 2004.

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and allow CDC to plan the application review.

*Application Deadline Date:* June 8, 2004.

*Explanation of Deadlines:* Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supercedes information provided in the application instructions. If the application does not meet the deadline, above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

*IV.4. Intergovernmental Review of Applications*

Executive Order 12372 does not apply to this program.

*IV.5. Funding Restrictions*

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may not supplant existing funds from any other public or private source.

Awards will not allow reimbursement of pre-award costs.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

*IV.6. Other Submission Requirements*

*LOI Submission Address:* Submit your LOI by express mail, delivery service, fax, or e-mail to: Juanika Mainor-Harper, MPH, CDC/NCCDPHP/Steps, 4770 Buford Highway, Mailstop–K41, Atlanta, GA 30341, telephone: 770–488–6452, fax: 770–488–6391, e-mail address: *StepsInfo@cdc.gov.*

*Application Submission Address:* Submit the original and two copies of your application by mail or express delivery service to: Technical Information Management—PA04134, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

**V. Application Review Information**

*V.1 Criteria*

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals

stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Plan (30 Points)

- Applicant should effectively address either Priority Area 1 or Priority Area 2 and all required activities as listed in the Activity section.
- Will the proposed plan accomplish the objectives set forth by the applicant?
- Will the plan support the Steps Community Program goals?
- Does the plan include collaboration with other local organizations in each of the Steps Communities?
- Does the plan account for activities in Steps Communities where no local chapters/affiliates of the national applicant organization exist?
- Is the timeline feasible?
- Do the activities coincide with the goals and objectives?

2. Organization (25 Points)

- Are the national and local organizational structures conducive to the support of the Steps Community Program?
- Does the organization have sufficient infrastructure and capacity to support and enhance the proposed activities?
- Does the organization have a history of success in conducting similar activities?
- Does the organization understand the Steps Community Program mission and the relationship between the Steps Communities and the national and local organizational structures?
- Does the applicant organization have the ability to host a national or regional meeting with key partners related to the Steps Initiative?
- Does the applicant organization have the ability to work within the community to develop viable evidence-based programs, interventions and/or programs related to the mission of the Steps Initiative that can be evaluated over the project period?

3. Program Evaluation Plan (20 Points)

- Does the program evaluation plan include core evaluation questions (both process and outcome), specific, time-phased, measurable objectives and indicators of progress?
- Does the program evaluation plan include detailed information about data collection, analysis, and reporting?
- Does the evaluation plan adequately speak to relevant standards for program evaluation planning, implementation, and the use of findings for program accountability and improvement?

4. Leadership or Governing Structure (15 Points)

- Applicant should demonstrate an effective governing structure within the organization that provides for effective leadership by members and effective day-to-day fiscal and operational management by competent full-time management staff, ensuring that members constitute the majority of committees and/or workshops assembled for the purpose of completing activities under this agreement.

5. Objectives (10 Points)

- Do the proposed objectives support the goals of the Steps Community Program?
- Are the proposed objectives reasonable and appropriate for the organization?
- Are the proposed objectives specific, measurable and time phased?

6. Budget (Not Scored)

**Note:** CDC may not approve or fund all proposed activities. Be precise about the program purpose of each budget item and itemize calculations wherever appropriate.

- Is the budget reasonable for accomplishing the proposed plan?
- Is there a detailed budget for each proposed activity with a justification of all operating expenses in relation to the planned activities and stated objectives?
- Is there a detailed explanation and justification for the use of contractor and consultants within the application budget? Is the organization or parties to be selected, method of selection and duties they will perform stated? Is a breakdown of and justification for the estimated costs of the contracts and consultants and a description of methods to be used for contract monitoring.
- Is the job description for each position, specifying job title, function, general duties, and activities included? Are salary ranges or rates of pay and the levels of effort and/or percentages of time to be spent on activities that would be funded through this cooperative agreement provided?

*V.2. Review and Selection Process*

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff and for responsiveness by NCCDPHP. Incomplete applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Review Criteria" section above.

*V.3. Anticipated Announcement and Award Dates*

May 1, 2004.

**VI. Award Administration Information**

*VI.1. Award Notices*

Successful applications will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicant will receive notification of the results of the application review by mail.

*VI.2. Administration and National Policy Requirements*

45 CFR parts 74 and 92.

For more information on the Code of Federal Regulations, *see* the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–8—Public Health Systems Reporting Requirements
- AR–9—Paperwork Reduction Act Requirements
- AR–10—Smoke-Free Workplace Requirements
- AR–11—Healthy People 2010
- AR–12—Lobbying Restrictions
- AR–15—Proof of Non-Profit Status

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

*Reporting Requirements:* You must provide CDC with an original, plus two copies of the following reports:

1. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Additional Requested Information.

f. Measures of Effectiveness.

2. Financial status report and annual progress report will be due no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the "Agency Contacts" section of this announcement.

**VII. Agency Contacts**

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2700.

For program technical assistance, contact: Juanika Mainor-Harper, MPH, Centers for Disease Control and Prevention, 4770 Buford Highway, NE., Mailstop K–41, Atlanta, GA 30341, telephone: 770–488–6452, e-mail: *StepsInfo@cdc.gov*.

For financial, grants management, or budget assistance, contact: Ms. Sylvia Dawson, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2771, e-mail address: *snd8@cdc.gov*.

**VIII. Other Information**

Common questions and answers about the Steps to a HealthierUS National Partnerships announcement can be found at: *http://www.HealthierUS.gov/steps/*.

This announcement, other CDC announcements, and the necessary forms for application can be found on the CDC Web site, Internet address: *http://www.cdc.gov*. Click on "Funding" then "Grants and Cooperative Agreements".

Dated: April 19, 2004.

**William P. Nichols,**

*Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–9238 Filed 4–22–04; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–265]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Type of Information Collection Request:* Extension of a currently approved collection.

*Title of Information Collection:* Independent Renal Dialysis Facility Cost Report Form and Supporting Regulations in 42 CFR 413.20, 413.24.

*Form No.:* CMS–265 (OMB# 0938–0236).

*Use:* The Medicare Independent Renal Dialysis Facility Cost Report provides for determinations and allocation of costs to the components of the Renal Dialysis facility in order to establish a proper basis for Medicare payment.

*Frequency:* Annually.

*Affected Public:* Business or other for-profit, not-for-profit institutions, and State, Local, or Tribal Government.

*Number of Respondents:* 3,592.

*Total Annual Responses:* 3,592.

*Total Annual Hours:* 704,032.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://cms.hhs.gov/regulations/pra/default.asp*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov*, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Brenda Aguilar, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: April 15, 2004.

**John P. Burke, III,**

*Paperwork Reduction Act Team Leader, CMS Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances.*

[FR Doc. 04–9271 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–03–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–R–215]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Type of Information Collection Request:* Revision of a currently approved collection.

*Title of Information Collection:* Information Collection Requirements Referenced in 42 CFR 424.57; Additional DMEPOS Supplier Standards.

*Form No.:* CMS–R–215 (OMB# 0938–0717).

*Use:* Respondents will be suppliers of Durable Medicare Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS). CMS needs documentation that the DMEPOS supplier has advised beneficiaries that they may either rent or purchase inexpensive or routinely purchased equipment and about the purchase option for capped rental equipment. This is needed to determine if the supplier has met the supplier standards.

*Frequency:* On Occasion and Annually.

*Affected Public:* Business or other for-profit and Not-for-profit institutions.

*Number of Respondents:* 63,986.

*Total Annual Responses:* 35,900.

*Total Annual Hours:* 280,000.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://cms.hhs.gov/regulations/pra/default.asp,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Clearance Officer designated at the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances, Attention: Melissa Musotto, Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: April 15, 2004.

**John P. Burke, III,**

*Paperwork Reduction Act Team Leader, Office of Strategic Operations and Strategic Affairs, Division of Regulations Development and Issuances.*

[FR Doc. 04–9272 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–03–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

### Administration on Aging

**RIN 0938–ZA48**

### Aging and Disability Resource Center Grant Program

**ACTION:** Notice.

**Part 1. Overview Information**

*Funding Opportunity Title:* Aging and Disability Resource Center Grant Program.

*Program Announcement Nos.:* AoA–03–05 and CMS–2196–N.

*Catalog of Federal Domestic Assistance (CFDA) No.:* 93.048 (AoA) and 93.779 (CMS).

**DATES:** *Deadline for Submitting the Signed Cooperative Agreement:* Fiscal Year (FY) 2004 Qualified Applicants (see "Definition of Qualified Applicants" in Part 2, section III.1 of this notice) who plan to accept a grant award in FY 2004 must submit the signed Cooperative Agreement (that was enclosed with their written notification dated April 23, 2004) no later than May 24, 2004. FY 2004 Qualified Applicants who fail to submit a signed Cooperative Agreement on or before May 24, 2004, will not receive funding, and those funds may be reallocated to the next highest-ranked Qualified Applicant.

Because funding for this program appears as part of the Administration on Aging (AoA) and CMS' FY 2004 budgets, all awards will be made before October 1, 2004. All grantees receiving awards under this funding opportunity will have a budget period of 36 months and a start date of no later than September 30, 2004.

**Part 2. Full Text of the Announcement**

*I. Funding Opportunity Description*

1. Background

The Administration on Aging (AoA) and the Centers for Medicare & Medicaid Services (CMS) announce the continuation in funding of the joint AoA and CMS Aging and Disability Resource Center grants program. These discretionary grants to be issued as cooperative agreements will fund 12 projects at a Federal share of up to $800,000 over 3 years (11 grants at approximately $800,000 each, and 1 grant at $200,000). The Aging and Disability Resource Center grants are designed to assist States in developing citizen-centered, "one-stop" entry points into the long-term support system and will be based in local communities. AoA and CMS plan to continue to process the ranked applications submitted in FY 2003, beginning with the highest-ranked applications that were not funded in FY 2003. This notice also contains information about the manner in which we will continue the award process that originated in FY 2003. We will not accept any new applications for Aging and Disability Resource Center grants in FY 2004.

AoA's authority for these grants is under the Older Americans Act, (Pub. L. 106–501).

CMS' legislative authority for these grants is under section 1110 of the Social Security Act (the Act). Funding and Congressional language for the CMS Real Choice Systems Change Grants was provided in the Consolidated Appropriations Act, 2004 (Pub. L. 108–199). Although the Congress appropriated $40 million in funding for Real Choice Systems Change activities, the Congress also passed an across-the-board rescission of 0.59 percent and a second rescission of 0.6864 percent leaving a total appropriation of $39,491,060. Some of these funds will be used for FY 2004 Aging and Disability Resource Center grants that CMS will fund in collaboration with the AoA. A separate **Federal Register** notice, Medicaid Program; Real Choice Systems Change Grants (CMS–2189–N), will be published regarding the remaining Real Choice Systems Change Grand funds.

AoA and CMS are the designated agencies with administrative responsibility for their respective portion of funding for this joint effort.

*Purpose of Grant Awards:* The awards are to be used by States to develop Aging and Disability Resource Center programs that will provide citizen-centered, "one-stop" entry points into the long term support system and will be based in local communities accessible to people who may require long term support. Aging and Disability Resource Centers will serve individuals who need long-term support, their family caregivers, and those planning for future long-term support needs. These Aging and Disability Resource Center grants, to be awarded by AoA and CMS as cooperative agreements, are a part of the President's New Freedom Initiative.

The Aging and Disability Resource Center Grant Program is part of AoA's Research and Demonstration efforts under Title IV of the Older Americans Act and is one of several demonstration opportunities in support of the New Freedom Initiative.

CMS has restructured its research and demonstration efforts under section 1110 of the Act into eight themes. The Aging and Disability Resource Center Grants are part of CMS' Research and Demonstration efforts under Theme 5; Strengthening Medicaid, State Children's Health Insurance Program (SCHIP), and State Programs. This effort includes research and demonstrations on ways to improve access to and delivery of health care to the persons served by Medicaid. The New Freedom

Initiative calls for the removal of barriers to community living for people with disabilities. CMS is the designated Department of Health and Human Services agency with administrative responsibility for the Real Choice Systems Change Grant program.

2. Fiscal Year 2003 Aging and Disability Resource Center Grants

On May 29, 2003, AoA and CMS jointly published a Notice of Funding Availability for the Aging and Disability Resource Center Grants in the **Federal Register** (68 FR 32053). Under this notice, AoA and CMS invited proposals from States, in partnership with their disability and aging communities, to design and implement effective and enduring improvements in community long term support systems. Grant applications were due on July 28, 2003. To view a copy of the **Federal Register** notice and Program Announcement from FY 2003, please visit the respective AoA and CMS Web sites at: *http://www.aoa.gov/prof/aging_dis.asp* and *http://www.cms.hhs.gov/newfreedom/resctrannappinst.pdf.*

The response of States to this grant opportunity revealed a strong interest on the part of States and their citizens to improve their community-based systems, and a vital role for Federal technical and resource assistance. We received 37 applications: 36 applications were from States and 1 application was from a Territory.

On September 22, 2003, we announced the award of 12 FY 2003 Aging and Disability Resource Center Grants to States totaling $9.3 million (see section VIII of this notice for a list of FY 2003 grantees). For further information regarding the FY 2003 grantees, please visit the respective AoA and CMS Web sites at: *http://www.aoa.gov/prof/aging_dis.asp* or *http://www.cms.hhs.gov/newfreedom.*

Since we received far more applications in FY 2003 than we were able to fund, we will not accept any new applications in FY 2004. Instead, we have used the independent review panel scores from FY 2003 to determine the ranking of all applications and will continue to process the ranked applications submitted in FY 2003, beginning with the highest-ranked applications that were not funded in FY 2003 (for a listing of FY 2004 Qualified Applicants, see Table 2). In this way, we will attempt to provide funding for applications where funding was previously unavailable. On the day of publication of this **Federal Register** notice, we will contact the 12 FY 2004 Qualified Applicants by phone to advise them of the grant award. In addition, we will send to the FY 2004 Qualified Applicants a notice of the grant award, terms and conditions of award, and a Cooperative Agreement.

We note that the Commonwealth of the Northern Mariana Islands (CNMI) is one of 12 awardees of the 2004 Aging and Disability Resource Center grants. Due to CNMI's smaller, less complicated State government service structure, and a considerably smaller grant target population, the goals of the Aging and Disability Resource Center grant can be achieved with less funding. To illustrate, the total CNMI population is 69,221, of which 1,047 are elderly (65 years and older), and 66 persons are 85 years and older. Of the total population, approximately 1,928 are individuals with a known disability (data source: 2000 Census). Therefore, the recommended funding level for CNMI is $200,000 of the requested $756,114.

We reserve the right to ensure reasonable balance in awarding grants in FY 2004, in terms of key factors (such as geographic distribution and broad target group representation), as noted in the FY 2003 Program Announcement (*see* section I.2 of this notice for the Web site address). We reserve the right to reallocate those funds to the next highest-ranked FY 2004 Qualified Applicant(s), if a FY 2004 Qualified Applicant is subsequently determined not to have met all of the requirements of our FY 2003 Notice of Funding Availability for the Aging and Disability Resource Center Grants (68 FR 32053), the grant terms and conditions, or otherwise fail to submit a signed Cooperative Agreement to us by the date indicated above in the **DATES** section of this notice.

*II. Award Information*

1. Funding Available

Using FY 2004 funds, AoA and CMS will fund 12 Aging and Disability Resource Center Grants that total approximately $8.97 million (11 grants at approximately $800,000 each and 1 grant at $200,000).

2. Description of Grant Opportunities

As previously mentioned, this notice contains information about the manner in which we will continue the award process that originally started in FY 2003. We will not accept any new applications for Aging and Disability Resource Center grants in FY 2004. As previously stated, to view a copy of the **Federal Register** notice and Program Announcement from FY 2003, please visit the respective AoA and CMS Web sites at: *http://www.aoa.gov/prof/aging_dis.asp* and *http://www.cms.hhs.gov/newfreedom/resctrannappinst.pdf.*

*III. Eligibility Information*

1. Definition of Qualified Applicants

We will not accept any new applications in FY 2004, due to the number of quality, unfunded applications received in FY 2003. Instead, we will continue to process the ranked applications submitted in FY 2003, beginning with the highest-ranked applications that were not funded in FY 2003. We will offer funding to those FY 2004 Qualified Applicants on the day that this notice is published in the **Federal Register.**

FY 2004 Qualified Applicants are those Applicants who (1) submitted an application in FY 2003; and (2) received from us written notification dated November 18, 2003 that advised the applicant that his or her application received a score from the review panel in a range that would permit us to make an award "subject to the availability of funding in FY 2004." Through our technical assistance efforts, we will continue to work with all States and Territories to improve community-integrated long-term services and supports.

2. Cost Sharing or Matching

As stated in the FY 2003 Program Announcement, "Grantees are required to provide at least 5 percent of the project's total cost with non-Federal cash or a non-financial recipient contribution (match) in order to be considered for the award" (*see* 68 FR 32054). A full description of the cost sharing or matching requirements for the Aging and Disability Resource Center Grants is included in the FY 2003 Program Announcement (*see* "Eligibility for grant awards and other requirements" at 68 FR 32054.)

3. Eligibility Threshold Criteria

*See* "Qualified Applicants" in part 2, section III.1 of this notice.

*IV. Application and Submission Information*

As previously noted, we will not accept new applications for funding in FY 2004, as we will continue to process the ranked applications submitted in FY 2003, beginning with the highest-ranked applications that were not funded in FY 2003.

1. Address to Request Application Package

N/A.

2. Content and Form of Application Submission

N/A.

3. Submission Dates and Times

*Cooperative Agreement:* The addresses for submitting signed Cooperative Agreements are listed in order by our preferred means of receipt; they are as follows: (1) Facsimile to Margaret Tolson at (202) 357–3466; or (2) mail to Margaret Tolson, U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, Washington, DC 20201. Signed Cooperative Agreements mailed through the U.S. Postal Service or a commercial delivery service will be considered "on time" if received by close of business on the closing date, or postmarked (first class mail) by the date specified and received within 5 business days. If express, certified, or registered mail is used, the FY 2004 Qualified Applicant should obtain a legible dated mailing receipt from the U.S. Postal Service. Private metered postmarks are not acceptable as proof of timely mailings. Cooperative Agreements that do not meet the above criteria will be considered late.

FY 2004 Qualified Applicants who would like to obtain an electronic copy of the Cooperative Agreement or have questions regarding the Cooperative Agreement, please contact Greg Case at (202) 357–3442 or e-mail at *greg.case@aoa.gov.*

4. Funding Restrictions

Reimbursement of indirect costs under this notice is governed by the provisions of OMB Circular A–87 and the regulations of the U. S. Department of Health and Human Services (HHS) (45 CFR 92—States), Grants-Policy Directive (GPD) Part 3.01: Post-Award—Indirect Costs and Other Cost Policies. A copy of OMB Circular A–87 is available online at: *http://www.whitehouse.gov/omb/circulars/a087/a087.html.* Additional information regarding the Department's internal policies for indirect rates is available online at: *http://www.hhs.gov/grantsnet/adminis/gpd/gpd301.htm.*

5. Other Submission Requirements

N/A.

*V. Application Review Information*

1. Criteria

N/A.

2. Review and Selection Process

N/A.

*VI. Award Administration Information*

1. Award Notices

Successful applicants will receive two Notices of Grant Award (NGA). One will be signed and dated by the AoA Grants Management Officer, and one will be signed and dated by the CMS Grants Management Officer. The NGA is the document that authorizes the grant award, and it will be sent through the U.S. Postal Service to the applicant organization. Any communication between either AoA or CMS and applicants before the issuance of the NGA is not an authorization to begin performance of a project. The notices of grant award will be concurrently issued with the publication of the **Federal Register** notice.

2. Administrative and National Policy Requirements

A full description of the administrative and national policy requirements for Aging and Disability Resource Center Grants are described in the May 29, 2003, **Federal Register** (68 FR 32053) and the FY 2003 Program Announcement.

This funding opportunity will lead to awards with AoA's and CMS' standard terms and conditions and may lead to awards with additional "special" terms and conditions. FY 2004 Qualified Applicants should be aware that special requirements could apply to particular awards based on the particular circumstances of the effort to be supported and/or deficiencies identified in the application by AoA and CMS (for example, failure to supply an acceptable work plan or detailed 36-month budget).

3. Reporting

Grantees must agree to cooperate with any Federal evaluation of the program and provide semi-annual and final reports in a form prescribed by AoA and CMS (including the SF–269a, "Financial Status Report"). These reports will describe how grant funds were used, program progress, any barriers to project implementation, and measurable outcomes. AoA and CMS will provide a format for reporting and technical assistance necessary to complete required report forms. Grantees must also agree to respond to requests that are necessary for the evaluation of the national Real Choice Systems Change Grants efforts and provide data on key elements of their Real Choice Systems Change Grant activities.

*VII. Agency Contacts*

To obtain additional information about the Aging and Disability Resource Center Grants, please visit our respective Web sites at: *http://www.aoa.gov/prof/aging_dis/aging_dis.as* or *http://www.cms.hhs.gov/newfreedom/default.asp.* To obtain additional information regarding the Real Choice Systems Change Grants Program, please visit the CMS Web site at: *http://www.cms.hhs.gov/newfreedom/default.asp.*

Programmatic questions concerning the Aging and Disability Resource Center Grants may be directed to: Greg Case, U.S. Department of Health and Human Services, Administration on Aging, Center for Planning and Policy Development, Washington, DC 20201, telephone: (202) 357–3442 or e-mail: *greg.case@aoa.gov.* Questions about the Real Choice Systems Change Grant Program and this notice may be directed to: Mary Guy, U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, Center for Medicaid and State Operations, DEHPG/DCSI, Mail Stop: S2–14–26, 7500 Security Blvd., Baltimore, MD 21244–1850, (410) 786–2772, or e-mail: *RealChoiceFY04@cms.hhs.gov.*

Administrative questions about the Aging and Disability Resource Center Grants may be directed to: Margaret Tolson, U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, Washington, DC 20201, 202–357–3440 (voice), 202–357–3466 (facsimile) or by e-mail by at *Margaret.tolson@aoa.gov* or Judith L. Norris, Centers for Medicare & Medicaid Services, OICS/Acquisition and Grants Group, Mail Stop C2–21–15, 7500 Security Boulevard, Baltimore, MD 21244–1850, 410–786–5130 (voice), 410–786–9088 (fax), or by e-mail at *Jnorris1@cms.hhs.gov.*

*VIII. Other Information*

TABLE 1.—EXISTING AWARDS—BELOW ARE THE GRANTEES THAT ACCEPTED AWARDS IN FY 2003 AS DESCRIBED IN PART 2, SECTION I.2 OF THIS NOTICE

| State | Agency | Total award |
|---|---|---|
| **Aging and Disability Resource Center Grant Program Fiscal Year 2003 Awards** | | |
| Louisiana | Governor's Office of Elderly Affairs | $799,998 |
| Maine | DHS Bureau of Elder and Adult Services | 767,205 |
| Maryland | Department of Aging | 800,000 |
| Massachusetts | Executive Office of Elder Affairs | 750,000 |
| Minnesota | Board on Aging | 739,136 |
| Montana | DPHHS Senior and Long-Term Care Division | 699,284 |
| New Hampshire | University of New Hampshire | 800,000 |
| New Jersey | Department of Health & Senior Services | 798,041 |
| Pennsylvania | Department of Aging | 764,000 |
| Rhode Island | Department of Elderly Affairs | 749,000 |
| South Carolina | DHHS Bureau of Senior Services | 800,000 |
| West Virginia | Bureau of Senior Services | 798,975 |
| Total | | 9,265,639 |

TABLE 2.—NEW AWARDS—BELOW ARE THE QUALIFIED APPLICANTS THAT WERE OFFERED NEW AWARDS IN FY 2004 AS DESCRIBED IN PART 2, SECTION I.2 OF THIS NOTICE.

| | Agency | Address | Award amount |
|---|---|---|---|
| **Aging and Disability Resource Center Grant Program Fiscal Year 2004 Qualified Applicants** | | | |
| Arkansas | Arkansas Department of Human Services, Division of Aging and Adult Services. | P.O. Box 1437, Slot S530, Little Rock, AR 72203–1437. | $793,262 |
| CNMI | Commonwealth of the Northern Mariana Islands, Department of Community & Cultural Affairs. | Caller Box 10007, Saipan, MP 96950 | 200,000 |
| Iowa | State of Iowa, Department of Elder Affairs | Clemens Building, 3rd Floor, 200 10th Street, Des Moines, IA 50309–3609. | 799,950 |
| North Carolina | North Carolina Department of Health & Human Services, Office of Long Term Care. | 2101 Mail Services Center, Raleigh, NC 27699–2101. | 800,000 |
| Georgia | Georgia Department of Human Resources, Division of Aging Services. | Two Peachtree St., NW., Suite 9.398, Atlanta, GA 30303–3142. | 799,998 |
| Illinois | Illinois Department on Aging, Division of Older American Services. | 421 East Capitol Avenue, #100, Springfield, IL 62701–1789. | 800,000 |
| New Mexico | New Mexico Aging and Long-Term Care Dept., Consumer and Elder Rights Division. | 228 East Palace Ave., Santa Fe, NM 87501 | 798,900 |
| Wisconsin | State of Wisconsin, Department of Health and Family Services. | 1 West Wilson Street, P.O. Box 7850, Madison, WI 53707–7850. | 799,999 |
| Alaska | Alaska Housing Finance Corporation | P.O. Box 101020, Anchorage, AK 99510–1020 | 799,581 |
| Indiana | Indiana Division of Disability, Aging & Rehabilitative Services, Bureau of Aging and In-Home Services. | P.O. Box 7083, Indianapolis, IN 46207–7083 | 778,810 |
| California | State of California Department of Aging, Director's Office. | 1600 K Street Sacramento, CA 95814 | 799,998 |
| Florida | Florida Department of Elder Affairs Planning and Evaluation Unit. | 4040 Esplanade Way, Tallahassee, FL 32399–7000. | 799,945 |
| Total | | | 8,970,443 |

## IX. Information Collection Requirements

In summary, this notice informs applicants of the "AoA and CMS Aging and Disability Resource Center Grants Program" that CMS will not accept any new applications but plans to continue to process the ranked applications submitted in FY 2003, beginning with the highest-ranked applications that were not funded in FY 2003. This notice also informs grantees that they must agree to cooperate with any Federal evaluation of the program, provide semi-annual and final reports in a form prescribed by AoA and CMS, and respond to requests that are necessary for the evaluation of the national Real Choice Systems Change Grants efforts.

These information collection requirements are subject to the PRA; however, the burden associated with these requirements are currently approved under OMB control number 0938–0903 entitled "AoA Grant Solicitation" with a current expiration date of 2/28/2007.

Dated: April 2, 2004.

**Josefina G. Carbonell,**

*Assistant Secretary for Aging.*

Dated: March 19, 2004.

**Dennis G. Smith,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–8830 Filed 4–16–04; 8:45 am]

BILLING CODE 4120–01–P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**[CMS–5004–N]**

## Medicare Program; Voluntary Chronic Care Improvement Under Traditional Fee-for-Service Medicare

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice informs interested parties of an opportunity to apply to implement and operate a chronic care improvement program as part of Phase I (CCI–I) of the Voluntary Chronic Care Improvement Under Traditional Fee-for-Service (FFS) Medicare initiative as authorized by section 721 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173).

*Eligible Organizations:* Organizations eligible to apply to implement and operate chronic care improvement programs under CCI–I include: (1) Disease management organizations; (2) health insurers; (3) integrated delivery systems; (4) physician group practices; (5) a consortium of entities; or (6) any other legal entity that meets the requirements of this notice.

**FOR FURTHER INFORMATION CONTACT:** For information concerning this initiative, contact Raymond Wedgeworth, CMS Project Officer, at (410) 786–6676, or *ccip@cms.hhs.gov*.

**DATES:** Applications must be received on or before 5 p.m. e.s.t. on August 6, 2004, to be considered.

**ADDRESSES:** Mail applications to: Centers for Medicare & Medicaid Services, Attention: Raymond Wedgeworth, Mail Stop: C4–15–17, 7500 Security Boulevard, Baltimore, Maryland 21244.

Because of staff and resource limitations, we cannot accept applications by facsimile (FAX) transmission or by e-mail.

*Format:* Applicants must submit a completed Medicare Waiver Application. Although this is not a demonstration, CCI–I will contain study elements, such as a control group and an evaluation. For this reason, we have decided to use the Medicare Waiver Application as the most appropriate available tool at this time. Application forms may be found online at: *http://www.cms.hhs.gov/medicarereform/ccip/default.asp*. Please refer to the file code CMS–5004–N in the upper right hand corner on your application cover page. Detailed instructions for completing and submitting applications appear with the application form and are supplemented by information in the "Requirements for Submission" section of this notice.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 721 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108–173, adds a new section 1807 "Voluntary Chronic Care Improvement Under Traditional Fee-for-Service (FFS) Medicare" to the Social Security Act (the Act). Section 1807(a)(1) of the Act specifies that the Secretary shall provide for the phased-in development, testing, evaluation, and implementation of chronic care improvement programs. Each program shall be designed to improve clinical quality and beneficiary and provider satisfaction and achieve spending targets with respect to expenditures for targeted beneficiaries with one or more threshold conditions. Section 1807(c)(1) of the Act requires the Secretary to enter into agreements to expand the implementation of CCI programs or components to additional geographic areas, which may include the implementation of CCI on a national basis, if CCI–I programs meet certain statutory requirements. This initiative represents one of multiple strategies that the Department of Health and Human Services (DHHS) is developing and testing to improve chronic care, accelerate the adoption of health information technology, reduce avoidable costs, and diminish health disparities among Medicare beneficiaries nationally.

In CCI–I, the Centers for Medicare and Medicaid Services (CMS) plans to test programs in approximately ten areas in which in the aggregate at least 10 percent of the Medicare FFS population resides. In these initial programs, we will focus primarily on implementing and evaluating programs for beneficiaries with congestive heart failure (CHF) and/or diabetes with significant co-morbidities (hereafter referred to as complex diabetes). In one or two areas, we may focus on beneficiaries with chronic obstructive pulmonary disease (COPD). The Secretary will define the selection criteria and prospectively identify at least 30,000 beneficiaries in each area, split between intervention and control groups.

One awardee will be selected per area to offer intervention group beneficiaries services in CCI–I. Organizations will provide support in improving beneficiaries' self-care and provide them and their providers enhanced information and information tools to increase adherence to evidence-based care. As specified in sections 1807(a)(3) and section 1807(d)(3) of the Act, participation in the programs will be voluntary and will not change the amount, duration or scope of participants' FFS Medicare benefits. FFS Medicare benefits will continue to be covered, administered and paid under the traditional FFS Medicare program. Programs will be of no charge to the beneficiary. Awardees will not be able to restrict beneficiary access to care (for example, there can be no utilization review or gatekeeper function) or restrict beneficiaries to a limited number of doctors in a network.

We are particularly interested in applications for programs in geographic areas (for example, States, metropolitan statistical areas) that have a high prevalence of CHF and/or diabetes, or COPD among Medicare FFS beneficiaries and poor Medicare quality rankings compared to national averages. Applicants may propose to serve one or more areas, but we may request that applicants adjust their proposed service areas to ensure that the population is of an appropriate size and does not interfere with current FFS chronic care demonstrations.

As specified in section 1807(f)(2)(A) of the Act, awardees will be paid a monthly fee per participant; however, payment will be contingent on improvements in clinical quality of care, beneficiary and provider satisfaction, and savings to Medicare in the intervention groups compared to control groups. The planned duration of CCI–I is three years.

CCI–I programs will be evaluated by an independent evaluator per section 1807(b)(5) of the Act.

The principal objectives of CCI–I are to develop and test new strategies to improve quality of care and beneficiary and provider satisfaction cost-effectively for chronically ill FFS Medicare beneficiaries that are scalable, replicable and adaptable nationally.

#### *A. Program Authorization*

Section 1807(b) of the Act requires the Secretary to provide for the phased-in development, testing, evaluation, and implementation of chronic care improvement programs. The purpose of Phase I, the developmental phase of the Voluntary Chronic Care Improvement Under Traditional FFS Medicare initiative (CCI), is to develop and test, through randomized controlled trials, the cost-effectiveness of programs for target populations that may benefit from program participation. The Secretary will evaluate whether quality of care

and satisfaction improve for targeted beneficiaries with threshold conditions and will ensure that Medicare expenditures, including CCI fees, for these programs do not exceed what estimated Medicare expenditures would have been for the targeted populations in the absence of the CCI programs.

*B. Concerns*

Widespread failings in chronic care management are a major national concern. Many of these failings stem from systemic problems rather than lack of effort or intent by providers to deliver high quality care. Medicare beneficiaries are disproportionately affected because they typically have multiple chronic health problems. (Anderson, G. Testimony before the Subcommittee on Health of the House Committee on Ways and Means, Hearing on Promoting Disease Management in Medicare. 16 April 2002. *http://www.partnershipforsolutions.org/DMS/files/4_16_02_testimony.doc*). Beneficiaries who have multiple progressive chronic diseases are a large and costly subgroup of the Medicare population: Medicare beneficiaries with five or more chronic conditions represent 20 percent of the Medicare population but 66 percent of program spending.

Congestive Heart Failure (CHF) and diabetes are among the five most common chronic diseases in the Medicare population. Beneficiaries with these diseases tend to have complex self-care regimens and medical care needs. In addition, many of these beneficiaries have other chronic conditions that add to their self-care burdens and risks of developing co-morbid conditions, complications, and acute care crises. The health risks of these beneficiaries depend heavily on how effectively they are able to control their conditions in their daily lives and whether or not they receive appropriate medical care and effective coordination of their care. Controlling their conditions successfully may require ongoing guidance and support beyond individual provider settings.

According to findings from the 1999 Medicare Current Beneficiary Survey, individuals with CHF represent 14 percent of non-institutionalized FFS Medicare beneficiaries and account for 43 percent of Medicare expenditures, including treatment for all their health problems. Individuals with diabetes represent 18 percent of beneficiaries and 32 percent of FFS Medicare expenditures. (Foote, S. Population-based Disease Management in Fee-For-Service Medicare. *Health Affairs*, Web Exclusive, 30 July 2003, W3–350.). Each year, 10 percent of the Medicare population accounts for two-thirds of all Medicare FFS program payments. (Centers for Medicare and Medicaid Services. CMS Chart Book June 2002 edition, Section III. A, p. 29.) Many of these high-cost beneficiaries suffer from progressive chronic diseases, such as CHF and/or diabetes, and most of the Medicare expenditures for their care are for multiple and often preventable hospitalizations.

Prevalence rates of diabetes and CHF are even higher among minorities than among all Medicare beneficiaries. For example, the Centers for Disease Control and Prevention reports that 23.0 percent of black males and 23.5 percent of Hispanic males ages 65–74 have diabetes compared to 16.4 percent of white males and 15.4 percent of all individuals in that age group. Black and Hispanic females in that age group have diabetes prevalence rates of 25.4 percent and 23.8 percent, respectively, compared to 12.8 percent for white females and 15.4 percent for all individuals in that age group. (Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Diabetes Surveillance System. *See www.cdc.gov/diabetes/statistics/prev/national/f5dt2000.htm*. Given these prevalence figures, improving quality and adherence to evidence-based care should also improve outcomes and thus reduce racial and ethnic disparities, which is consistent with HHS' Healthy People 2010 goals.

The Institute of Medicine's landmark report *Crossing the Quality Chasm: A New Health System for the 21st Century* (National Academy Press, 2001) highlighted the challenges of assuring that patients with major chronic conditions such as CHF and diabetes receive adequate care. The current health care delivery system is structured and financed to manage acute care episodes, not to manage and support individuals with progressive chronic diseases. Providers of care are organized and paid for services provided in discrete settings (for example, hospitals, physician offices, home health care, long-term care, preventive services, etc.). Some literature supports an argument that provider incentives favor focusing on each patient only while he or she is within the provider's care setting. (Todd, W. and Nash, T., eds. *Disease Management, A Systems Approach to Improving Patient Outcomes*). Patient care can be fragmented and poorly coordinated and patient information difficult to integrate among settings as patients move from one care setting to another. Providers may lack timely and complete patient clinical information to fully assess their patients' needs and to help prevent complications. Ongoing support to beneficiaries for managing their conditions outside their physicians' offices is rare.

Fragmentation of care is a particularly serious problem for Medicare beneficiaries. The average Medicare beneficiary sees seven different physicians and fills upwards of 20 prescriptions per year. (Anderson, G. *Chronic Conditions: Making the Case for Ongoing Care*. Partnership for Solutions and the Robert Wood Johnson Foundation, p. 4). In a recent survey, 18 percent of people with chronic conditions reported having duplicate tests or procedures and 17 percent received conflicting information from providers. (Anderson, p. 32) Providers reported feeling ill-prepared to manage chronically ill patients and reported that poor coordination of care led to poor outcomes. (Anderson, p. 36).

The gap between what we know is appropriate care for patients with chronic diseases and the care they actually receive is significant. According to findings of a recent national study, only 56 percent of patients with chronic diseases received recommended care based on well-established guidelines referenced by the researchers. Among patients in the study sample who had CHF, only 64 percent received recommended care, and among those with diabetes, only 45 percent received recommended care. Specifically, only 24 percent of diabetes patients in the study received three or more glycosylated hemoglobin tests over a two-year period. (McGlynn, E., Asch, S., Adams, J., Keesey, J., Hicks, J., DeCristofaro, A., Kerr, E. The Quality of Health Care Delivered to Adults in the United States. *New England Journal of Medicine*. 2003; 348:26:2635–2645). Similarly, in a recent study of practice patterns under Medicare, researchers found that, across all States, an average of 66 percent of Medicare beneficiaries with heart failure received ACE inhibitors and 16 percent with diabetes received a lipid test. (Jencks, S., Huff, E., Cuerdon, T. Change in the Quality of Care Delivered to Medicare Beneficiaries, 1998–1999 to 2000–2001. *Journal of the American Medical Association*. 2003; 289; 305–312).

Quality of care is not a function of regional spending levels under FFS Medicare. In a carefully controlled national study, Fisher *et al.*, found that, "quality of care in higher-spending regions was no better on most measures and was worse for several preventive measures." (Fisher, E.S., Wennberg,

D.E., Stukel, T.A., Gottlieb, D.J., Lucas, F.L., Pinder, E.L. The implications of regional variations in Medicare spending. Part 1: The content, quality, and accessibility of care. *Ann Intern Med.* 2003; 138:273–87). Thus, managing care in a cost-effective manner may in fact raise the quality of care delivered if incentives are properly designed.

Moreover, health information technology is expected to improve quality and fundamentality change the way health care is provided (Institute of Medicine, IOM 2004) by providing actionable evidence at the point of care, reducing errors, duplicate tests, unnecessary admissions, adverse events, and rejected claims.

*C. Current Chronic Care Improvement Initiatives*

Many payers in the private sector have begun sponsoring chronic care improvement initiatives, such as disease management and intensive case management programs, in an attempt to address pervasive problems in ensuring that chronically ill individuals receive appropriate care. The intensive case management programs are typically designed to assist patients who develop costly and complex medical care needs and who need help arranging for appropriate care. Private sector disease management programs often include: Patient self-care support, provider information support, and use of integrative clinical information systems to collect and synthesize patient information from the fragmented segments of the health care delivery system. These disease management programs are often designed to—

- Supply providers with timely, actionable clinical information regarding their patients;
- Provide clinical decision support for patients and providers based on evidence-based guidelines;
- Promote care coordination; and
- Guide and encourage patients in adhering to prescribed care management plans and self-care regimens.

The programs are also typically designed to ensure that preventive measures are taken when appropriate (for example, screening tests) and to prevent or mitigate complications that may result in costly hospitalizations or emergency room visits. In most programs, individual participants are assessed and stratified by their risk levels and self-care concerns, permitting interventions to be targeted based on individual needs. Some programs also provide social services, transportation, and tracking of prescription medications.

While many private sector disease management programs initially had a single-disease focus, many organizations today are attempting to support patients in managing their self-care holistically, including all their co-morbid conditions, regardless of the threshold condition that triggered eligibility for the program.

Many of the current private sector disease management programs are population-based, meaning that organizations are held accountable to improve quality and cost outcomes for prospectively identified target populations. Organizations often agree to put some of their fees at risk if they fail to achieve savings. Organizations often stratify individuals according to risk and tailor interventions to reflect the intensity of changing individual needs; however, the programs are responsible for achieving performance standards across the identified population, regardless of which interventions are provided.

The National Committee for Quality Assurance (NCQA), the American Accreditation Healthcare Commission/URAC and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) have developed quality standards and certification programs for disease management programs.

The chronic care improvement programs to be tested under CCI–I will have some program characteristics in common with the aforementioned private sector disease management programs, but will need to be adapted to suit the unique needs of beneficiaries in the FFS Medicare environment.

**II. Provisions of This Notice**

*A. Purpose/Design*

Section 1807 of the Act authorizes the Secretary to begin building chronic care improvement programs under the Medicare FFS program, incorporating relevant features from private sector programs, but allowing sufficient flexibility for us and the awardees to adapt the design of CCI–I programs to meet the unique needs of the Medicare population. For example, applicants will need to consider how to serve individuals with complex problems that might typically be referred for case management under private sector plans since FFS Medicare does not operate an intensive case management program. Organizations will have the latitude to stratify targeted beneficiaries according to risk and need and to tailor interventions to the unique needs of FFS Medicare beneficiaries, including self-care and caregiver support, care coordination, education, and use of in-home monitoring devices as appropriate.

As specified in section 1807(f)(3)(B)(ii) of the Act, the organizations will also be required to agree to assume financial risk in the event of failure to meet agreed upon performance guarantees for clinical quality, beneficiary and provider satisfaction and savings targets. We have established that financial risk is fee risk. Thus, we believe that the chronic care improvement organizations in CCI–I will have strong incentives to reach the targeted beneficiaries and their providers on a continuing basis to help them improve chronic care management. The CCI–I organizations will be expected to track and improve the health outcomes of all identified members of their intervention group, not just those who seek treatment during a given time period.

1. Eligible Organizations

Section 1807(a)(2)(B) of the Act defines the organizations eligible to apply to implement and operate chronic care improvement programs under CCI–I. These include:

(1) Disease management organizations;
(2) Health insurers;
(3) Integrated delivery systems;
(4) Physician group practices;
(5) A consortium of entities; or
(6) Any other legal entity that the Secretary determines to be appropriate.

The Secretary has determined an appropriate legal entity is one that meets the requirements of this notice.

2. Identification of Intervention Groups

Section 1807(d) of the Act requires the Secretary to identify targeted beneficiaries who may benefit from CCI–I. Section 1807(a)(2)(E) of the Act defines a targeted beneficiary for a CCI program as a FFS beneficiary with a threshold condition covered under the program.

Threshold condition is defined in section 1807(a)(2)(D) as a chronic condition, such as CHF, diabetes, or COPD, or other diseases or conditions selected by the Secretary as appropriate for the establishment of a CCI program. For CCI–I, we have chosen to focus initially on beneficiaries who have CHF and/or complex diabetes, or Chronic Obstructive Pulmonary Disease (COPD) because they are major population subgroups within Medicare with significant health risks and disproportionately high health care

costs that are not being consistently well managed. Evidence from research and private sector experience suggests that chronic care improvement programs may produce measurable improvements in quality and health status and yield net reductions in health care spending for these subgroups by lowering their hospital admission rates and emergency service use, but the population-based programs have not been rigorously tested in large populations of people aged 65 and older or with severely disabling conditions in a FFS context. CCI–I will permit us to implement and rigorously test these programs under Medicare FFS.

Section 1807(d) of the Act requires the Secretary to establish a method for identifying eligible beneficiaries for CCI–I. Thus, we have established that eligible beneficiaries will be those beneficiaries who meet the inclusion and exclusion criteria established by us and who are identified by us for randomization. Through analysis of Medicare historical claims data, we initially plan to prospectively identify eligible beneficiaries in each CCI–I geographic area (henceforth referred to as a "target population"). To be eligible for inclusion in a target population under CCI–I, Medicare beneficiaries must be enrolled in Parts A and B, have CHF and/or complex diabetes, or COPD, and have Medicare as primary payer.

Beneficiaries with CHF and/or complex diabetes will be identified using a combination of two or more professional visits on separate dates for CHF or complex diabetes (or a hospitalization for CHF) based on 1 year of historical claims data. Based on literature reviews and extensive input from the private sector, we have decided to focus on eligible beneficiaries with these threshold conditions who have moderate to high Hierarchical Coexisting Condition (HCC) risk adjustment scores in order to achieve our clinical and financial objectives within the 3-year program window (see our Web site, *http://www.cms.hhs.gov/medicarereform/ccip/default.asp,* for further information on HCC risk adjustment scoring).

Because of the high prevalence of COPD in the Medicare population, we will consider testing programs targeting beneficiaries with COPD in one or two geographic areas if an applicant(s) presents a strong proposal(s). For these program(s), beneficiaries with COPD will be identified using two or more professional visits on separate dates for COPD or a hospitalization in the year based on 1 year of historical claims data. Eligible beneficiaries with COPD will have moderate to high HCC risk adjustment scores as well.

As part of the process for identifying beneficiaries who might benefit from CCI–I, we have established that the following groups of beneficiaries will be excluded from CCI–I. We will not consider beneficiaries if they are currently or become enrolled in any of the following:

- Medicare End-Stage Renal Disease (ESRD) program;
- Hospice;
- Medicare Advantage (Medicare+Choice) plan; or
- A CMS FFS chronic care demonstration.

Detailed documentation on the inclusion and exclusion criteria above, and a more detailed explanation of the identification methodology, including the HCC risk score cut-off for each threshold condition, will be included with the dataset we will provide for bidding purposes. (*See* Section II.B. of this notice for further details on the bidding process.)

As specified in section 1807(b)(1) of the Act, CCI–I requires randomized controlled trials for Phase I. Our expectation is to randomize beneficiaries in the target population in each area into intervention and control groups at the beneficiary level. Randomization is intended to ensure comparability on factors that could affect performance improvement and overall health care costs.

In addition, we may request the applicant to adjust the size of the proposed geographic area to ensure that the population is of the appropriate minimum size to meet the requirements specified in section 1807(b)(3)(A) of the Act, that CCI–I in the aggregate cover areas in which at least 10 percent of the Medicare population resides or address other issues like conflicts with Medicare FFS demonstrations. If the applicant and CMS cannot come to an agreement on the size of the geographic area, that could be a basis to reject the proposal. Effects on clinical quality, beneficiary and provider satisfaction and total Medicare costs for individuals with CHF, for those with diabetes and CHF, and for those with complex diabetes will be evaluated. Programs targeting beneficiaries with COPD will be evaluated separately.

3. Identification of Potential Geographic Areas

We are interested in applications that target areas with higher than average prevalence of CHF or complex diabetes, or COPD, and low Medicare quality rankings.

We are particularly interested in applications for geographic areas that do not conflict with a currently operating FFS chronic care demonstration designed to reduce Medicare expenditures through care coordination, disease management or other care management efforts (*see* chart containing a list of the FFS chronic care demonstration areas). Running a CCI–I program in the same geographic area as the demonstration, even if enrollees in CCI–I cannot participate in the demonstration, could confound the results of the CCI–I study by cross-contamination of control groups. Chronic care improvement programs would be measured against the results of organizations running other demonstrations. To the extent that these demonstrations are successful in reducing the costs of their enrollees, chronic care improvement organizations would have a more difficult time demonstrating measurable quality improvement, beneficiary and provider satisfaction and savings. Moreover, we believe it would be inappropriate to cut into the enrollee pools of existing demonstrations for potential enrollees in order to assign populations of beneficiaries to CCI–I programs. However, applicants who are interested in proposing an area where a demonstration exists in part of a State are encouraged to contact us for further details concerning how they might structure their CCI–I proposals in a manner that will not cause cross-contamination with an ongoing FFS chronic care demonstration.

| State | Medicare fee for service beneficiaries [a] | Percent diabetes [b] | Percent CHF [c] | Percent COPD [d] | Medicare quality rank [e] | Geographic areas with conflicting demonstraions [f] |
|---|---|---|---|---|---|---|
| United States | 34,717,973 | 17 | 12 | 12 | | |
| Alabama ..... | 661,747 | 20 | 14 | 15 | 42 | |
| Alaska ..... | 45,728 | 9 | 6 | 6 | 33 | |
| Arizona ..... | 474,227 | 12 | 9 | 10 | 29 | AZ |
| Arkansas ..... | 436,271 | 15 | 13 | 12 | 48 | NW AR |

| State | Medicare fee for service beneficiaries [a] | Percent diabetes [b] | Percent CHF [c] | Percent COPD [d] | Medicare quality rank [e] | Geographic areas with conflicting demonstraions [f] |
|---|---|---|---|---|---|---|
| California | 2,557,305 | 7 | 5 | 5 | 44 | CA |
| Colorado | 339,159 | 12 | 11 | 12 | 7 | CO |
| Connecticut | 454,662 | 18 | 12 | 12 | 9 | S Central CT |
| Delaware | 114,806 | 22 | 14 | 12 | 14 | |
| DC | 73,382 | 11 | 7 | 4 | 37 | DC |
| Florida | 2,240,227 | 18 | 12 | 15 | 41 | N FL |
| Georgia | 927,667 | 20 | 13 | 13 | 47 | |
| Hawaii | 116,160 | 2 | 2 | 1 | 16 | |
| Idaho | 158,301 | 13 | 10 | 9 | 22 | |
| Illinois | 1,535,043 | 17 | 13 | 11 | 46 | Rural/E IL |
| Indiana | 854,548 | 19 | 14 | 14 | 27 | Central/Western IN |
| Iowa | 474,090 | 16 | 11 | 11 | 6 | NE IA, NW IA |
| Kansas | 371,539 | 15 | 12 | 11 | 30 | |
| Kentucky | 622,181 | 19 | 13 | 16 | 40 | |
| Louisiana | 543,327 | 20 | 15 | 12 | 51 | Corridor I–49 |
| Maine | 225,477 | 16 | 11 | 14 | 3 | ME |
| Maryland | 651,698 | 18 | 12 | 11 | 25 | Mont. Cnty, DC Suburbs, Baltimore |
| Massachusetts. | 768,883 | 17 | 12 | 12 | 15 | |
| Michigan | 1,376,774 | 22 | 14 | 14 | 26 | MI |
| Minnesota | 596,098 | 14 | 10 | 8 | 10 | E Rural MN, S Central MN |
| Mississippi | 430,625 | 19 | 13 | 11 | 50 | |
| Missouri | 764,550 | 17 | 14 | 13 | 28 | SW MO, St. Louis |
| Montana | 142,428 | 11 | 10 | 11 | 13 | SE MT |
| Nebraska | 251,062 | 15 | 12 | 10 | 12 | |
| Nevada | 176,387 | 12 | 9 | 11 | 35 | |
| New Hampshire. | 176,330 | 16 | 11 | 12 | 1 | SW NH |
| New Jersey | 1,089,135 | 21 | 16 | 13 | 43 | |
| New Mexico | 211,363 | 14 | 9 | 11 | 36 | NM |
| New York | 2,327,080 | 21 | 16 | 12 | 24 | NYC |
| North Carolina | 1,141,084 | 20 | 12 | 12 | 23 | NW NC |
| North Dakota | 104,775 | 14 | 10 | 9 | 4 | |
| Ohio | 1,497,640 | 20 | 15 | 14 | 38 | |
| Oklahoma | 473,529 | 16 | 14 | 13 | 45 | |
| Oregon | 336,477 | 10 | 7 | 7 | 11 | |
| Pennsylvania | 1,623,162 | 20 | 14 | 13 | 31 | Eastern PA, Central NE PA |
| Rhode Island | 117,890 | 19 | 13 | 13 | 17 | |
| South Carolina. | 597,582 | 22 | 13 | 12 | 32 | |
| South Dakota | 122,324 | 13 | 11 | 10 | 20 | SD |
| Tennessee | 829,852 | 19 | 13 | 14 | 39 | NE TN |
| Texas | 2,112,410 | 19 | 14 | 12 | 49 | Houston, Urban/S TX |
| Utah | 210,115 | 15 | 11 | 6 | 5 | |
| Vermont | 92,798 | 15 | 10 | 11 | 2 | E VT |
| Virginia | 914,745 | 19 | 12 | 11 | 18 | SW VA, Richmond |
| Washington | 616,018 | 13 | 10 | 9 | 19 | W Central WA |
| West Virginia | 324,294 | 22 | 14 | 17 | 34 | |
| Wisconsin | 769,142 | 16 | 11 | 9 | 8 | N Central WI |
| Wyoming | 67,139 | 13 | 11 | 13 | 21 | N WY |

**Sources:**

[a] Health Insurance Reform Project, George Washington University: Analysis of 5 percent Standard Analytic File (SAF), Denominator Files, Number of FFS Enrollees by State.

[b] Health Insurance Reform Project, George Washington University: Analysis of 5 percent SAF, All Physician-Supplier Claims, Percent of FFS Enrollees in State with Diabetes Diagnosis Reported.

[c] Health Insurance Reform Project, George Washington University: Analysis of 5 percent SAF, All Physician-Supplier Claims, Percent of FFS Enrollees in State with CHF Diagnosis Reported.

[d] Health Insurance Reform Project, George Washington University: Analysis of 5 percent SAF, All Physician-Supplier Claims, Percent of FFS Enrollees in State with COPD Diagnosis Reported.

[e] Jencks, S., Huff, E., Cuerdon, T. Change in the Quality of Care Delivered to Medicare Beneficiaries, 1998–1999 to 2000–2001. *Journal of the American Medical Association.* 289; 305–312; 2003.

[f] CMS, Office of Research, Development and Information, Listing of Demonstrations.

4. Outreach to Intervention Group

Beneficiary participation in CCI–I will be strictly voluntary. Eligible beneficiaries who are randomized to be contacted by us for potential participation in a CCI–I program (henceforth referred to as "intervention group") will be notified of the opportunity to participate through a letter from the Medicare program including the information specified by section 1807(d)(2) of the Act. The letter will provide a description of the program and give the beneficiary an opportunity to decline to be contacted by the CCI–I organization. The letter will detail how the beneficiary can obtain further information about the program. We will then expect each awardee to contact the intervention group beneficiaries in its area who did

not decline to be contacted to describe the program, confirm participation, and initiate support services. Beneficiaries who confirmed participation will be presumed to be "participants" until they either become ineligible (for example, join a Medicare Advantage plan) or notify the awardee or us that they no longer want to be contacted by the awardee. Participation is still voluntary and the beneficiary may terminate participation at any time.

We will provide awardees with historical Medicare claims data and other information on the intervention group beneficiaries who did not decline to be contacted in their geographic areas. Awardees will use the data for outreach and preliminary assessment of beneficiary risk levels and support needs. Our data will not include beneficiary phone numbers.

We will expect applicants' proposals to specify detailed descriptions about their outreach protocols, including for example, frequency and number of outreach attempts, and how the applicant will assure that outreach efforts are respectful of the beneficiary. The "outreach period" will consist of 6 months. We reserve the right to negotiate limits on the number and/or frequency of outreach attempts during the outreach period, and may specify that awardees will be required to cease further outreach efforts after the outreach period.

Under our authority in section 1807(e)(4)(B) of the Act, awardees will be required to maintain records of beneficiary contact and confirmation of their participation in the program. We will also require awardees to share beneficiary eligibility and participation status (that is, whether a beneficiary declined to participate or terminated participation) with us on a regular basis.

We will expect applicants to provide projections as to the percent of intervention group beneficiaries confirming participation, the percent of beneficiaries declining to be contacted (to the awardee or to us), the percent of beneficiaries they expect they will be unable to reach, and the percent of participants terminating participation.

Private sector experience has shown that this approach to program start-up facilitates ramping up participation levels rapidly and reaches individuals who are likely to benefit significantly from participating but who are not otherwise likely to take the initiative to seek this assistance. Programs will be evaluated based on health and cost outcomes of their entire intervention group, including those beneficiaries who chose not to be contacted, beneficiaries who dropped out of the program at any time, and those beneficiaries the awardee was unable to reach, over time and as compared to control groups. Beneficiaries in the control groups will not be contacted to inform them of the program, and therefore will not have the opportunity to decline to participate.

5. Program Characteristics

As specified in section 1807(a)(3) of the Act, participation in CCI–I will not—

- Expand the amount, duration or scope of a beneficiary's FFS Medicare benefits;
- Provide an entitlement for participation in a CCI program;
- Provide for any hearing or appeal rights with respect to a CCI program; or
- Provide benefits under a CCI program for which a claim may be submitted to the Secretary by any provider or supplier of services.

Additionally, Medicare beneficiaries will continue to have access to care and the same freedom of choice of providers as they do currently. Participants can drop out of the program at any time. Awardees must track and inform us of all participants who drop out of programs. Awardees must be able to demonstrate that they conduct their CCI–I programs in accordance with section 1807(e) of the Act.

As specified in section 1807(e)(1) and (e)(2) of the Act, CCI–I programs must develop a care management plan with each participant. In carrying out the care management plan and other CCI–I activities, chronic care improvement organizations shall:

1. Guide the participant in managing the participant's health (including all co-morbidities, relevant health care services, and pharmaceutical needs) and in performing activities as specified under the elements of the care management plan of the participant;

2. Use decision-support tools such as evidence-based practice guidelines or other criteria as determined by the Secretary (see the paragraph below for details on other criteria); and

3. Develop a clinical information database to track and monitor each participant across settings and to evaluate outcomes.

We plan to provide monthly or quarterly claims data to awardees for their assigned populations to support these activities.

Section 1807(e)(4)(B) of the Act specifies that the Secretary also has the discretion to establish additional program requirements beyond those specified in section 1807(e) of the Act. We are particularly interested in programs that have a track record of success in engaging beneficiaries' physicians and other providers in information sharing and in working with community organizations, local and state agencies, and other organizations that serve the proposed target populations. Many chronic care improvement programs have developed integrative information infrastructures, new applications of information and communication technologies, expert clinical systems that incorporate evidence-based guidelines for multiple conditions, and predictive modeling capabilities to support their operations. Others have been working to develop interoperative electronic health records and other health information technology used at the point of care to improve quality and safety. We are interested in receiving applications from organizations that have proven to be successful in applying tools to meet the individual needs of participants and their providers, reduce fragmentation in patient information, and facilitate better communications between chronically ill beneficiaries and their providers at the point of care.

We recognize that some of these tools and capabilities may be proprietary. We are not seeking ownership of the tools, protocols, materials, and capabilities and we will work with awardees to ensure that the confidentiality of proprietary tools and capabilities is protected. Nonetheless, it is essential that we be able to conduct a thorough evaluation of CCI–I to understand how the programs operate and assess their effectiveness. Transparency is essential. Therefore, awardees must agree to the following statement: "At any phase in CCI–I, including at its conclusion, the awardee, if so requested by the project officer, must deliver to us all chronic care management software, algorithms and associated documentation, as well as beneficiary health information, program operational methods, and other data used by the awardee in the course of performing the services pursuant to CCI–I, to be used by us solely to further the purpose of CCI–I." The data will not be subject to use for any other purpose without written permission of the awardee. All proprietary information and technology of the awardee (including, without limitation, the specific proprietary algorithms used by the awardee for CCI–I) is and remains the sole property of the awardee. We do not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights to the proprietary information or technology.

CCI–I programs must comply with all applicable laws, including but not limited to privacy laws and the Health Insurance Portability and Accountability Act (HIPAA).

6. Billing and Payment

Section 1807(f)(2)(A) of the Act specifies that each awardee will be paid a fee for each participant per month in CCI–I. The fee amounts to be paid to awardees may vary because we envision testing a range of program models that may have different cost structures. We will establish fee amounts by agreement with each awardee.

Claims for medical services provided to participants will continue to be covered, administered, and paid under the Medicare FFS program. The monthly rate paid to awardees for providing chronic care improvement support to participants will be considered a programmatic administrative fee, and no beneficiary coinsurance amount or deductible liability will be applied. During the outreach period, we will pay a per beneficiary monthly payment for all intervention group beneficiaries, except those who declined to be contacted either to us or to the awardee. After the outreach period, we will pay a per participant monthly fee for all beneficiaries who confirm participation, until they become ineligible or terminate their participation in the program. We will not pay any per participant monthly fees for beneficiaries who have not been reached by the time the outreach period comes to a close unless agreed to by us and the awardee and specified in the CCI–I agreements. No program start-up funds will be allowable for costs incurred prior to program implementation. No added payments will be made to awardees for their program evaluation costs, travel, capital investments, data collection, or any activity related to CCI–I. All program costs must be factored into the per-participant fee. The bid should not include CMS programmatic costs as the standardized satisfaction survey or collection of information on control group beneficiaries, etc.

7. Performance Standards: Clinical Quality, Beneficiary Satisfaction and Savings Guarantees

Section 1807(f)(3)(A) of the Act specifies that each agreement with an awardee will specify performance standards for improving clinical quality, improving beneficiary and provider satisfaction and achieving savings. As part of the application process, we will expect applicants to set forth their projections for improvement on clinical quality and savings on a year-to-year basis in the intervention group and as compared to the control group. The projections set forth by awardees in their applications and agreed upon by us may be included in their CCI–I agreements as standards that will be used in monitoring performance.

Section 1807(f)(3)(B)(i) of the Act also specifies that each agreement will provide for adjustment in payment rates in the event the Secretary determines that the awardee failed to meet its agreed-upon performance standards.

Applicants will be expected to propose performance guarantees for the first two performance standards, quality improvement and beneficiary satisfaction, and propose payment adjustment amount(s) and methods of liability calculation to be applied in the event of failure to meet the proposed quality improvement and satisfaction guarantees. The proposed guarantees for quality improvement can relate to achievement of agreed-upon standards collectively rather than on individual measures. The proposed guarantees will be evaluated as part of the review of proposals. Performance guarantees, liability calculation methods, and payment amounts agreed upon by us will be included in agreements with awardees. We may terminate a program after 18 months of operation if the Secretary determines the program is not demonstrating significant progress in improving clinical quality and beneficiary satisfaction. Provisions relating to termination for non-performance, including the methodology used to determine any fees to be returned to us, will be specified in the CCI–I agreements. It is important to reiterate that awardees' performance will be measured on the entire intervention group (which includes those beneficiaries who chose not to be contacted, beneficiaries who dropped out of the program at any time, and those beneficiaries the awardee was unable to reach, for all months in which they were eligible to participate).

For the third performance standard, savings, section 1807(f)(4) of the Act requires the Secretary to ensure budget neutrality. To ensure that neutrality, we are specifying that each awardee will also be required to guarantee that the total of Medicare claims payments for beneficiaries in the intervention group and chronic care improvement fees under CCI–I paid for participants will be no more than 95 percent of the amount that total Medicare claims payments would have been absent CCI–I, as measured by claims for the corresponding control group over a 3-year period (applicants will be given the opportunity to propose multiple payment and savings guarantees structures, as described further in section II.B.6 of this notice). Beginning in 2006, beneficiaries will have the opportunity to purchase Medicare prescription drug coverage under Pub. L. 108–173. We intend to include Medicare drug expenditures in the calculation of total Medicare expenditures.

Section 1807(f)(1)(B)(ii) of the Act specifies that organizations must assume financial risk for performance under CCI–I agreements. We are establishing that, in the event that 5 percent net savings is not achieved over the 3-year program window, the awardee will be required to refund to the government the amount of excess expenditures made under CCI–I, up to the full amount of the total chronic care improvement fees paid to the awardee. We may require awardees to make refunds to the government based on interim performance monitoring results or we may specify in agreements with awardees some other mechanisms to limit our exposure, but the final financial settlement will be based on 3-year program performance.

Throughout CCI–I, CMS and our contractor, in conjunction with the awardee, will monitor Medicare benefit expenditures using Medicare administrative claims records. Net savings will be calculated by comparing the average Medicare expenditures per person per month, including program fees, for the identified intervention group (including those who declined to be contacted, those who could not be reached or those who terminated participation) to the average Medicare expenditures per person per month for beneficiaries in the control group in the geographic area. All months for which a beneficiary was eligible to participate in the intervention or control group will be included, regardless of the number of months a beneficiary actually participated in the program. Net savings calculations will include appropriate claims run-out for both the intervention and control groups.

8. Reconciliation Process

We will hire an independent contractor to monitor clinical quality, beneficiary and provider satisfaction, utilization, and costs for purposes of interim payment adjustments and to perform final financial reconciliation at the end of the 3-year program period to determine any refunds due to the government from awardees in the event awardees fail to achieve agreed-upon

performance guarantees over the 3-year program window.

As noted previously, awardees are to assume financial risk related to fees, not insurance risk. Awardees will be required to establish a system to compensate Medicare (up to 100 percent of the applicant's chronic care improvement fees) in the event that they fail to achieve their performance guarantees. Applicants will need to demonstrate financial solvency to assure us of their capacity to refund us up to 100 percent of their fees if this situation occurs, through available reserves, reinsurance, withholds, or other appropriate means. Awardees will be required to agree in writing to performance standards, guarantees, and liability calculation methodology as a condition of acceptance of CCI–I awards, and will have an opportunity to review the annual and final calculations when completed.

9. Program Monitoring

We will conduct ongoing formative program monitoring throughout the period of program operations. The formative evaluation will be conducted in collaboration with CMS and awardees to help identify and address operational problems, foster continuing improvement in program operations, and inform us as to how we might expand the program as specified by section 1807(c) of the Act if Phase I is successful.

Section 1807(f)(1)(B)(i) of the Act specifies that the Secretary may establish other requirements as appropriate. Thus, awardees will be required to cooperate with our implementation contractor, including submitting performance monitoring data and operational metrics, as well as hosting site visits as requested. Program monitoring includes both performance monitoring (on clinical quality, beneficiary and provider satisfaction and savings targets) and operational metrics (including but not limited to, outreach and engagement rates, and management information). Awardees will be expected to provide us with ongoing program monitoring information by tracking various measures of program performance and operational metrics. Awardees will be expected to track clinical quality, satisfaction, utilization, and cost measures on participants on a continuing basis and to analyze trends quarterly. The requirements for data exchange and reporting will be established in CCI–I agreements to satisfy our need for program monitoring and the independent evaluator's needs for program analysis.

10. Independent Formal Evaluation

Pursuant to section 1807(b)(5) of the Act, we will hire an independent contractor for the formal evaluation of program results. The independent evaluator will study the experience of the intervention group in each area compared to the relevant control group to ascertain the ability of each program and individual elements of each program to improve clinical quality, achieve high levels of beneficiary and provider satisfaction, promote efficient use of health care services, and produce savings for Medicare in the intervention group (as specified by section 1807(b)(5) of the Act). Awardees will be expected to cooperate with the independent evaluator, to participate in case studies of their programs, and to track and provide agreed-upon performance data for participants as needed for the independent contactor's performance evaluation. Detailed definitions of the indicators, measures, and calculation methods to be used in determining performance will be agreed upon by us and specified in the CCI–I agreements. A commonly acceptable standardized beneficiary and provider satisfaction survey instrument will be developed to compare satisfaction levels between the control groups and the intervention groups.

*B. Requirements for Submission*

1. Awardee Selection Process

We will select awardees for CCI–I in a staged process. In the first stage, we will provide prospective applicants with a de-identified data set of Medicare claims information for a national sample of beneficiaries who meet the inclusion and exclusion criteria for CCI–I. This data set will be available on CD–ROM. Prior to receiving the data on CD–ROM, applicants will be required to download, sign and mail to us a Data Use Agreement that will be posted on our Web site in advance of the publication of this notice. The applicant will analyze the data and submit an application and bid, including proposed target population (CHF, complex diabetes, or COPD), geographic area, per participant per month fees and performance guarantees. Applicants should base their proposals on 20,000 beneficiaries in the intervention group. Applicants may propose to serve a larger size population as well, but, for comparability, applicants must submit at least one proposal based on 20,000 beneficiaries in the intervention group. We reserve the right to negotiate and limit the size of the population. Applicants may propose adjustment factors to account for any differences between the nationally representative sample population and the actual population in their proposed geographic area that may warrant changes in performance projections, payment structure, or guarantees. We reserve the right to reject proposed adjustment factors. Applicants will have 90 days from the date the data are made available to submit applications.

In the second stage, our review panel will evaluate all submitted applications based upon the application evaluation criteria listed in section II.C. of this notice and will recommend applicants to be considered for the second stage of the awardee selection process. We may conduct site visits to selected applicants based upon review panel recommendations.

For applicants who are selected as finalists, we will provide the actual historical data for the applicable target population in the applicant's proposed geographic area. Finalists will analyze the data to determine if originally proposed and agreed upon adjustment factor(s) apply. (Adjustment factors must be specified in the initial application in order to be applied at this point.) If the applicant finds that an adjustment in the proposed payment or savings guarantees applies due to the differences in the data, we will verify the analysis and findings prior to entering into an agreement with the awardee.

The Administrator will make the final selections. Only one awardee will be selected for any given geographic area, and will be provided with HIPAA compliant identified data once selected. We may add to the intervention group individuals who meet the eligibility criteria for the original cohort.

2. Application

Applicants must submit completed applications following the standard format outlined in our Medicare Waiver Application in order to be considered for review by the technical review panel. Although this is not a demonstration, CCI–I will contain study elements, such as a control group and an evaluation. For this reason, we have decided to use the Medicare Waiver Application. The application is available online at: *http://www.cms.hhs.gov/medicarereform/ccip/default.asp*. Applicants should also include in their applications the information requested below related to each section of the Application. Only applications that follow the standard Medicare Waiver Application format and include the information requested in the Application instructions and in this CCI–I notice will be reviewed.

Additional information about CCI–I, for example, fact sheets, press releases, question and answer documents, and information about the bidders' conference will be posted on the Web site. All questions must be submitted to us in writing; all responses will be posted on our Web site.

As noted in the Application instructions, applications must be typed using 12-point font with 1-inch page margins. The applications must not exceed 40 double-spaced pages, exclusive of the cover letter, executive summary, forms, and appendices. An unbound original, 2 copies, and 3 electronic copies on CD–ROM of the Application must be submitted. Applicants may, but are not required to, submit a total of 10 copies to assure that each reviewer receives an application in the manner intended by the applicant (for example, collated, tabulated, color copies, etc.). Hard copies and electronic copies must be identical. Applicants must designate one copy as the official proposal.

Applications will be reviewed by the technical review panel only if they are received on or before 5 p.m. EST on August 6, 2004. At a minimum, applicants should ensure that their applications and supplemental materials include the information requested below by section of the application.

1. Cover Letter.
2. Application Form.
3. Executive Summary.
4. Rationale for Proposed Geographic Area and Target Population (Problem Statement).

Applicants should describe the geographic area(s) they propose to serve (for example, State, metropolitan statistical area) and explain the rationale for targeting each proposed geographic area. Applicants should specify which target population they intend to serve (CHF and/or complex diabetes, or COPD). Applicants should specify the size of the population they intend to serve if it differs from the required proposal based on 20,000 beneficiaries in the intervention group. Applicants should describe the demographics of the Medicare FFS population in the area, utilization rates, prevalence rates of CHF and complex diabetes or COPD in the Medicare population, and Medicare quality rankings (as defined by Jencks, S., Huff, E., Cuerdon, T. Change in the Quality of Care Delivered to Medicare Beneficiaries, 1998–1999 to 2000–2001. *Journal of the American Medical Association.* 2003; 289; 305–312) for the area with comparisons to national averages. The current health care delivery system and access to care in the proposed geographic area should be briefly described. Obstacles to providing chronic care improvement services in the area should also be explained.

Applicants need not provide a description of Medicare coverage and payment or discuss implications of changes as called for in the standard application instructions as neither coverage nor payment for Medicare benefits and services will change under CCI–I.

5. Chronic Care Improvement Program Design

Applicants should describe the proposed program and explain how the proposed interventions will improve clinical quality, beneficiary and provider satisfaction, and achieve savings for the intervention group.

In this section, applicants should explain how the proposed program will address each of the following activities (*see* section II.C. of this notice for further details on the application evaluation process):

- *A plan for outreach.*
- Describe how the program will actively engage participants and the rate at which the applicant expects to ramp up the program. Provide a detailed description about outreach protocols, including for example, frequency and number of outreach attempts.
- Describe how program will assure that outreach efforts are respectful of beneficiaries. Describe how program will overcome language or cultural barriers, or cognitive impairment in outreach.
- Describe how the program plans to reach out to physicians to inform them of the program.
- *A plan to assess and stratify participants.*
- Describe how the program will stratify participants by risk (including types and frequencies of interventions for beneficiaries at various strata and an explanation of when and how patients are transitioned between levels of intensity, if at all).
- Describe the stratification tool and whether it was validated.
- Describe how the program will screen each participant for conditions other than threshold conditions, such as impaired cognitive ability and co-morbidities.
- *Frequency and type of interventions.*
- Describe how the program will work with beneficiaries to develop and carry out their care management plans as specified in section 1807(e) of the Act.
- Describe how a beneficiary communicates with the program and how the program communicates with the beneficiary.
- Describe how the program will determine the appropriateness of chronic care improvement interventions as specified in section 1807(e)(2) of the Act, such as self-care education for beneficiaries or caregivers, education for physicians, the use of monitoring technologies, provision of information about hospice care, pain and palliative care, and end-of-life care, etc.
- Describe how the program will increase use of preventive services.
- Describe how the program will guide the participant in managing his/her health, including all co-morbidities, relevant health care services and pharmaceutical needs. Describe how the program will improve efficiency and effectiveness of utilization of Medicare services.
- *Appropriate services and educational materials for participants.*
- Describe how the program will ensure that all chronic care improvement services provided are tailored to meet the needs of all participants, including those with limited reading skills, with diverse cultural and ethnic backgrounds, with sensory/physical/mental disabilities or cognitive impairment, or primary languages other than English.
- Describe how the program will use decision-support tools to ensure adherence to evidence-based medicine and monitoring of quality standards.
- Describe how the program will ensure use of clinical protocols or evidence-based medicine to guide care delivery and management.
- *Adequate mechanisms for ensuring physician integration with the program.*
- Describe the program's strategy to encourage physicians and other providers to actively participate in the program.
- Describe how the program will integrate beneficiaries' physicians and other providers into the program and ensure that the program enhances patient-provider relationships.
- Describe how the program will ensure exchange of patient information with applicable providers in an effective, timely, and confidential manner across care settings.
- Describe how the program will facilitate access to timely and accurate patient information at the point of care. If the program includes incentives for the physician to adopt or use decision-support tools or other health information technology, describe the basis and impact of these incentives.
- *Adequate mechanisms for ensuring coordination with State and local agencies.*

• Describe how the program will coordinate, if applicable, with State and local agencies, as well as other organizations that serve the target population.

• *Adequate mechanisms for supporting participants with more intensive needs.*

• Describe strategies for supporting participants with more intensive needs (for example, describe whether there will be a care coordination or intensive case management program as part of the overall CCI–I program or some other mechanism for supporting this population).

• *Data to be collected, data sources, and data analyses.*

• Describe data to be collected and data sources.

• Describe how the program will collect information on intervention group beneficiaries that are not available from claims data (for example, laboratory results, prescription drug data, clinical information from physicians).

• Describe data analyses.

• Describe how the program will ensure privacy of participant information.

• Describe how the program will develop a clinical information database to track and monitor patients' major chronic conditions and integrate management for participants who have multiple co-morbid conditions, such as diabetes and depression, across settings and to evaluate outcomes.

• Describe the data exchange between the program, physicians and beneficiaries. Describe whether physicians can access participant information on their patients. Describe process for sharing sensitive information between physicians (for example, HIV status or mental health diagnoses).

• Describe how the program will anticipate incorporating prescription drug data, including claims after 2006, to the extent possible.

In addition, applicants should provide sample communications and educational materials to be used with participants and providers and explain any plans to customize them for Medicare.

Applicants do not need to describe how beneficiaries will be assigned to intervention and control groups, as we will be responsible for that function under CCI–I.

6. Organizational Structure and Capabilities

Applicants should demonstrate that they have the management capacity and organizational infrastructure to carry out CCI–I.

At a minimum, in addition to the information requested in the Application instructions, applicants should explain how the organization has demonstrated capacity in each of the areas listed below (*see* section II.C. of this notice for further details on the application evaluation process) and how their programs could be expanded or replicated over time.

• *Staff.*

• Describe type of staff, level of staff, level of effort required to provide the service.

• Describe staff to participant ratios and required qualifications of staff that will be providing services to the participants.

• Describe similar detailed information on any services to be performed on a sub-contracted or affiliated basis (List full name and address of any subcontractors involved in the services to be performed. Describe all handoffs and coordination arrangements).

• Describe qualifications of the non-clinical staff that will be responsible for the information systems, data analysis, and other major program functions.

• Describe organizational and reporting structure of personnel.

• Provide a listing of key personnel.

• Provide a breakout of staff responsibilities.

• *Facilities.*

• Describe locations that will be used to operate CCI–I.

• Describe typical hours of operation (EST) in terms of hours per day and days per week, including types of staff available during these hours of operation. (If the organization is not open 24 hours per day, 7 days a week, describe the process beneficiaries follow to contact professional staff.)

• *Equipment.*

• Describe equipment, including participant monitoring equipment or electronic input devices.

• *Strong working relationships with local providers.*

• Describe how the organization reaches out to local providers.

• Provide contact information for at least two physicians who provide care to program participants or representatives from physician associations who have worked with the organization and who will serve as references.

• *Strong working relationships with community organizations in the area.*

• Describe how the organization interacts with local community organizations (such as Quality Improvement Organizations, among others).

• Provide contact information for at least two community organizations who have worked with the organization and who will serve as references.

• Provide contact information for a hospital or health plan medical director who has worked with the organization and who will serve as a reference.

• *Appropriate information and financial systems.*

• Describe the organization's information and financial systems, including the organization's computer systems capabilities and how the applicant collects, integrates, analyzes, and reports data necessary to support program components. (Describe the data repository, and how the applicant's computer systems can transmit data to us.)

• Provide samples of clinical, financial and management information reports used in program operations.

• Describe the modification of its existing data systems, if necessary.

• Describe how the organization ensures compliance with all applicable laws, including but not limited to privacy laws and HIPAA.

• With respect to data flows between organizations and us and within organizations, identify participating organizations, their covered entity status and the relationships among the partners. Indicate these data flows, detailing who is receiving what information and for what purpose.

• *Clinical protocols to guide care delivery and management.*

• Describe the clinical protocols used to guide interventions, as well as processes and responsibilities for updating them (clinical protocols must be derived from evidence-based medicine or nationally accepted practice guidelines). Describe how clinical protocols will support all of a participant's co-morbidities, not just his/her threshold condition.

• *Ongoing performance monitoring.*

• Specify additional clinical and services indicators other than the performance standards specified in section II.B.7 of this notice and the timetable that the program proposes to use to monitor health status and quality of care by condition and severity level for all conditions, including co-morbidities.

• *Organizational background and references.*

• Describe the organization's history (including how long the organization has been in business, including any relevant predecessor companies), ownership, and current products and services.

• For consortia, provide a history of the consortium and any supporting relevant experiences of the partners collectively and/or individually.

• Provide references (including name, title, and telephone number) for two organizations for which the applicant has developed and currently administers programs of similar scope and complexity as the proposed program.

• Indicate the numbers of beneficiaries now under active management by the applicant for CHF, for complex diabetes, and for each other type of major chronic condition the applicant manages (including as a co-morbid condition).

• Describe the organization's risk management history or demonstrated capability to operate with fee risk.

• Indicate agreement to language regarding proprietary data, materials, systems, etc. in the Program Characteristics part of section II.A. of this notice.

• *Accreditation.*

• Describe accreditation for disease management or chronic care improvement programs, if any. Section 1807(e)(5) of the Act specifies that the Secretary may consider deeming accredited organizations as meeting the CCI–I requirements. In the interest of encouraging proposals from a broad array of organizational models, we are not deeming accredited organizations at this time; however, we will consider accreditation as a factor.

Applicants who are selected as finalists in the second stage of the awardee selection process will also be expected to provide detailed financial statements.

For consortia, applicants should describe how the new entity will achieve the organizational capacity functions listed below. Consortia may draw from the organizational qualifications of each of the partners, but applicants should emphasize the capabilities of the collective partnership. Consortia should describe the interrelationships between the partners, a plan for dedicated resources to develop infrastructure and seamless program cohesion (including integrated interventions, communications, information systems, etc.), and a plan for governance and management structure with dedicated staffing and resources.

7. Performance Results

*Past Performance: Clinical Quality, Beneficiary and Provider Satisfaction and Savings.*

In addition to supplying the information requested in the Application instructions, applicants should describe how their proposed interventions are likely to have a positive effect on clinical quality, beneficiary and provider satisfaction, and savings for the intervention group within the proposed geographic area. Applicants should show evidence of positive outcomes from prior and current efforts. Applicants must quantify their results for other large target populations of individuals with CHF, complex diabetes, COPD, or other major chronic conditions. Claims of prior success should include definitions of performance measures used, evaluation methods, as well as explanations of the length of time over which performance was measured. For savings, to the extent possible, applicants should include evidence of success in improving outcomes based on paid claims data. If a consortium has no prior experience to draw from, the applicant should, to the best of its ability, provide the relevant experiences of one or more of the components of the consortium.

*Performance Projections*

As discussed in section II.A of this notice, we will expect applicants to lay out their projections for improvement in clinical quality, beneficiary and provider satisfaction, and savings year to year in the intervention group and as compared to the control group. The projections set forth by awardees in their applications may be included in their CCI–I agreements as standards for monitoring performance. As mentioned in section II.B. of this notice, we have created a database of one year of historical data on a nationally representative target population. As appropriate, the organization should use this database as a point of reference to project performance improvements. The organization should also describe to what baseline values its projections apply and what adjustment factors would apply if the true baseline values were outside of the anticipated range.

• We have identified a core set of clinical quality indicators. The applicant should provide projected rates of improvement the awardee expects to achieve in each year of CCI–I on each proposed quality performance measure in the intervention group as compared to the prior year and as compared to the control group. The applicant should also include additional measures it could track. For each measure, the applicant should indicate its ability to track the measure, data sources that would be used, and projected improvement rates. Further information will be posted on our Web site. The measures presented here are subject to change.

• The applicant should provide projected savings for each year of the program in addition to the aggregate savings projections specified in section II.B.8 of this notice.

• The applicant should provide projections on operational metrics for each year of the program, including but not limited to, outreach and engagement rates. The applicants should provide detailed projections as to the percent of intervention group beneficiaries confirming participation, the percent of beneficiaries declining to be contacted (to us or to the awardee), the percent of beneficiaries they expect they will be unable to reach, and the percent terminating participation.

| Measure | Data source* | Projected % improvement in intervention group over prior year | | | Projected % change compared to control group | | |
|---|---|---|---|---|---|---|---|
| | | 1YR | 2YRS | 3YRS | 1YR | 2YRS | 3YRS |
| **Heart Failure** | | | | | | | |
| Assessment of left ventricular ejection fraction | | | | | | | |
| Blood Pressure controlled (< 130/85) | | | | | | | |
| Use of angiotensin converting enzyme inhibitors (ACE–I)/angiotensin receptor blockers (ARB) or hydralazine/isosorbide for patients with LVEF < .4 | | | | | | | |
| Dose of ACE–I | | | | | | | |
| Use of beta-blockers for patients with LVEF < .4 | | | | | | | |
| Monitoring daily weights | | | | | | | |

| Measure | Data source* | Projected % improvement in intervention group over prior year | | | Projected % change compared to control group | | |
|---|---|---|---|---|---|---|---|
| | | 1YR | 2YRS | 3YRS | 1YR | 2YRS | 3YRS |
| Sodium intake counseling | | | | | | | |
| Compliance with medication regimen | | | | | | | |
| Spironolactone for patients with AHA/ACC III or IV classification | | | | | | | |
| Daily aspirin, other antiplatelet or anticoagulant | | | | | | | |
| **Diabetes** | | | | | | | |
| Annual Hemoglobin A1c test | | | | | | | |
| Lipid profile performed once every year | | | | | | | |
| Eye exam performed once every year | | | | | | | |
| Monitoring for nephropathy (test for microalbumin) or receiving treatment for nephropathy | | | | | | | |
| Annual foot exam performed | | | | | | | |
| HbA1c controlled (≤7.0) | | | | | | | |
| Lipids controlled (LDL <130 mg/dl) within past 2 years | | | | | | | |
| Poor HbA1c control (>9.0 percent) | | | | | | | |
| Blood pressure controlled (<130/80) | | | | | | | |
| Patients with microalbuminuria on ACE or ARB | | | | | | | |
| Compliance with medication regimen | | | | | | | |
| Daily aspirin | | | | | | | |
| **COPD** | | | | | | | |
| Systemic corticosteroids for acute exacerbation | | | | | | | |
| Oxygen therapy | | | | | | | |
| Smoking quit rate | | | | | | | |
| Annual spirometry testing | | | | | | | |
| Oxygen status | | | | | | | |

| Condition | Measure | Data source* | Projected % improvement in intervention group over prior year | | | Projected % change compared to control group | | |
|---|---|---|---|---|---|---|---|---|
| | | | 1YR | 2YRS | 3YRS | 1YR | 2YRS | 3YRS |
| **Other Co-Morbid Conditions (Specify by Condition)** | | | | | | | | |
| | | | | | | | | |

| Measure | Data source* | Projected % improvement in intervention group over prior year | | | Projected % change compared to control group | | |
|---|---|---|---|---|---|---|---|
| | | 1YR | 2YRS | 3YRS | 1YR | 2YRS | 3YRS |
| **Preventive Measures** | | | | | | | |
| Receipt of pneumococcal vaccine ever | | | | | | | |
| Annual flu shot | | | | | | | |
| Cigarette smoking cessation counseling | | | | | | | |
| Nutrition screening/counseling | | | | | | | |
| Depression screening | | | | | | | |
| **Utilization of Health Care Services** | | | | | | | |
| Hospital admission rates | | | | | | | |
| Hospital re-admission rates | | | | | | | |
| Emergency service utilization rates | | | | | | | |
| Rate of hospitalizations for lower extremity complications (for diabetes patients) | | | | | | | |

*Data Source: C=Claims, SR=Self-Report, VSR=Validated Self-Report, P=Provider, S=Survey, PBM=Pharmacy Benefit Manager, L=Labs, CR=Chart Review

8. Payment Methodology & Budget Neutrality

Using the historical claims database of a representative target population that we provide (available on CD-ROM), applicants must provide a fee proposal in the format of Model 1 below for comparability across applications. We will also entertain applications that propose up to two additional payment proposals. All applicants must propose a payment structure that guarantees 5 percent net savings and places chronic care improvement fees at 100 percent risk for savings shortfalls relative to that target. For comparability, in this model, applicants should base this payment structure on 20,000 beneficiaries in the intervention group. All applicants must submit this bid in the format specified in Model 1. In addition, applicants may also include up to two alternative payment structures for programs in which organizations guarantee more than 5 percent net savings and/or propose to serve larger populations. In these scenarios, the applicant could propose to limit its fee risk associated with any shortfall relative to the proposed savings guarantee. Under these alternatives, however, an awardee would still be responsible for refunding us the full amount of its fees if net savings fall below 5 percent.

| | Model 1<br>5% net savings | Alternate fee structure<br>> 5% net savings |
|---|---|---|
| Per participant fee/month | $_____/month | $_____/month. |
| Percent net Medicare savings guaranteed | 5% | _____%. |
| Percent fees at risk for guaranteed savings | 100% | 100% on 5% net savings; Define fee risk for net savings > 5% and < guarantee. |

An applicant should describe the components of its monthly fee. The proposed fee should include the projected cost for each chronic care improvement service, including any ancillary services, such as transportation or provision of equipment, and administrative costs in aggregate and per participant. All administrative costs relating to CCI–I should be included in this budget, including costs for recruitment, travel, capital investments, data collection, profit, and any other relevant items or services. An applicant should describe the assumptions that underlie its price structure, including but not limited to, expected outreach and engagement rates, assessment rates, levels of intervention intensity, drop-out rates, etc.

In addition, in conjunction with each bid, the applicant should:

- Describe what differences, if any, in the demographic composition or claims experience of the population in the selected geographic area relative to the national sample would require adjustment in the proposed fees or savings guarantees (for example, hospital admission rates); and
- Specify the proposed adjustment factor to be used to calculate final fees and performance guarantees if the identified values in the actual target population falls outside the corridor for which the proposed fees apply.

An applicant should also propose fee adjustments in the event its program fails to achieve agreed-upon performance guarantees for clinical quality improvement and beneficiary and satisfaction. An applicant should provide a detailed explanation of its proposed fee adjustments and methods for calculating liability in the event of failure to meet agreed-upon performance guarantees.

*Medicare Expenditure Projections*

The applicant should estimate the expected total yearly Medicare expenditures for the population in the sample dataset and give projections for the intervention group with and without CCI–I, and the resulting net savings to Medicare by major service category, for example, inpatient hospitalizations, outpatient services, emergency department utilization and physician office visits. While we do not have historical claims data available for drug costs, we will include Medicare prescription drug expenditures in cost comparisons between the intervention and control groups beginning in 2006. The applicant should explain any differences it projects in drug costs between the intervention and control group and how these differences (if any) are accounted for in its 3-year net savings projection. Estimates of expenditures with CCI–I should include chronic care improvement fees as well as the payments for traditional Medicare benefits provided to the intervention group as described in section II.A Purpose/Design (Billing and Payment section) of this notice.

An applicant should show the basis for the assumptions used in its proposed payment methodology and budget. The strength of the evidence supporting these estimates will be considered in evaluating the proposals. Further, applicants selected for award will be required to submit data supporting their utilization and financial assumptions prior to award. CMS or its financial contractor will use the information provided by the applicant, as well as Medicare claims and other data, to determine an estimate of what we would pay to provide care for a population similar to the projected intervention group both with and without CCI–I.

9. Implementation Plan

An applicant should provide the implementation information requested in the waiver application as well as those listed below.

- Provide schedule with timelines for all essential tasks.
- Describe modifications to protocols, services, outreach, education initiatives, timelines, etc., if any.
- Describe what process improvements the organization has made in the last 12 months as part of continuous quality improvement related to providers, patients, health plans, communication, health education and/or training. Describe the organization's plan for implementing process improvements.
- Among the staff named and biographies provided, identify the individual who will be the liaison to us for CCI–I.

10. Supplemental Materials (Appendices)

*C. Application Evaluation Process and Criteria*

As noted in the Waiver Application instructions, a panel of experts will conduct a review of responsive proposals. The panelists' evaluations will contain numerical ratings based on the application evaluation criteria, rankings for all responsive proposals, and a written assessment of each application.

1. Application Evaluation Criteria and Weights

*a. Rationale for Proposed Geographic Area and Target Population (5 Points)*

The proposal provides a thorough and convincing rationale for choosing the targeted population in the selected geographic area as specified in section II.B. of this notice, including:

- Demographics and socio-economic characteristics.
- Access to and utilization of health care services, and Medicare quality ranking.
- Characteristics of the health care delivery system.
- Prevalence of CHF and complex diabetes, or COPD.
- Obstacles to providing chronic care improvement services.

*b. Chronic Care Improvement Program (25 Points)*

The proposal describes or demonstrates clear and convincing evidence that program design will improve quality of care for participating beneficiaries and reduce aggregate costs to Medicare (with any applicable supporting materials) as specified in section II.B. of this notice, including:

- A plan for outreach to the intervention group.
- A plan to assess, stratify, and screen participants.
- Frequency and type of interventions, including plan for development and implementation of care management plans.
- Appropriate services and educational materials for participants.
- Adequate mechanisms for ensuring physician integration with the program.
- Adequate mechanisms for ensuring coordination with State and local agencies.
- Adequate mechanisms for handling participants with more intensive needs.
- Data to be collected, data sources, and data analyses.

*c. Organizational Capabilities and Structure (25 Points)*

The proposal describes or demonstrates clear and convincing evidence that the organization has the structure and capacity to conduct the chronic care improvement program effectively as specified in section II.B. of this notice, including:

- Staff.
- Facilities.
- Equipment.
- Clinical protocols to guide care delivery and management.
- Strong working relationships with local providers.
- Strong working relationships with community organizations in the area.
- Appropriate information and financial systems.
- Ongoing performance monitoring.
- Organizational background and references.
- Accreditation, if any.

*d. Performance Results: Past Performance and Performance Projections (25 Points)*

The proposal describes or demonstrates clear and convincing evidence that the organization can produce a positive effect on clinical quality, beneficiary and provider satisfaction, and savings with respect to the intervention group in the selected geographic area as specified in section II.B. of this notice, including:

- Positive outcomes from prior and current efforts, including quantified results for clinical quality, beneficiary and provider satisfaction and savings.
- Past success in performance standards data capture and management necessary to monitoring this type of program.
- Reasonableness of projections for quality improvement and beneficiary and provider satisfaction.
- Willingness to work with us to determine data to be collected and procedures for submission of those data.
- Willingness to cooperate in independent formal and formative evaluations of CCI–I.

*e. Payment Methodology & Budget Neutrality (20 Points)*

The proposal describes or demonstrates clear and convincing evidence that the proposed fees and performance guarantees are appropriate to improve quality of care for participating beneficiaries and reduce aggregate costs to Medicare as specified in section II.B.6 of this notice, including:

- Justification and explanation for the proposed chronic care improvement fees.
- Reasonableness of the proposed chronic care improvement fees and savings guarantees.
- Reasonableness of applicant's estimates of the expected net Medicare savings and the expected total yearly Medicare expenditures for the intervention and control groups.
- Financial solvency and an ability to compensate Medicare in the event the organization fails to meet its performance targets, including reinsurance, withholds, unreserved assets or some other means.

2. Final Selection

The CMS Administrator will make the final selection of organizations for CCI–I from among the most highly qualified applicants, taking into consideration a number of factors, including operational feasibility, geographic location, and Medicare program priorities (for example, testing a variety of approaches for delivering services, targeting beneficiaries, payment, and using integrative information and communications tools). We will also conduct a financial analysis of these proposals and evaluate the proposed programs to ensure that aggregate Medicare program expenditures will be reduced. Applicants must be aware that proposals may be accepted in whole or in part. Awards may be subject to special terms and conditions that are identified during the review process. We reserve the right to conduct one or more site visits before making awards. The Administrator reserves the right to negotiate and limit the size of the population and the number of areas. We expect to make the awards in the fall of 2004. Once awarded, CCI–I will be phased in over a period of time.

**III. Collection of Information Requirements**

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before 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 Paperwork Reduction Act of 1995 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 comment on each of these issues that contain information collection requirements:

This notice informs interested parties of an opportunity to apply for a pilot program agreement for the Voluntary Chronic Care Improvement Under Fee-for-Service Medicare initiative. If interested, applicants must submit a completed Medicare Demonstration Waiver Application that can be found online at: *http://www.cms.hhs.gov/medicarereform/ccip/default.asp.*

Requirements for this submission are described in Section B of this notice.

The burden associated with this information collection is estimated to be 1,200 hours annually (80 hours per response × 15 respondents).

This information collection requirement is subject to the PRA; however, the burden associated with this requirement is currently approved under OMB control number 0938–0880 entitled "Medicare Demonstration Waiver Application" with a current expiration date of 7/31/2006.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group, Attn: Dawn Willinghan, CMS–5004–N, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS Desk Officer.

Comments submitted to OMB may also be emailed to the following address: e-mail: *baguilar@omb.eop.gov;* or faxed to OMB at (202) 395–6974.

**Authority:** Section 721 of Pub. L. 108–173, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

(Catalog of Federal Domestic Assistance Program No. 93.779, Health Care Financing Research, Demonstrations and Evaluations).

Dated: March 3, 2004.

**Dennis G. Smith,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–9127 Filed 4–20–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1273–N]**

## Medicare Program; Public Meetings in Calendar Year 2004 for New Durable Medical Equipment Coding and Payment Determinations

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice of meetings.

**SUMMARY:** This notice announces the dates and location of public meetings to be held in calendar year 2004 to discuss our preliminary coding and payment determinations for new durable medical equipment (DME). These meetings provide a forum for interested parties to make oral presentations or to submit written comments in response to preliminary coding and pricing recommendations for DME that have been submitted using the Healthcare Common Procedure Coding System coding modification process. Discussion is directed toward response to our specific preliminary recommendations, and will be limited to items on the new DME public meeting agenda.

**DATES:** The public meetings are scheduled for Tuesday, June 29; Wednesday, June 30; and Thursday, July 1, 2004. Each meeting day will begin at 9 a.m. and end at 5 p.m., e.d.t. A meeting will only be held on July 1, 2004, if the number of agenda items cannot be managed in two meeting days.

**ADDRESSES:** The public meetings will be held in the Centers for Medicare & Medicaid Services (CMS) Auditorium, located at 7500 Security Boulevard, Baltimore, MD 21244.

Web site: Additional details regarding the public meeting process for new DME, along with information on how to register and guidelines for an effective presentation, will be posted at least one month before the first meeting date on the official HCPCS Web site, and can be accessed at *http://cms.hhs.gov/medicare/hcpcs/default.asp.*

Individuals who intend to provide a presentation at a public meeting for new DME need to familiarize themselves with this information. This Web site also includes a description of the HCPCS coding process, along with a detailed explanation of the procedures used to make coding and payment determinations for DME and other items and services that are coded in the HCPCS.

A summary of each public meeting for new DME will be posted on the above Web site within one month after the meeting.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Carver, (410) 786–6610.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On December 21, 2000, the Congress passed the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), Public Law 106–554. Section 531(b) of BIPA mandated that we establish procedures that permit public consultation for coding and payment determinations for new DME under Medicare Part B of title XVIII of the Social Security Act (the Act). The procedures and public meetings announced in this notice for new DME are in response to the mandate of section 531(b) of BIPA.

We published a notice in the November 23, 2001, **Federal Register** (66 FR 58743) with information regarding the establishment of the public meeting process for DME.

### II. Registration

Registration Procedures: Registration may be completed online at *http://cms.hhs.gov/medicare/hcpcs/default.asp,* or you may contact the DME Public Meeting Coordinator, Jennifer Carver at 410–786–6610, to register by phone. The following information must be provided when registering: Name, company name and address, telephone and fax numbers, e-mail address and special needs information. Registrants must also indicate whether they are the "Primary Speaker" for an agenda item, designated by the entity that submitted the HCPCS coding request. A CMS staff member will confirm your registration by mail, e-mail or fax.

Registration Deadline: Individuals must register for each date they plan to attend and/or provide a presentation. The deadline for registration for all of the meetings dates is Tuesday, June 15, 2004.

### III. Presentations and Comment Format

*A. Primary Speaker Presentations*

The entity that submitted the HCPCS coding request for an item that appears on the Public Meeting agenda may designate one person to be the "Primary Speaker" and make a presentation at the meeting. We will post guidelines regarding the amount of time allotted to the speaker, as well as other presentation guidelines, on the official HCPCS website at least a month before the first public meeting in 2004 for new DME. Persons designated to be a Primary Speaker must register to attend the meeting using the registration procedures described above and, at least 15 days before the meeting, contact the DME Public Meeting Coordinator, Jennifer Carver at 410–786–6610. At the time of registration, Primary Speakers must provide a brief, written statement regarding the nature of the information they intend to provide, and advise the meeting coordinator regarding needs for Audio/Visual Support. In order to avoid disruption of the meeting and ensure compatibility with our systems, tapes and disk files are tested and arranged in speaker sequence well in advance of the meeting. We will accommodate tapes and disk files that are received by the DME Public Meeting Coordinator 7 or

more calendar days before the meeting. In addition, on the day of the meeting, Primary Speakers must provide a written summary of their comments to the DME Public Meeting Coordinator.

*B. "5-Minute" Speaker Presentations*

Meeting attendees will be permitted to sign up at the meeting, on a first-come, first-served basis, to make 5-Minute presentations on individual agenda items. Based on the number of items on the agenda and the progress of the meeting, a determination will be made at the meeting by the meeting coordinator and the meeting moderator, regarding how many 5-Minute speakers can be accommodated. In order to offer the same opportunity to all attendees, there is no pre-registration for 5-Minute speakers. Attendees may signup only on the day of the meeting to do a 5-Minute presentation. They must provide their name, company name and address, contact information as specified on the sign-up sheet, and identify the specific agenda item that will be addressed. On the day of the meeting, 5-Minute speakers must provide a written summary of their comments to the DME Public Meeting Coordinator.

*C. Speaker Declaration*

The Primary Speakers and the 5-Minute Speakers must declare, at the meeting as well as in their written summary, whether or not they have any financial involvement with the manufacturers or competitors of any items or services being discussed. This includes any payment, salary, remuneration, or benefit provided to the speaker by the manufacturer.

*D. Written Comments from Meeting Attendees*

We welcome written comments from persons in attendance at a public meeting, whether or not they had the opportunity to make an oral presentation. Written comments may be submitted at the meeting, or prior to the meeting via e-mail to *www.cms.hhs.gov/medicare/hcpcs* or via regular mail to the HCPCS Coordinator, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mail Stop C5–08–27, Baltimore, MD 21244.

**IV. General Information**

The meetings are held in a Federal government building; therefore, Federal measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. In order to gain access to the building and grounds, participants must bring a government-issued photo identification and a copy of your confirmation of pre-registration for the meeting. Access may be denied to persons without proper identification.

Security measures also include inspection of vehicles, inside and out, at the entrance to the grounds. In addition, all persons entering the building must pass through a metal detector. All items brought to CMS, whether personal or for the purpose of demonstration or to support a presentation, are subject to inspection. CMS cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a presentation.

Special Accommodations: Persons attending a meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance or accommodations, must provide this information upon registering for the meeting.

Each meeting day will begin at 9 a.m. and end at 5 p.m., e.d.t. Because it is impossible to anticipate, in advance of the April 1, 2004, submission deadline, the nature and the number of coding requests that will be submitted for new DME, we can only estimate the amount of meeting time that will be needed, and we are unable to post a final agenda at this time. We may not need three full-day meetings. We will consider each meeting individually, and we may modify the meeting dates and times published in this notice. Final confirmation of meeting dates and times, and agenda items will be posted three weeks in advance of each scheduled meeting, on the official HCPCS Web site and can be accessed at *http://cms.hhs.gov/medicare/hcpcs/default.asp*.

**Authority:** Section 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 42 U.S.C. 1395hh).

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 25, 2004.

**Dennis G. Smith,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–8832 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–4066–N]**

### Medicare Program; Meeting of the Advisory Panel on Medicare Education—May 11, 2004

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. appendix 2, section 10(a) (Pub. L. 92–463), this notice announces a meeting of the Advisory Panel on Medicare Education (the Panel) on May 11, 2004. The Panel advises and makes recommendations to the Secretary of the Department of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services on opportunities to enhance the effectiveness of consumer education strategies concerning the Medicare program. This meeting is open to the public.

**DATES:** The meeting is scheduled for May 11, 2004, from 9:15 a.m. to 4 p.m., e.s.t.

*Deadline for Presentations and Comments:* May 4, 2004, 12 noon, e.s.t.

**ADDRESSES:** The meeting will be held at the Wyndham Washington Hotel, 1400 M Street, NW., Washington, DC 20005, (202) 429–1700.

**FOR FURTHER INFORMATION CONTACT:** Lynne Johnson, Health Insurance Specialist, Division of Partnership Development, Center for Beneficiary Choices, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, mail stop S2–23–05, Baltimore, MD 21244–1850, (410) 786–0090. Please refer to the CMS Advisory Committees' Information Line (1–877–449–5659 toll free)/(410–786–9379 local) or the Internet (*http://www.cms.hhs.gov/faca/apme/default.asp*) for additional information and updates on committee activities, or contact Ms. Johnson via e-mail at *ljohnson3@cms.hhs.gov*. Press inquiries are handled through the CMS Press Office at (202) 690–6145.

**SUPPLEMENTARY INFORMATION:** Section 222 of the Public Health Service Act (42 U.S.C. 217a), as amended, grants to the Secretary of the Department of Health and Human Services (the Secretary) the authority to establish an advisory panel if the Secretary finds the panel necessary and in the public interest. The Secretary signed the charter establishing

this Panel on January 21, 1999 (64 FR 7849), and approved the renewal of the charter on January 21, 2003.

The Panel advises and makes recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services (CMS) on opportunities to enhance the effectiveness of consumer education strategies concerning the Medicare program.

The goals of the Panel are as follows:

- To develop and implement a national Medicare education program that describes the options for selecting a health plan under Medicare.
- To enhance the Federal government's effectiveness in informing the Medicare consumer, including the appropriate use of public-private partnerships.
- To expand outreach to vulnerable and underserved communities, including racial and ethnic minorities, in the context of a national Medicare education program.
- To assemble an information base of best practices for helping consumers evaluate health plan options and build a community infrastructure for information, counseling, and assistance.

The current members of the Panel are: James L. Bildner, Chairman and Chief Executive Officer, Tier Technologies; Dr. Jane Delgado, Chief Executive Officer, National Alliance for Hispanic Health; Joyce Dubow, Senior Policy Advisor, Public Policy Institute, American Association of Retired Persons (AARP); Clayton Fong, President and Chief Executive Officer, National Asian Pacific Center on Aging; Timothy Fuller, Executive Director, National Gray Panthers; John Graham IV, President and Chief Executive Officer, American Society of Association Executives; Dr. William Haggett, Senior Vice President, Government Programs, Independence Blue Cross; Thomas Hall, Chairman and Chief Executive Officer, Cardio-Kinetics, Inc.; David Knutson, Director, Health System Studies, Park Nicollet Institute for Research and Education; Brian Lindberg, Executive Director, Consumer Coalition for Quality Health Care; Katherine Metzger, Director, Medicare and Medicaid Programs, Fallon Community Health Plan; Dr. Laurie Powers, Co-Director, Center on Self-Determination, Oregon Health Sciences University; Dr. Marlon Priest, Professor of Emergency Medicine, University of Alabama at Birmingham; Dr. Susan Reinhard, Co-Director, Center for State Health Policy, Rutgers University and Chairperson of the Advisory Panel on Medicare Education; Dr. Everard Rutledge, Vice President of Community Health, Bon Secours Health Systems, Inc.; Dallas Salisbury, President and Chief Executive Officer, Employee Benefit Research Institute; Rosemarie Sweeney, Vice President, Socioeconomic Affairs and Policy Analysis, American Academy of Family Physicians; and Bruce Taylor, Director, Employee Benefit Policy and Plans, Verizon Communications.

The agenda for the May 11, 2004, meeting will include the following:

- Recap of the previous (February 5, 2004) meeting.
- Centers for Medicare & Medicaid Services Update/ Center for Beneficiary Choices Update.
- Medicare Modernization Act.
- Monitoring the Utilization of Drugs Through the Use of the Drug Card.
- Medicare Part D Benefit Overview.
- Public Comment.
- Listening Session with CMS Leadership.
- Next Steps.

Individuals or organizations that wish to make a 5 minute oral presentation on an agenda topic must submit a written copy of the oral presentation to Lynne Johnson, Health Insurance Specialist, Division of Partnership Development, Center for Beneficiary Choices, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mail stop S2–23–05, Baltimore, MD 21244–1850 or by e-mail at *ljohnson3@cms.hhs.gov* no later than 12 noon, May 4, 2004. The number of oral presentations may be limited by the time available. Individuals not wishing to make a presentation may submit written comments to Ms. Johnson by 12 noon, May 4, 2004. The meeting is open to the public, but attendance is limited to the space available.

*Special Accommodation:* Individuals requiring sign language interpretation or other special accommodations must contact Ms. Johnson at least 15 days before the meeting.

**Authority:** Sec. 222 of the Public Health Service Act (42 U.S.C. 217a) and sec. 10(a) of Pub. L. 92–463 (5 U.S.C. App. 2, sec. 10(a) and 41 CFR 102–3).

(Catalog of Federal Domestic Assistance Program No. 93.733, Medicare— Hospital Insurance Program; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 8, 2004.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–8833 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–4071–N2]**

### Medicare Program; Listening Sessions on Performance Measures for Public Reporting on the Quality of Hospital Care During April, May, and June 2004

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces dates and locations for five listening sessions to be held in various sites throughout the country to focus discussion on the next steps in the development of an expanded set of performance measures for public reporting on the quality of hospital care. Health care consumers, payers, plans, providers, purchasers, and other interested parties are invited to attend these sessions to present their individual views. The opinions and alternatives provided during these sessions will assist us in our collaboration with the National Voluntary Hospital Reporting Initiative, as well as in our other hospital quality reporting and improvement efforts. Attendance at the listening session is free and open to the public, but advance registration is strongly encouraged.

**DATES:** *Session Dates:* The dates, time, and location of the five listening sessions are as follows:

Tuesday, April 27, 2004 Time: 9 a.m. to 12 p.m. Location: Boston, MA. Site: Hilton Hotel-Logan Airport: 85 Terminal Road, Boston, MA 02128. Phone: (617) 568–6700. The notice announcing the April 27, 2004 Listening Session was previously published in the March 26, 2004 **Federal Register** (69 FR 15884).

Monday, May 17, 2004 Time: 1 p.m. to 5 p.m. Location: Orlando, FL. Site: Holiday Inn Hotel and Suites at Universal Orlando, 5905 Kirkman Road, Orlando, FL 32819. Phone: (407) 351–3333.

Tuesday, June 8, 2004 Time: 1 p.m. to 5 p.m. Location: Dallas, TX. Site: Cooper Guest Lodge, 12230 Preston Road, Dallas, TX 75230. Phone: (972)-386–0306.

Monday, June 14, 2004 Time: 1 p.m. to 5 p.m. Location: San Francisco, CA. Site: San Francisco Airport Marriott, 1800 Old Bayshore Highway, Burlingame, CA 94010. Phone: (650) 692–9100.

Monday, June 28, 2004 Time: 1 p.m. to 5 p.m. Location: Chicago, IL. Site: Oak Brook Marriott, 1401 West 22nd

Street, Oak Brook, IL 60523. Phone: (630) 573–8555.

*Comment Deadline:* We must receive written comments by July 30, 2004.

**ADDRESSES:** We will accept written comments or other statements, not to exceed three single-spaced, typed pages received by July 30, 2004. Send written comments, or other statements via mail to Lisa Lang, Centers for Medicare & Medicaid Services, Quality Measurement and Health Assessment Group, Mailstop S3–24–14, 7500 Security Boulevard, Baltimore, Maryland 21244–1850; or via email to *llang@cms.hhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Lisa Lang, (410) 786–1182. You may also send inquiries via email to *llang@cms.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In December 2002, the American Hospital Association (AHA), the Federation of American Hospitals (FAH), and the Association of American Medical Colleges (AAMC) joined the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and CMS in the development of the National Voluntary Hospital Reporting Initiative (NVHRI), a voluntary initiative to collect and report hospital quality performance information. This collaboration expanded to include the National Quality Forum (NQF), Agency for Healthcare Research and Quality (AHRQ), American Medical Association (AMA), Consumer-Purchaser Disclosure Project, American Association of Retired Persons (AARP), American Federation of Labor-Congress of Industrial Organizations (AFL–CIO), and other external stakeholders. The collaborators support this initiative as the beginning of an ongoing effort to make hospital performance information more accessible to the public, payers, and providers of care and to stimulate the adoption of quality improvement strategies. As part of the NVHRI, hospitals across the country are currently voluntarily reporting a "starter set" of 10 clinical performance measures for three clinical conditions (heart attack, heart failure, and pneumonia) on the CMS website *(http://www.cms.hhs.gov)*.

In furtherance of this effort, we intend to engage the broad stakeholder community to identify its wishes for what should be included in an expanded set of measures for hospital public reporting. With input from the public and private sectors and from consumers, we will identify a set of measures that are both robust and of high priority to these stakeholders. We are working closely with our collaborators in the NVHRI on this effort, and we will be joined in hosting several of the sessions by various collaborators, as well as local providers, purchasers, and consumer organizations.

The discussion at the listening sessions will draw upon, but not be limited to, priority areas for clinical quality performance measurement identified by the National Quality Forum, the Institute of Medicine, and others. We anticipate that these listening sessions will help identify priority areas for assessing clinical quality of care—some of which have performance measures that are ready for the immediate next phase of public reporting, and others in which measures will need refinement or final testing. We also expect that some areas of interest will require additional research and development. After reviewing the set of measures determined to be appropriate for public reporting, we will ask the National Quality Forum to formally consider any measures that it has not yet endorsed.

The listening sessions are a key element of the CMS Hospital Quality Initiative. The Hospital Quality Initiative uses a variety of tools to stimulate and support significant improvement in hospital care quality. The initiative aims to refine and standardize hospital data, data transmission, and performance measures to construct a quality of care measurement set for hospitals that is robust, prioritized, and widely used. Our ultimate goal is that all private and public purchasers, oversight and accrediting entities, payers, and providers of hospital care would voluntarily use the same measures in their public reporting activities.

Through the listening sessions, we expect to be able to identify a robust and comprehensive measure set for hospital public reporting, and thereby support the efforts of the NVHRI, as well as the CMS Quality Improvement Organization (QIO) program and other CMS hospital quality improvement and reporting efforts. The listening sessions will provide a unique opportunity to consult with a broad and diverse set of public and private stakeholders to assess the face validity and demand for measures to be proposed for the next and subsequent expansions of the current public reporting activity.

In advance of the meeting, participants may wish to consult the CMS Hospital Quality Initiative Website (*http://www.cms.hhs.gov/quality/hospital*) to learn more about the NVHRI and other activities related to the CMS Hospital Quality Initiative. Participants may also wish to review relevant reports of the National Quality Forum (such as "National Voluntary Consensus Standards for Hospital Care: An Initial Performance Measure Set" and "Reaching the Tipping Point: Measuring and Reporting Quality Using the NQF-Endorsed Hospital Care Measures") and the Institute of Medicine (such as "Priority Areas for National Action Transforming Health Care Quality"). These reports are available on those organizations' websites.

More detailed information about this project and subsequent listening sessions, the Hospital Quality Initiative, the NVHRI, and other related activities may be found on our website at (*http://www.cms.hhs.gov/quality/hospital/*).

In the March 26, 2004 **Federal Register** (69 FR 15884), we published a notice announcing the April 27, 2004 listening session. In that notice, we stated that we would publish a subsequent notice announcing the dates and locations for the remaining listening sessions in the series.

## II. Listening Session Format

We anticipate that the format for each listening session will be similar. First, we will describe our current activities related to public reporting of hospital quality measures, including the NVHRI. The next portion of the meeting will be reserved for a panel discussion and comments from key local stakeholders concerning public reporting activities and quality performance priorities. The last portion of the meeting will be reserved for comments, questions, and feedback from interested parties in attendance. Sessions in Orlando, FL., Dallas, TX., San Francisco, CA., and Chicago, IL. may also afford opportunities for smaller, more focused discussions of particular topics. To obtain the agenda for a particular listening session, please consult (*http://www.cms.hhs.gov/quality/hospital*).

Time for participants to ask questions or offer comments will be limited according to the number of registered participants. Individuals who wish to offer comments need not indicate their interest in advance, but they should register for and attend the meeting.

We are interested in a national public dialogue on public reporting of hospital care performance beyond the ten measures currently included in the NVHRI. We believe that an active discussion will help us clearly identify the complementary and competing priorities and concerns of the various stakeholders interested in public reporting. Therefore, we are providing

an opportunity for those who are unable to attend the listening sessions in person to submit written comments to one of the addresses listed in the **ADDRESSES** section of this notice by July 30, 2004. We will not be able to respond personally to the written comments received. However, summaries of each listening session and written comments received will be posted on the CMS website at (*http://www.cms.hhs.gov/quality/hospital*).

### III. Registration Instructions

The New York State Quality Improvement Organization, IPRO, is coordinating registration for all listening sessions. There is no registration fee to attend any of the sessions. You may register online by visiting the IPRO website at (*http://www.ipro.org*), or you may call 1–800–852–3685, ext. 258. You will receive a registration confirmation.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 15, 2004.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–8994 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1363–N]**

## Medicare Program; May 17, 2004, Meeting of the Practicing Physicians Advisory Council

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council (the Council). The Council will be meeting to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary of the Department of Health and Human Services (the Secretary). This meeting is open to the public.

**DATES:** The meeting is scheduled for May 17, 2004, from 8:30 a.m. until 5 p.m. e.s.t.

**ADDRESSES:** The meeting will be held in Room 705A, 7th floor, at the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

*Meeting Registration:* Persons wishing to attend this meeting must contact John Lanigan, Council Coordinator, by e-mail at *Jlanigan@cms.hhs.gov* or by telephone at (410) 786–2312, at least 72 hours in advance to register. Persons not registered in advance will not be permitted into the Humphrey Building and will not be permitted to attend the meeting. Persons attending the meeting will be required to show a photographic identification, preferably a valid driver's license, before entering the building.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Simon, M.D., Executive Director, Practicing Physicians Advisory Council, 7500 Security Blvd., Mail Stop C4–11–27, Baltimore, MD 21244–1850, telephone (410) 786–2312, or e-mail *Ksimon@cms.hhs.gov*. News media representatives must contact the CMS Press Office, (202) 690–6145. Please refer to the CMS Advisory Committees Information Line (1–877–449–5659 toll free)/(410–786–9379 local) or the Internet at *http://www.cms.hhs.gov/faca/ppac/default.asp* for additional information and updates on committee activities.

**SUPPLEMENTARY INFORMATION:** The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act (the Act) to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services not later than December 31 of each year.

The Council consists of 15 physicians, each of whom must have submitted at least 250 claims for physicians' services under Medicare in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 members of the Council must be physicians as described in section 1861(r)(1) of the Act; that is, State-licensed doctors of medicine or osteopathy. The remaining 4 members may include dentists, podiatrists, optometrists and chiropractors. Members serve for overlapping 4-year terms; terms of more than 2 years are contingent upon the renewal of the Council by appropriate action prior to its termination. Section 1868(a) of the Act provides that nominations to the Secretary for Council membership must be made by medical organizations representing physicians.

The Council held its first meeting on May 11, 1992. The current members are: James Bergeron, M.D.; Ronald Castellanos, M.D.; Rebecca Gaughan, M.D.; Carlos R. Hamilton, M.D.; Dennis K. Iglar, M.D.; Joe Johnson, D.C.; Christopher Leggett, M.D.; Barbara McAneny, M.D.; Laura B. Powers, M.D.; Michael T. Rapp, M.D.; Robert L. Urata, M.D. Four new Council members will be sworn-in on May 17, 2004. The new nominees to be sworn-in are Jose Azocar, M.D.; Peter Grimm, D.O.; Geraldine O'Shea, D.O.; and Anthony Senagore, M.D.

The meeting will commence with a status report and discussion on prior meeting recommendations. Additionally, updates will be provided on the Health Insurance Portability and Accountability Act, Physicians Regulatory Issues Team, and Competitive Bidding. Council updates will be followed by discussion and comment on the following agenda topics:

- Enrollment and PECOS.
- Medical Care for Undocumented Aliens.
- SNF Consolidated Billing.
- Medicare Graduate Medical Education Payment.

For additional information and clarification on these topics, contact the Executive Director, listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individual physicians or medical organizations that represent physicians wishing to make a 5-minute oral presentation on agenda issues must contact the Executive Director by 12 noon, May 7, 2004, to be scheduled. Testimony is limited to agenda topics only. The number of oral presentations may be limited by the time available. A written copy of the presenter's oral remarks must be submitted to John Lanigan, Council Coordinator, no later than 12 noon, May 7, 2004, for distribution to Council members for review prior to the meeting. Physicians and medical organizations not scheduled to speak may also submit written comments to the Administrative Officer for distribution. The meeting is open to the public, but attendance is limited to the space available.

*Special Accommodations:* Individuals requiring sign language interpretation or other special accommodation must

contact John Lanigan by e-mail at *Jlanigan@cms.hhs.gov* or by telephone at (410) 786–2312 at least 10 days before the meeting.

**Authority:** (Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Pub. L. 92–463 (5 U.S.C. App. 2, section 10(a).)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: April 9, 2004.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 04–8831 Filed 4–22–04; 8:45 am]

BILLING CODE 4120–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2004–17580]**

### Merchant Marine Personnel Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of committee renewal.

**SUMMARY:** The Secretary of the Department of Homeland Security has determined that the renewal of the Merchant Marine Personnel Advisory Committee (MERPAC) is necessary and in the public interest in connection with the performance of the duties of the Commandant of the U.S. Coast Guard. This determination follows consultation with the Committee Management Secretariat, General Services Administration. Accordingly, the Secretary has renewed the MERPAC charter.

**DATES:** The MERPAC charter was renewed on March 22, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Gould, Assistant Executive Director of MERPAC at (202) 267–6890.

**SUPPLEMENTARY INFORMATION:** *Name of Committee:* The Merchant Marine Personnel Advisory Committee (MERPAC).

*Purpose and Objectives:* MERPAC is an advisory committee operating under the Federal Advisory Committee Act, 5 U.S.C. App. 2 (Pub. L. 92–463, 86 Stat. 770, as amended). The Committee advises the Secretary of the Department of Homeland Security and the Commandant of the Coast Guard on matters relating to the training, qualification, licensing, certification, and fitness of seamen serving in the U.S. merchant marine. This notice and the charter are available on the Internet by going to *http://dms.dot.gov/search/searchFormSimple.cfm* and inserting "17580."

*Balanced Membership Plans:* The Committee consists of not more than 19 members as follows: nine active U.S. merchant mariners—including three deck officers, three engineering officers, two unlicensed seamen, and one pilot; six marine educators—including three from maritime academies and three from other maritime training institutions; two from shipping companies; and two from the general public.

Duration: Continuing.

*Responsible DHS Official:* Rear Admiral Thomas H. Gilmour, Commandant (G–M), U.S. Coast Guard, 2100 Second St., SW., Washington, DC 20593–0001. His telephone number is 202–267–2200.

Dated: April 16, 2004.

**Joseph J. Angelo,**

*Director of Standards, Marine Safety, Security & Environmental Protection.*

[FR Doc. 04–9201 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2004–17495]**

### Merchant Marine Personnel Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meetings.

**SUMMARY:** The Merchant Marine Personnel Advisory Committee (MERPAC) and its working groups will meet to discuss various issues relating to the training and fitness of merchant marine personnel. MERPAC advises the Secretary of Homeland Security on matters relating to the training, qualifications, licensing, and certification of seamen serving in the U.S. merchant marine. All meetings will be open to the public.

**DATES:** MERPAC will meet on Wednesday, June 2, 2004, from 8 a.m. to 4 p.m. and on Thursday, June 3, 2004, from 8 a.m. to 4 p.m. These meetings may adjourn early if all business is finished. Requests to make oral presentations should reach the Coast Guard on or before May 19, 2004. Written material and requests to have a copy of your material distributed to each member of the committee or subcommittee should reach the Coast Guard on or before May 19, 2004.

**ADDRESSES:** MERPAC will meet on both days in Room 2415 of the Coast Guard Headquarters Building, 2100 Second St., SW., Washington, DC 20593. Further directions regarding the location of Coast Guard Headquarters may be obtained by contacting Mr. Mark Gould (202) 267–6890. Send written material and requests to make oral presentations to Commander Brian J. Peter, Commandant (G–MSO–1), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. This notice is available on the Internet at *http://dms.dot.gov/search/searchFormSimple.cfm.*

**FOR FURTHER INFORMATION CONTACT:** For questions on this notice, contact Commander Brian J. Peter, Executive Director of MERPAC, or Mr. Mark C. Gould, Assistant to the Executive Director, telephone 202–267–6890, fax 202–267–4570, or e-mail *mgould@comdt.uscg.mil.*

**SUPPLEMENTARY INFORMATION:** Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2 (Pub. L. 92–463, 86 Stat. 770, as amended).

**Agenda of Meeting on June 2, 2004**

The full committee will meet to discuss the objectives for the meeting. The committee will then break up into the following working groups as necessary: Task statement 30, concerning utilizing military sea service for STCW certifications; Task statement 36, concerning recommendations on a training program for officers in charge of an engineering watch coming up through the hawsepipe; Task statement 37, concerning credit for sea service on vessels with no, or limited, underway time; Task statement 38, concerning improvements to STCW certificates; Task statement 40, concerning methods to determine the date at which a mariner established competency in Basic Safety Training in light of National Maritime Policy Letter 12–01; Task statement 42, concerning recommendations on actual demonstrations of skills for masters and chief mates on ships of between 500 and 3,000 gross tonnage (ITC) on international and near-coastal voyages; Task statement 43, concerning recommendations on a training and assessment for able-bodied seamen on sea-going vessels in preparation for discussions of this issue at the Subcommittee on Standards of Training and Watchkeeping at the International Maritime Organization; and Task statement 44, concerning security training and certification for vessel personnel, vessel security officer, and

other vessel personnel. These task statements may be viewed at the MERPAC Web site at *http://www.uscg.mil/hq/g-m/advisory/merpac/merpac.htm.*

New working groups may be formed to address issues proposed by the Coast Guard, MERPAC members, or the public. At the end of the day, the working groups will make a report to the full committee on what has been accomplished in their meetings. No action will be taken on these reports on this date.

**Agenda of Meeting on June 3, 2004:**

The agenda comprises the following:

(1) Introduction.

(2) Working Groups' Reports

(a) Task Statement 30, concerning Utilizing military sea service for STCW certifications.

(b) Task Statement 36, concerning Recommendations on a training program for officers in charge of an engineering watch coming up through the hawsepipe.

(c) Task Statement 37, concerning Credit for sea service on vessels with no, or limited, underway time.

(d) Task Statement 38, concerning Improvements to STCW Certificate.

(e) Task statement 40, concerning Qualifications in Basic Safety Training.

(f) Task statement 42, concerning Recommendations on actual demonstrations of skills for masters and chief mates on ships of between 500 and 3,000 gross tonnage (ITC) on international and near-coastal voyages.

(g) Task Statement 43, concerning Recommendations on a training and assessment program for able-bodied seamen on sea-going vessels.

(h) Task Statement 44, concerning Security training and certification for vessel personnel, vessel security officer, and other vessel personnel.

(i) Other task statements which may have been adopted for discussion and action.

(3) Other items to be discussed:

(a) Standing Committee—Prevention Through People.

(b) Briefings concerning on-going projects of interest to MERPAC.

(c) Other items brought up for discussion by the committee or the public.

**Procedural**

Both meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meetings. If you would like to make an oral presentation at a meeting, please notify the Executive Director no later than May 19, 2004. Written material for distribution at a meeting should reach the Coast Guard no later than May 19, 2004. If you would like a copy of your material distributed to each member of the committee or subcommittee in advance of the meeting, please submit 25 copies to the Executive Director no later than May 19, 2004.

**Information on Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities or to request special assistance at the meetings, contact the Assistant Executive Director as soon as possible.

Dated: April 15, 2004.

**Joseph J. Angelo,**

*Director of Standards, Marine Safety, Security and Environmental Protection.*

[FR Doc. 04–9198 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1508–DR]**

### Maine; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Maine (FEMA–1508–DR), dated February 5, 2004, and related determinations.

**EFFECTIVE DATE:** April 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Maine is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of February 5, 2004:

Sagadahoc County for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–9221 Filed 4–22–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1511–DR]**

### Federated States of Micronesia; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the Federated States of Micronesia (FEMA–1511–DR), dated April 10, 2004, and related determinations.

**EFFECTIVE DATE:** April 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated April 10, 2004, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the Federated States of Micronesia resulting from Typhoon Sudal beginning on April 8, 2004, and continuing is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the Federated States of Micronesia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective

measures (Categories A and B) under Public Assistance, including direct Federal assistance, in the designated areas, and any other forms of assistance under the Stafford Act you may deem appropriate, subject to completion of Preliminary Damage Assessments. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act and Hazard Mitigation are later requested and warranted, Federal funding under these programs will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael Karl, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the Federated States of Micronesia to have been affected adversely by this declared major disaster:

Yap State for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, at 75 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–9222 Filed 4–22–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–3196–EM]**

### North Dakota; Emergency and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of an emergency for the State of North Dakota (FEMA–3196–EM), dated April 2, 2004, and related determinations.

**EFFECTIVE DATE:** April 2, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated April 2, 2004, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act), as follows:

I have determined that the impact in certain areas of the State of North Dakota, resulting from the record snow on January 23–27, 2004, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act). I, therefore, declare that such an emergency exists in the State of North Dakota.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide emergency protective measures under the Public Assistance program to save lives, protect public health and safety, and property. Other forms of assistance under Title V of the Stafford Act may be added at a later date, as you deem appropriate. You are further authorized to provide this emergency assistance in the affected areas for a period of 48 hours. You may extend the period of assistance, as warranted. This assistance excludes regular time costs for sub-grantees' regular employees. Assistance under this emergency is authorized at 75 percent Federal funding for eligible costs.

The North Dakota Division of Emergency Management (DEM) will manage the Public Assistance operation, including project eligibility reviews, process control, and resource allocation. The Department of Homeland Security, Federal Emergency Management Agency (FEMA), will retain obligation authority, the final approval of environmental and historic preservation reviews, and will assist the North Dakota DEM to the extent that such assistance is requested by the DEM.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Anthony Russell, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of North Dakota to have been affected adversely by this declared emergency:

Dunn, McHenry, McKenzie, McLean, Mercer, and Ward Counties, and the Fort Berthold Indian Reservation for emergency protective measures (Category B) under the Public Assistance program for a period of 48 hours.

(Catalog of Federal Domestic Assistance No. 97.036, Disaster Assistance.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–9220 Filed 4–22–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–4901–N–17]**

### Federal Property Suitable as Facilities to Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Kathy Burruss, room 7266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C.

11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Heather Ranson, Division of Property Management, Program Support Center, HHS, room 5B–41; 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Coast Guard:* Commandant, United States Coast Guard, ATTN: Teresa Sheinberg, 2100 Second St., SW., Rm 6109, Washington, DC 20314–1000; (202) 267–6142; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Strets, NW., Washington, DC 20405; (202) 501–0084; *Energy:* Mr. Andy Duran, Department of Energy, Office of Engineering & Construction Management, ME–90, 1000 Independence Ave., SW., Washington, DC 20585; (202) 586–4548; *Interior:* Ms. Linda Tribby, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS5512, Washington, DC 20240; (202) 219–0728; *Navy:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: April 15, 2004.

**Mark R. Johnston,**

*Acting Director, Office of Special Needs Assistance Programs.*

**TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 4/23/2004**

**Suitable/Available Properties**

*Buildings (by State)*

New Jersey

Parcels 3, 4, 5
Former Cost Guard Station
Beach Haven Co: Ocean NJ 08008–
Landholding Agency: GSA
Property Number: 54200420005
Status: Excess
Comment: 11,644 sq. ft. bldg. w/1.4 acres, within floodplain, environmental considerations, legal restrictions
GSA Number: 1–U–NJ–499B

Tennessee

Tract 01–169
Shiloh Natl Military Park
Shiloh Co: Hardin TN 38376–
Landholding Agency: Interior
Property Number: 61200420003
Status: Excess
Comment: 1400 sq. ft., concrete block, off-site use only

Washington

Tract 03–123
Cascades National Park
Stehekin Co: Chelan WA 98852–
Landholding Agency: Interior
Property Number: 61200420004
Status: Excess
Comment: 636 sq. ft., off-site use only

Alabama

Stockpile Storage Site
Hamilton Blvd.
Theodore Co: AL 36582–
Landholding Agency: GSA
Property Number: 54200420003
Status: Excess
Comment: 43.27 acres of unimproved land
GSA Number: 4–G–AL–0772

Kentucky

Site #7
Smithland Lock & Dam 50
Hwy 387
Crittenden Co: KY 42064–
Landholding Agency: GSA
Property Number: 54200420004
Status: Excess
Comment: 26.79 acres w/boat ramp and parking, flowage easement, endangered species impact
GSA Number: 4–D–KY–0618

Hawaii

Property 100001AE≤

Naval Station
Pearl Harbor Co: Honolulu HI 96818–
Landholding Agency: Navy
Property Number: 77200420015
Status: Unutilized
Comment: 1.39 acres w/improvement

Property 100001AU
Naval Station
Pearl Harbor Co: Honolulu HI 96818–

Landholding Agency: Navy
Property Number: 77200420016
Status: Unutilized
Comment: 2.77 acres w/improvement

Property 100019AA
Naval Station
Pearl Harbor Co: Honolulu HI 96818–
Landholding Agency: Navy
Property Number: 77200420017
Status: Unutilized
Comment: 4.48 acres w/improvement

Property 100019AB
Naval Station
Pearl Harbor Co: Honolulu HI 96818–
Landholding Agency: Navy
Property Number: 77200420018
Status: Unutilized
Comment: 3.15 acres w/improvement

Property 100021AC
Naval Station
Pearl Harbor Co: Honolulu HI 96818–
Landholding Agency: Navy
Property Number: 77200420019
Status: Unutilized
Comment: 2.57 acres w/improvement

Property 100021AD
Naval Station
Pearl Harbor Co: Honolulu HI 96818–
Landholding Agency: Navy
Property Number: 77200420020
Status: Unutilized
Comment: 2.77 acres w/improvement

California

Bldgs. 9163, 962, 9621
Sandia National Lab
Livermore Co: Alameda CA 94551–
Landholding Agency: Energy
Property Number: 41200420001
Status: Unutilized
Reason: Secured Area

Trailer 067E
Lawrence Berkeley National Lab
Berkeley Co: Alameda CA 947220–
Landholding Agency: Energy
Property Number: 41200420002
Status: Excess
Reason: Extensive deterioration

Tract 16–147
Yosemite National Park
Yosemite Co: Mariposa CA 95418–
Landholding Agency: Interior
Property Number: 61200420001
Status: Unutilized
Reason: Extensive deterioration

Bldg. CH1078
Naval Base
Oxnard Co: Ventura CA 93042–5000
Landholding Agency: Navy
Property Number: 77200420001
Status: Unutilized
Reason: Extensive deterioration

Bldg. 1223
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420002
Status: Excess
Reason: Extensive deterioration

Bldg. 2514
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420003
Status: Excess
Reason: Extensive deterioration

Bldg. 14103
Marine Corps Base
Camp Pendleton Co: CA
Landholding Agency: Navy
Property Number: 77200420004
Status: Excess
Reason: Extensive deterioration

Bldg. 14104
Marine Corps Base
Camp Pendleton Co: CA 92055—
Landholding Agency: Navy
Property Number: 77200420005
Status: Excess
Reason: Extensive deterioration

Bldg. 27604
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420006
Status: Excess
Reason: Extensive deterioration

Bldg. 43311
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420007
Status: Excess
Reason: Extensive deterioration

Bldg. 22150
Marine Corps Base
Camp Pendleton Co: CA 92055+
Landholding Agency: Navy
Property Number: 77200420008
Status: Excess
Reason: Extensive deterioration

Bldg. 22154
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420009
Status: Excess
Reason: Extensive deterioration

Bldg. 22156
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 7720040010
Status: Excess
Reason: Extensive deterioration

Bldg. 210582
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200420011
Status: Excess
Reason: Extensive deterioration

Hawaii

56 Buildings
NAVMAG/NRTE
Navy Housing
Waianae Co: Oahu HI 96792–
Landholding Agency: Navy
Property Number: 77200420012
Status: Excess
Reason: Extensive deterioration

Idaho

Bldg. TAN 628
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420003
Status: Excess
Reason: Secured Area

Bldg. TRA 611
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420004
Status: Excess
Reason: Secured Area

Bldg. TRA 624/732
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420005
Status: Excess
Reason: Secured Area

Bldg. TRA 647
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420006
Status: Excess
Reason: Secured Area

Bldg. TRA651, TRA656
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420007
Status: Excess
Reason: Secured Area

Bldg. TRA 663
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420008
Status: Excess
Reason: Secured Area

Bldg. TRA 779
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415-
Landholding Agency: Energy
Property Number: 41200420009
Status: Excess
Reason: Secured Area

Michigan

Bldg. TH1
USCG Beaver Island
Charlevoix Co: MI
Landholding Agency: Coast Guard
Property Number: 88200420001
Status: Unutilized
Reason: Secured Area

Bldg. OW1
USCG Beaver Island
Charlevoix: MI
Landholding Agency: Coast Guard
Property Number: 88200420002
Status: Unutilized
Reason: Secured Area

Bldg. OW2
USCG Beaver Island
Charlevoix Co: MI
Landholding Agency: Coast Guard
Property Number: 88200420003
Status: Unutilized
Reason: Secured Area

Minnesota

Federal Building
720 St. Germain Street
St. Cloud Co: MN 56301-
Landholding Agency: GSA
Property Number: 54200420001

Status: Excess
Reason: Within 200 ft. of flammable or explosive material
GSA Number: 1–G–MN–581

Nevada

7 Bldgs.
Naval Air Station
101, 103, 201, 203, 202, 204, 206
Fallon Co: Churchill NV 89406-
Landholding Agency: Navy
Property Number: 77200420013
Status: Unutilized
Reasons: Within airport runway clear zone Secured Area

Bldg. 735B
Naval Air Station
Fallon Co: Churchill NV 89406-
Landholding Agency: Navy
Property Number: 77200420014
Status: Unutilized
Reasons: Secured Area, Extensive deterioration

New Mexico

Tract 102–73
El Malpais National Monument
Grants Co: Cibola NM 87020-
Landholding Agency: Interior
Property Number: 61200420002
Status: Unutilized
Reason: Extensive deterioration

Ohio

Petro Distribution System
4820 River Road
Cincinnati Co: Hamilton OH
Landholding Agency: GSA
Property Number: 54200420002
Status: Excess
Reasons: Within 200 ft. of flammable or explosive material
GSA Number: OH

South Carolina

Bldg. 701–6G
Jackson Barricade
Jackson Co: SC
Landholding Agency: Energy
Property Number: 41200420010
Status: Unutilized
Reason: Secured Area

Bldg. 211–000F
Nuclear Materials Processing Facility
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420011
Status: Excess
Reason: Secured Area

Bldg. 211–001F
Nuclear Materials Processing Facility
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420012
Status: Excess
Reason: Secured Area

Bldg. 211–002F
Nuclear Materials Processing Facility
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420013
Status: Excess
Reason: Secured Area

Bldg. 221–25F
Nuclear Materials Processing Facility
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420014
Status: Excess
Reason: Secured Area

Bldg. 221–001F
Nuclear Materials Processing Facility
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420015
Status: Excess
Reason: Secured Area

Bldg. 704–D
Federal Reserve Site
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420016
Status: Excess
Reason: Secured Area

Texas

Bldg. 15–016
Pantex Plant
Amarillo Co: Carson TX 79120–
Landholding Agency: Energy
Property Number: 41200420017
Status: Unutilized
Reason: Secured Area

Bldg. 4–052P
Pantex Plant
Amarillo Co: Carson TX 79120–
Landholding Agency: Energy
Property Number: 41200420018
Status: Unutilized
Reason: Secured Area

Virginia

Storage Bldg. OV2
USCG
Naval Amphibious Base
Little Creek Co: Princess Ann VA
Landholding Agency: Coast Guard
Property Number: 88200420004
Status: Excess
Reason: Secured Area

[FR Doc. 04–8979 Filed 4–22–04; 8:45 am]

BILLING CODE 4210–29–M

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Sport Fishing and Boating Partnership Advisory Council Charter

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice is published in accordance with section 9a(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988). Following consultation with the General Services Administration, the Secretary of the Interior hereby renews the Sport Fishing and Boating Partnership Council (Council) charter to continue for 2 years.

**DATES:** The charter will be filed under the Act May 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Doug Hobbs, Council Coordinator, U.S. Fish and Wildlife Service (Service), (703) 358–1711.

**SUPPLEMENTARY INFORMATION:** The purpose of the Council is to provide advice to the Secretary of the Interior through the Director of the Service to help the Department of the Interior (Department) and the Service achieve their goal of increasing public awareness of the importance of aquatic resources and the social and economic benefits of recreational fishing and boating.

The Council will represent the interests of the sport fishing and boating constituencies and industries and will consist of no more than 18 members appointed by the Secretary to assure a balanced, cross-sectional representation of public and private sector organizations. The Council will consist of two ex-officio members: Director, U.S. Fish and Wildlife Service, and the President, International Association of Fish and Wildlife Agencies (IAFWA). The 16 remaining members will be appointed at the Secretary s discretion to achieve balanced representation for recreational fishing and boating interests. The membership will comprise senior-level representatives for recreational fishing, boating, and aquatic resource conservation. These appointees must have demonstrated expertise and experience in one or more of the following areas of national interest: The director of a State agency responsible for the management of recreational fish and wildlife resources, selected from a coastal State if the President of IAFWA is from an inland State, or selected from an inland State if the President of IAFWA is from a coastal State; saltwater and freshwater recreational fishing; recreational boating; recreational fishing and boating industries; conservation of recreational fishery resources; aquatic resource outreach and education; and tourism.

The Council will function solely as an advisory body and in compliance with provisions of the Federal Advisory Committee Act (Act).

The Certification of renewal is published below.

**Certification**

I hereby certify that the renewal of the Sport Fishing and Boating Partnership Council is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by those statutory authorities as defined in Federal laws including, but not restricted to, the Federal Aid in Sport Fish Restoration Act, Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956 in furtherance of the Secretary of the Interior s statutory responsibilities for administration of the

U.S. Fish and Wildlife Service's mission to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Council will assist the Secretary and the Department of the Interior by providing advice on activities to enhance fishery and aquatic resources.

Dated: April 20, 2004.

**Gale Norton,**

*Secretary of the Interior.*

[FR Doc. 04–9386 Filed 4–21–04; 12:31 pm]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Sport Fishing and Boating Partnership Council

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the Fish and Wildlife Service announces a meeting designed to foster partnerships to enhance public awareness of the importance of aquatic resources and the social and economic benefits of recreational fishing and boating in the United States. This meeting, sponsored by the Sport Fishing and Boating Partnership Council (Council), is open to the public, and interested persons may make oral statements to the Council or may file written statements for consideration.

**DATES:** The meeting will be held on Thursday, May 6, 2004, from 9 a.m. to 4 p.m.

**ADDRESSES:** The meeting will be held at the Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

Summary minutes of the conference will be maintained by the Council Coordinator at 4401 N. Fairfax Drive, MS–3103–AEA, Arlington, VA 22203, and will be available for public inspection during regular business hours within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

**FOR FURTHER INFORMATION CONTACT:** Douglas L. Hobbs, Council Coordinator, at (703) 358–1711.

**SUPPLEMENTARY INFORMATION:** The Sport Fishing and Boating Partnership Council was formed in January 1993 to advise the Secretary of the Interior, through the Director, U.S. Fish and Wildlife Service, about sport fishing and boating issues. The Council represents the interests of the public and private sectors of the sport fishing and boating communities and is organized to enhance partnerships among industry, constituency groups, and government. The 18-member Council includes the Director of the Service and the president of the International Association of Fish and Wildlife Agencies, who both serve in ex officio capacities. Other Council members are Directors from State agencies responsible for managing recreational fish and wildlife resources and individuals who represent the interests of saltwater and freshwater recreational fishing, recreational boating, the recreational fishing and boating industries, recreational fisheries resource conservation, aquatic resource outreach and education, and tourism. The Council will convene to discuss: (1) The Council's continuing role in providing input to the Fish and Wildlife Service on the Service's strategic vision for its Fisheries Program; (2) the Council's work in its role as a facilitator of discussions with Federal and State agencies and other sportfishing and boating interests concerning a variety of national boating and fisheries management issues; and (3) the Council's role in providing the Interior Secretary with information about the implementation of the Strategic Plan for the National Outreach and Communications Program. The Interior Secretary approved the Strategic Plan in February 1999, as well as the five-year, $36-million federally funded outreach campaign authorized by the 1998 Sportfishing and Boating Safety Act that is now being implemented by the Recreational Boating and Fishing Foundation, a private, nonprofit organization.

Dated: April 14, 2004.

**Marshall P. Jones, Jr.,**

*Director.*

[FR Doc. 04–9387 Filed 4–21–04; 12:31 pm]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CO–03–840–1610–241A]**

### Canyons of the Ancients National Monument Advisory Committee Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Canyons of the Ancients National Monument (Monument) Advisory Committee (Committee), will meet as directed below.

**DATES:** The meeting will be held May 19, 2004, at the Anasazi Heritage Center in Dolores, Colorado at 9 a.m. The public comment period will begin at approximately 3 p.m. and the meeting will adjourn at approximately 3:30 p.m.

**FOR FURTHER INFORMATION CONTACT:** LouAnn Jacobson, Monument Manager or Stephen Kandell, Monument Planner, Anasazi Heritage Center, 27501 Hwy 184, Dolores, Colorado 81323; telephone (970) 882–5600.

**SUPPLEMENTARY INFORMATION:** The eleven member committee provides counsel and advice to the Secretary of the Interior, through the BLM, concerning development and implementation of a management plan developed in accordance with FLMPA, for public lands within the Monument. At this meeting, topics we plan to discuss include planning issues and management concerns, planning alternatives and other issues as appropriate.

All meetings will be open to the public and will include a time set aside for public comment. Interested persons may make oral statements at the meetings or submit written statements at any meeting. Per-person time limits for oral statements may be set to allow all interested persons an opportunity to speak.

Summary minutes of all Committee meetings will be maintained at the Anasazi Heritage Center in Dolores, Colorado. They are available for public inspection and reproduction during regular business hours within thirty (30) days of the meeting. In addition, minutes and other information concerning the Committee can be obtained from the Monument planning Web site at: *www.blm.gov/rmp/canm* which will be updated following each Committee meeting.

Dated: April 15, 2004.

**LouAnn Jacobson,**

*Manager, Canyons of the Ancients National Monument.*

[FR Doc. 04–9240 Filed 4–22–04; 8:45 am]

BILLING CODE 4310–84–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Pajaro Valley Water Management Agency Revised Basin Management Plan Project; Santa Cruz; Santa Clara, Monterey, and San Benito Counties, CA

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of availability of the final environmental impact statement.

**SUMMARY:** The Bureau of Reclamation (Reclamation) has prepared a Final Environmental Impact Statement (FEIS) for the Pajaro Valley Water Management Agency (PVWMA) Revised Basin Management Plan Project.

The purpose of the project is to address groundwater overdraft and seawater intrusion problems in the Pajaro Valley Basin. The proposed action is the approval of the connection of a PVWMA pipeline to the Santa Clara Conduit and the funding for the design, planning, and construction of a recycled water facility.

Notice of the availability of the Draft EIS was published in the **Federal Register** on September 25, 2003 (68 FR 55412). A public meeting was held on October 29, 2003 to receive comments on the Draft EIS. The FEIS contains responses to all comments received and changes made to the text of the Draft EIS as a result of those comments.

**DATES:** Reclamation will not make a decision on the proposed action until 30 days after release of the FEIS. After the 30-day waiting period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and will discuss all factors leading to the decision.

**ADDRESSES:** Copies of the FEIS in hard copy or on CD may be requested from Reclamation's South-Central California Area Office or from PVWMA's office at the following addresses:

- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, CA 93721–1813.
- Pajaro Valley Water Management Agency, 36 Brennan Street, Watsonville, CA 95076.

The document can also be viewed on PVWMA's web page at *http://www.pvwma.dst.ca.us/*

**FOR FURTHER INFORMATION CONTACT:** Ms. Lynne Silva, Bureau of Reclamation, South-Central California Area Office, telephone 559–487–5807; or Mr. Charles McNiesh, Pajaro Valley Water Management Agency, 831–722–9292.

**SUPPLEMENTARY INFORMATION:** The FEIS considers the effects of the construction of PVWMA's pipeline and the construction and operation of a water treatment facility. The water treatment facility would be used to blend imported water. In 1999, Reclamation prepared an Environmental Assessment and approved a contract assignment from Mercy Springs Water District that provided 6,260 acre feet per year of Central Valley Project (CVP) water for PVWMA. The proposed pipeline connection to the Santa Clara Conduit (a component of the CVP) would provide the means for this imported water to be delivered into PVMWA. Therefore, the FEIS considers the effects of imported water on water resources in PVMWA. Other contract assignments or transfers resulting in importing water into PVWMA are not the focus of this FEIS. Separate environmental analysis and documents would be required. Reclamation is developing an Environmental Assessment for the assignment from Broadview Water District to PVWMA. This proposed assignment is discussed in the FEIS for disclosure purposes. Broadview Water District's CVP contract supply is up to 27,000 acre feet per year. The project description and alternatives have yet to be fully developed. The environmental impacts associated with this assignment and other actions occurring in the San Joaquin Valley are outside the scope of analysis in this FEIS.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses available for public disclosure in their entirety.

Dated: January 6, 2004.

**Kirk C. Rodgers,**

*Regional Director, Mid-Pacific Region.*

[FR Doc. 04–9301 Filed 4–22–04; 8:45 am]

BILLING CODE 4310–MN–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Fish and Wildlife Service

### Trinity River Fishery Restoration Program, Weaverville, CA

**AGENCIES:** Bureau of Reclamation and Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability of the Draft Supplemental Environmental Impact Statement/Environmental Impact Report (Draft SEIS/EIR) and notice of public hearings.

**SUMMARY:** The Bureau of Reclamation, Fish and Wildlife Service, Hoopa Valley Tribe (Tribe) and Trinity County (County) have made available for public review and comment the Draft SEIS/EIR for the Trinity River Fishery Restoration Program (Program).

A final environmental impact statement (EIS) on the Program was issued in November 2000, and a Record of Decision (ROD) executed on December 19, 2000. Central Valley water and power interests filed suit in the U.S. District Court for the Eastern District of California seeking to enjoin implementation of the ROD. On March 22, 2001, the district court issued a Memorandum Decision and Order preliminarily enjoining the Federal defendants from implementing certain flow related aspects of the ROD. In its Memorandum Decision and Order the court found that the effects of reasonable and prudent measures in the two biological opinions, as well as the effects on power in light of the California energy crisis were not adequately analyzed in the EIS. This Draft SEIS/EIR addresses the court's concerns and updates alternatives.

The purpose for the project alternatives outlined in the October 2000 EIS/EIR was as follows: to restore and maintain the natural production of anadromous fish on the Trinity River mainstem downstream of Lewiston Dam. The purpose of the Draft SEIS/EIR has been amended, consistent with court orders on the Program. The revised purpose for the alternatives discussed in the Draft SEIS/EIR is as follows: to restore and maintain the natural production of anadromous fish in the Trinity River basin downstream of Lewiston Dam and to meet the U.S. Government's tribal trust obligations. Secondary consideration is given to: (a) Meeting the Trinity Basin fishery and wildlife restoration goals of the Act of October 24, 1984, Public Law 98–541, and (b) achieving a reasonable balance among competing demands for use of

Central Valley Project (CVP) water, including the requirements of fish and wildlife, agricultural, municipal and industrial, and power contractors.

**DATES:** Submit written comments on the Draft SEIS/EIR on or before June 22, 2004, at the address provided below. Two public hearings have been scheduled to receive oral or written comments regarding the project's environmental effects:

- Thursday, June 1, 2004, 4:30–7:30 p.m., Redding, CA
- Tuesday, June 3, 2004, 4:30–7:30: p.m., Hoopa, CA

**ADDRESSES:** The public hearings will be held at the following locations:

- Redding, CA—Holiday Inn, 1900 Hilltop Drive
- Hoopa, CA—Hoopa Fire Department, Highway 96

Written comments on the Draft SEIS/EIR should be sent to Mr. Russell Smith, Bureau of Reclamation, P.O. Box 723, Shasta, CA 96087; telephone: 530–275–1554; fax 530–275–2441.

Copies of the Draft SEIS/EIR (but not the previous EIS/EIR) may be requested from Mr. Smith at the above address or by calling 530–275–1554.

**FOR FURTHER INFORMATION CONTACT:** Mr. Russell Smith, Bureau of Reclamation, P.O. Box 723, Shasta, CA 96087; telephone: 530–275–1554; fax 530–275–2441.

**SUPPLEMENTARY INFORMATION:** The primary objective of the Program is to meet Federal trust responsibilities for tribal fishery resources and restore the fisheries in the Trinity River basin to the level that existed prior to the construction of the Trinity River Division (TRD) of the CVP. These actions are authorized by the Act of August 12, 1955, 69 Stat. 719; the Trinity River Basin Fish and Wildlife Management Act, Public Law 98–541 (1984), as amended, and the Central Valley Project Improvement Act, Public Law 102–575, Title XXXIV (1992) (CVPIA). The Service and Reclamation are the Federal co-leads for purposes of complying with the National Environmental Policy Act (NEPA); along with Hoopa Valley Tribe, which is also acting in a co-lead capacity. Trinity County functions as the state lead agency for purposes of complying with the California Environmental Quality Act (CEQA).

In 1983, an EIS on the Trinity River Basin Fish and Wildlife Management Program was prepared by the Service (U.S. Fish and Wildlife Service, 1983). The environmental document analyzed habitat restoration actions, watershed rehabilitation, and improvements to the Trinity River Salmon and Steelhead Hatchery (TRSSH). The 1983 EIS clarified that the hatchery's purpose was to mitigate for the loss of the 109 miles of habitat upstream of Lewiston Dam, whereas, the restoration and rehabilitation projects were explicitly designed to increase natural fish production below the dam.

In 1984, Congress enacted the Trinity River Basin Fish and Wildlife Management Act (Pub. L. 98–541). It formalized the existence of the Trinity River Basin Fish and Wildlife Task Force (Task Force) and directed the Secretary of the Interior (Secretary) to implement measures to restore fish and wildlife habitat in the Trinity River Basin. The Task Force was directed at implementation of a fish and wildlife management program to "restore natural fish and wildlife populations to levels approximating those which existed immediately prior to the construction of the Trinity Division." In 1996, Congress reauthorized and amended the original Trinity River Basin Fish and Wildlife Management Act (Pub. L. 104–143). The 1996 amendments clarified that "restoration is to be measured not only by returning adult anadromous fish spawners, but by the ability of dependent tribal, commercial, and sport fisheries to participate fully, through enhanced in-river and ocean harvest opportunities, in the benefits of restoration * * *."

In 1992, Congress passed the CVPIA (Pub. L. 102–575, Title XXXIV) in order to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley, including the Trinity River Basin. Specifically, the CVPIA provides at section 3406(b)(23), that "[i]n order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe and meet the fishery restoration goals of Public Law 98–541," the Secretary is directed to complete the Trinity River Flow Evaluation Study (TRFES) and to develop recommendations "based on the best available scientific data, regarding permanent instream fishery flow requirements and TRD operating criteria and procedures for the restoration and maintenance of the Trinity River fishery." The CVPIA also specifically provided for the Secretary to consult with the Hoopa Valley Tribe on the TRFES and, upon the Tribe's concurrence, to implement the restoration recommendations accordingly.

A joint EIS/EIR for the Program was prepared by the Service, Reclamation, Trinity County, and the Hoopa Valley Tribe, and was completed in October 2000. A ROD selecting the alternative to be implemented for the Program was signed by the Secretary, with the concurrence of the Hoopa Valley Tribe, pursuant to section 3406(b)(23) of the CVPIA, and issued in December 2000. However, the EIR was not certified by Trinity County and it is not a finalized document under CEQA.

Subsequent to execution of the ROD, water and power interests in the Central Valley of California amended a previously filed lawsuit in Federal court against the Federal agencies materially involved in either the decision making process for the ROD or the associated Endangered Species Act (ESA) approvals for the Program (Reclamation, the Service, and the National Marine Fishery Service (NMFS)), in Federal district court. Plaintiffs sought, and were granted a preliminary injunction for implementation of certain flow-related aspects of the ROD. The terms of the injunction limit the increase in flows in the Trinity River which may be implemented in the ROD, but allow the Secretary to proceed with all other activities approved by the ROD. *Westlands Water District* v. *United States Department of the Interior*, CIVF–00–7124–OWW/DLB (E.D. Cal., filed May 3, 2001).

The lead agencies published a Notice of Intent on March 25, 2002 (67 FR 13647) announcing plans to produce a Draft SEIS/EIR and soliciting public input and comment on the process. A scoping meeting was held in Redding, California on May 9, 2002.

On December 10, 2002, the court issued a Memorandum Decision and Order re: Cross-motions for Summary Judgment to address the merits of the litigation including the validity of the EIS and ROD. The court's ruling on the merits found that the EIS failed to comply with Federal environmental statutes in certain respects and enjoined, in part, the ROD until Interior completes the Draft SEIR/EIR. The court's December 10 memorandum provided detailed direction regarding the preparation of the Draft SEIS/EIR that was not available for the previous scoping effort, including direction on the purpose statement for the Draft SEIS/EIR, alternatives to be considered in the Draft SEIS/EIR, and a timeline for completion of the Draft SEIS/EIR.

On February 20, 2003, the court entered final judgment in the case, finding that the ROD for the Program, issued on December 19, 2000, and the associated biological opinions issued by the Service and the NMFS, were unlawful in part. The court found that the ROD was in violation of NEPA in that it had an improperly framed purpose statement and the range of alternatives was too narrow. Certain

reasonable and prudent measures set forth in the biological opinions were found to exceed the agencies' authority under the ESA in that they required major modifications to operations of the CVP. The court also found the Government in breach of its general and specific Federal trust obligations to the Hoopa Valley and Yurok Tribes, as set out under CVPIA section 3406(b)(23) and related statutes. The case currently is on appeal to the U. S. Court of Appeals for the Ninth Circuit.

In response to the more detailed direction from the district court's ruling, additional scoping meetings were held on July 8, 2003, in Redding, California, and July 10, 2003, in Hoopa, California, to solicit public input on alternatives, concerns, and issues to be addressed in the Draft SEIS/EIR.

The Draft SEIS/EIR updates information on alternatives described in the October 2000 EIS/EIR. These alternatives include: Existing Conditions, No Action, Mechanical Restoration (revised to address the court's concerns and using information submitted by commenters), Percent Inflow (modified to address the court's concerns), Flow Evaluation and Maximum Flow. An additional alternative is also evaluated: a 70 Percent Inflow Alternative, based on comments documented in the October 2000 EIS/EIR. Consistent with the October 2000 EIS/EIR, the Flow Evaluation Alternative remains the designated Preferred Alternative.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: March 30, 2004.

**Willie R. Taylor,**

*Director, Office of Environmental Policy and Compliance.*

[FR Doc. 04–9300 Filed 4–22–04; 8:45 am]

BILLING CODE 4310–MN–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–1035 (Final)]**

### Certain Color Television Receivers From Malaysia

**AGENCY:** International Trade Commission.

**ACTION:** Termination of investigation.

**SUMMARY:** On April 16, 2004, the Department of Commerce published notice in the **Federal Register** of a negative final determination of sales at less than fair value in connection with the subject investigation (69 FR 20592). Accordingly, pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)), the antidumping investigation concerning certain color television receivers from Malaysia (investigation No. 731–TA–1035 (Final)) is terminated.

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Debra Baker (202–205–3180), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. 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 (*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*.

**Authority:** This investigation is being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

Issued: April 20, 2004.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–9302 Filed 4–22–04; 8:45 am]

BILLING CODE 7020–02–P

## INTERNATIONAL TRADE COMMISSION

**[Investigations Nos. 731–TA–1054 and 1055 (Final)]**

### Light-Walled Rectangular Pipe and Tube From Mexico and Turkey

**AGENCY:** International Trade Commission.

**ACTION:** Scheduling of the final phase of antidumping investigations.

**SUMMARY:** The Commission hereby gives notice of the scheduling of the final phase of antidumping investigations Nos. 731–TA–1054 and 1055 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Mexico and Turkey of light-walled rectangular ("LWR") pipe and tube, provided for in subheading 7306.60.50 of the Harmonized Tariff Schedule of the United States.[1]

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's rules of practice and procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

**EFFECTIVE DATE:** April 13, 2004.

**FOR FURTHER INFORMATION CONTACT:** Fred Ruggles (202–205–3187), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

[1] For purposes of these investigations, the Department of Commerce has defined the subject merchandise as "welded carbon-quality pipe and tube of rectangular (including square) cross-section, having a wall thickness of less than 0.156 inch. These LWR pipe and tube have rectangular cross sections ranging from 0.375 x 0.625 inches to 2 x 6 inches, or square cross sections ranging from 0.375 to 4 inches, regardless of specification." 69 FR 19403, Apr. 13, 2004. The written description of the scope is dispositive.

**SUPPLEMENTARY INFORMATION:**

**Background**

The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce that imports of LWR pipe and tube from Mexico and Turkey are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on September 9, 2003, by California Steel and Tube, City of Industry, CA; Hannibal Industries, Los Angeles, CA; Leavitt Tube Co., Chicago, IL; Maruichi American Corp., Santa Fe Springs, CA; Northwest Pipe Co., Portland, OR; Searing Industries, Inc., Rancho Cucamongo, CA; Vest, Inc., Los Angeles, CA; and Western Tube and Conduit Corp., Long Beach, CA.

**Participation in the Investigations and Public Service List**

Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

**Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List**

Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

**Staff Report**

The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on August 17, 2004, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

**Hearing**

The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on August 31, 2004, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before August 25, 2004. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on August 27, 2004, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

**Written Submissions**

Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is August 24, 2004. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is September 7, 2004; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before September 7, 2004. On September 22, 2004, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before September 24, 2004, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: April 20, 2004.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–9243 Filed 4–22–04; 8:45 am]

BILLING CODE 7020–02–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–504]**

## In the Matter of Certain Signature Capture Transaction Devices and Component Parts Thereof, and Systems That Employ Such Devices; Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement and Withdrawal of the Complaint

**AGENCY:** International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ's") initial determination ("ID") granting a joint motion to terminate the above-captioned investigation as to two respondents on

the basis of a settlement agreement and a motion by complainant to withdraw the complaint as to the remaining respondent.

**FOR FURTHER INFORMATION CONTACT:** Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the public version of the ID and all nonconfidential 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. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation, which concerns allegations of unfair acts in violation of section 337 of the Tariff Act of 1930 in the importation and sale of certain signature capture transaction devices, component parts thereof, and systems that employ such devices on January 9, 2004, based on a complaint filed by NCR Corporation, ("NCR") of Dayton, Ohio. The respondents named in the notice of investigation are Ingenico S.A., d/b/a Groupe Ingenico of Puteaux Cedex, France, and Ingenico Corp., of Roswell, Georgia (collectively "Ingenico"), and SMTC Corporation of Ontario, Canada ("SMTC").

On March 5, 2004, NCR and Ingenico filed a joint motion to terminate the investigation on the basis of the settlement agreement, and NCR filed a motion to terminate the investigation with respect to SMTC based on withdrawal of the complaint as to SMTC. The Commission investigative attorney supported both motions.

On March 22, 2004, the presiding ALJ issued the subject ID (Order No. 8) granting the joint motion of NCR and Ingenico to terminate the investigation on the basis of a settlement agreement and NCR's motion to withdraw the complaint as to SMTC.

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 section 210.42 of the Commission's rules of practice and procedure (19 CFR 210.42).

By order of the Commission.

Issued: April 16, 2004.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–9242 Filed 4–22–04; 8:45 am]

BILLING CODE 7020–02–P

## DEPARTMENT OF LABOR

### Employment Standards Administration; Wage and Hour Division

### Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Divisions, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

### Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

*Volume I*

New York
NY030013 (Jun. 13, 2003)

*Volume II*

Maryland
MD030028 (Jun. 13, 2003)
MD030029 (Jun. 13, 2003)

*Volume III*

None

*Volume IV*

Illinois
IL030011 (Jun. 13, 2003)
IL030012 (Jun. 13, 2003)
IL030013 (Jun. 13, 2003)
IL030014 (Jun. 13, 2003)
IL030015 (Jun. 13, 2003)
IL030020 (Jun. 13, 2003)
Michigan.
MI030007 (Jun. 13, 2003)
Minnesota
MN030007 (Jun. 13, 2003)
MN030008 (Jun. 13, 2003)
MN030010 (Jun. 13, 2003)
MN030013 (Jun. 13, 2003)
MN030015 (Jun. 13, 2003)
MN030019 (Jun. 13, 2003)
MN030027 (Jun. 13, 2003)
MN030044 (Jun. 13, 2003)
MN030048 (Jun. 13, 2003)
MN030052 (Jun. 13, 2003)
MN030058 (Jun. 13, 2003)
MN030059 (Jun. 13, 2003)
MN030061 (Jun. 13, 2003)
MN030062 (Jun. 13, 2003)
Wisconsin
WI030011 (Jun. 13, 2003)

*Volume V*

Missouri
MO030002 (Jun. 13, 2003)
MO030009 (Jun. 13, 2003)
MO030012 (Jun. 13, 2003)
MO030015 (Jun. 13, 2003)
MO030020 (Jun. 13, 2003)
MO030044 (Jun. 13, 2003)
MO030045 (Jun. 13, 2003)
MO030048 (Jun. 13, 2003)
MO030050 (Jun. 13, 2003)

*Volume VI*

North Dakota
ND030001 (Jun. 13, 2003)
ND030003 (Jun. 13, 2003)
ND030006 (Jun. 13, 2003)
ND030007 (Jun. 13, 2003)
ND030008 (Jun. 13, 2003)
ND030009 (Jun. 13, 2003)
ND030010 (Jun. 13, 2003)
ND030017 (Jun. 13, 2003)

*Volume VII*

None

**General Wage Determination Publication**

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help Desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 15th day of April, 2004.

**Terry Sullivan,**

*Acting Chief, Branch of Construction Wage Determinations.*

[FR Doc. 04–8921 Filed 04–22–04; 8:45 am]

BILLING CODE 4510–27–M

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. ICR 1218–0209 2003]**

### Agency Information Collection Activities; Announcement of OMB Approval

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is announcing that a collection of information regarding occupational injuries and illnesses has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This document announces the OMB approval number and expiration date.

**FOR FURTHER INFORMATION CONTACT:** Joseph J. DuBois, Office of Statistical Analysis, Occupational Safety and Health Administration. U.S. Department of Labor, Room N3507, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–1875.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of July 3, 2003 (68 FR 39985–39986), the Agency announced its intent to request an extension of approval for the OSHA Data Collection System. This data collection will request occupational injury and illness data and employment and hours worked data from selected employers in the following Standard Industrial Classifications (SICs):

20–39 Manufacturing
0181 Ornamental Floriculture and Nursery Products
0182 Food Crops Grown Under Cover
0211 Beef Cattle Feedlots
0212 Beef Cattle, Except Feedlots
0213 Hogs
0214 Sheep and Goats
0219 General Livestock, Except Dairy and Poultry
0241 Dairy Farms
0251 Broiler, Fryer, and Roaster
0252 Chicken Eggs
0253 Turkeys and Turkey Eggs
0254 Poultry Hatcheries
0259 Poultry and Eggs, NEC
0291 General Farms, Primarily Livestock and Animal Specialties
0782 Lawn and Garden Services (North Carolina only)
0783 Ornamental Shrub and Tree Services
4212 Local Trucking Without Storage
4213 Trucking, Except Local
4214 Local Trucking With Storage
4215 Courier Services, Except Air
4221 Farm Product Warehousing and Storage
4222 Refrigerated Warehousing and Storage
4225 General Warehousing and Storage, NEC
4231 Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation
4311 United States Postal Service
4491 Marine Cargo Handling
4492 Towing and Tugboat Services
4493 Marinas
4499 Water Transportation Services, NEC
4512 Air Transportation, Scheduled
4513 Air Courier Services
4581 Airports, Flying Fields, & Airport Terminal Services
4783 Packing and Crating
4952 Sewerage Systems (California only)
4953 Refuse Systems
4959S Sanitary Services, NEC (California only)
5012 Automobiles and Other Motor Vehicles
5013 Motor Vehicle Supplies and New Parts
5014 Tires and Tubes
5015 Motor Vehicle Parts, Used

5031 Lumber, Plywood, Millwork, and Wood Panels
5032 Brick, Stone, and Related Construction Materials
5033 Roofing, Siding and Insulation Materials
5039 Construction Materials, NEC
5051 Metal Service Centers and Offices
5052 Coal and Other Minerals and Ores
5093 Scrap and Waste Materials
5141 Groceries, General Line
5142 Packaged Frozen Food Products
5143 Dairy Products, Except Dried or Canned
5144 Poultry and Poultry Products
5145 Confectionery
5146 Fish and Seafoods
5147 Meats and Meat Products
5148 Fresh Fruits and Vegetables
5149 Groceries and Related Products, NEC
5181 Beer and Ale
5182 Wine and Distilled Alcoholic Beverages
5211 Lumber and Other Building Materials Dealers
5311 Department Stores (Pilot collection)
5411 Grocery Stores (Maryland only)
8051 Skilled Nursing Care Facilities
8052 Intermediate Care Facilities
8059 Nursing and Personal Care Facilities, NEC
8062 General Medical and Surgical Hospitals (Pilot collection)
8063 Psychiatric Hospitals (Pilot collection)
8069 Specialty Hospitals, Except Psychiatric (Pilot collection)

In addition, OSHA will collect data from establishments that were visited by OSHA after October 1, 1997 and are required to maintain the OSHA Log. Information will also be collected from Public Sector establishments in certain State Plan States.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). OMB has renewed its approval for the information collection and assigned OMB control number 1218–0209. The approval expires 03/31/2007. Under 5 CFR 1320.5(b), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Dated: April 19, 2004.

**John L. Henshaw,**

*Assistant Secretary of Labor.*

[FR Doc. 04–9256 Filed 4–22–04; 8:45 am]

BILLING CODE 4510–26–M

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors Search Committee for LSC President & Inspector General

**TIME AND DATE:** The Search Committee for LSC President and Inspector General of the Legal Services Corporation Board of Directors will meet May 1, 2004. The meeting will commence immediately following conclusion of the Operations and Regulations Committee meeting, which is anticipated to conclude at approximately 11:45 a.m.

**LOCATION:** Moot Court Room, University of Maryland School of Law, 500 West Baltimore Street, Baltimore, Maryland 21201.

**SPECIAL NOTICE:** Please note that meetings of the Board of Directors will be held at a different location on Friday, April 30, 2004.

**STATUS OF MEETING:** Open.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Approval of agenda.
2. Approval of the minutes of the Committee's meeting of January 30, 2004.
3. Status report on efforts to retain a recruitment firm to conduct the search.
4. Consider and act on qualifications for the position of LSC Inspector General.
5. Consider and act on the process for the selection of an LSC Inspector General.
6. Consider and act on future activities for the Committee.
7. Public comment.
8. Consider and act on other business.
9. Consider and act on adjournment of meeting.

**FOR FURTHER INFORMATION CONTACT:** Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: April 20, 2004.

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary.*

[FR Doc. 04–9429 Filed 4–21–04; 1:08 pm]

BILLING CODE 7050–01–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors Provision for the Delivery of Legal Services Committee

**TIME AND DATE:** The Provision for the Delivery of Legal Services Committee of the Legal Services Corporation Board of Directors will meet April 30, 2004. The meeting will begin at 2:30 p.m. and continue until completion of the Committee's agenda.

**LOCATION:** University of Baltimore Law Center, Moot Court Room, 1420 North Charles Street, Baltimore, Maryland 21201

**SPECIAL NOTICE:** Please note that meetings of the Board of Directors will be held at a different location on Saturday, May 1, 2004.

**STATUS OF MEETING:** Open.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Approval of agenda.
2. Approval of the minutes of the Committee's meeting of January 30, 2004.
3. Presentation on Quality in Legal Services:
   a. Presentation by Hannah Lieberman, Director of Advocacy, Legal Aid Bureau of Maryland.
   b. Presentation by Susan Erlichman, Executive Director of the Maryland Legal Services Corporation Interest on Lawyer Trust Account Program.
   c. Presentation by Ayn Crawley, Director of the Maryland Legal Assistance Network, on promoting and maintaining a high quality legal services delivery system in the State of Maryland.
4. Report by LSC President Helaine M. Barnett on the status of LSC's efforts and possible new approaches for promoting quality in the LSC-funded legal services delivery system.
5. Reports by OPP Technology Initiative Grant ("TIG") staff on using technology to enhance the delivery of legal services by improving quality and enhancing access.
6. Public comment.
7. Consider and act on other business.
8. Consider and act on adjournment of meeting.

**FOR FURTHER INFORMATION CONTACT:** Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: April 21, 2004.

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary,*

[FR Doc. 04–9430 Filed 4–21–04; 1:08 pm]

BILLING CODE 7050–01–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors Operations and Regulations Committee

**TIME AND DATE:** The Operations and Regulations Committee of the Legal Services Corporation Board of Directors will meet May 1, 2004. The meeting will begin at 10:15 a.m., and continue until completion of the Committee's agenda.

**LOCATION:** Moot Court Room, University of Maryland School of Law, 500 West Baltimore Street, Baltimore, Maryland 21201

**SPECIAL NOTICE:** Please note that meetings of the Board of Directors will be held at a different location on Friday, April 30, 2004.

**STATUS OF MEETING:** Open.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Approval of agenda.
2. Approval of the Committee's meeting minutes of January 31, 2004.
3. Consider and act on retainer agreement and group representation issues relating to LSC open rulemaking on financial eligibility (45 CFR Part 1611).
   a. Staff report; and
   b. Public comment.
4. Consider and act on potential new rulemaking to develop procedures for the imposition of a reduction of recipient funding by less than 5% as a sanction for recipient non-compliance with LSC requirements and restrictions.
   a. Staff report; and
   b. Public comment.
5. Other public comment.
6. Consider and act on other business.
7. Consider and act on adjournment of meeting.

**FOR FURTHER INFORMATION CONTACT:** Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: April 21, 2004.

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary.*

[FR Doc. 04–9431 Filed 4–21–04; 1:09 pm]

BILLING CODE 7050–01–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors Finance Committee

**TIME AND DATE:** The Finance Committee of the Legal Services Corporation Board of Directors will meet April 30, 2004. The meeting will commence immediately following conclusion of the Provision for the Delivery of Legal Services Committee meeting, which is anticipated to conclude at approximately 4:15 p.m.

**LOCATION:** University of Baltimore Law Center, Moot Court Room, 1420 North Charles Street, Baltimore, Maryland 21201.

**SPECIAL NOTICE:** Please note that meetings of the Board of Directors will be held at a different location on Saturday, May 1, 2004.

**STATUS OF MEETING:** Open.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Approval of agenda.
2. Approval of the minutes of the Committee's meeting of January 30, 2004.
3. Inspector General's presentation of the Fiscal Year 2003 annual financial audit.
4. Report on LSC's Temporary Operating Budget through March 31, 2004.
5. Consider and act on the President's and Acting Inspector General's recommendations for FY 2004 Consolidated Operating Budget.
6. Consider and act on whether to submit a supplemental request to Congress for additional funding for the development and implementation of a pilot project on Student Loan Repayment Assistance for LSC grantees.
7. Consider and act on other business.
8. Public comment.
9. Consider and act on adjournment of meeting.

**FOR FURTHER INFORMATION CONTACT:** Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: April 21, 2004.

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary.*

[FR Doc. 04–9432 Filed 4–21–04; 1:09 pm]

BILLING CODE 7050–01–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors

**TIME AND DATE:** The Board of Directors of the Legal Services Corporation will meet May 1, 2004 at 2 p.m.

**LOCATION:** Moot Court Room, University of Maryland School of Law, 500 West Baltimore Street, Baltimore, Maryland 21201.

**SPECIAL NOTICE:** Please note that meetings of the Board of Directors will be held at a different location on Friday, April 30, 2004.

**STATUS OF MEETING:** Open, except that a portion of the meeting may be closed pursuant to a vote of the Board of Directors to hold an executive session. At the closed session, the Corporation's General Counsel will report to the Board on litigation to which the Corporation is or may become a party, and the Board may act on the matters reported. The closing is authorized by 5 U.S.C. 552b(c)(2) and LSC's corresponding regulation 45 CFR 1622.5(a); 5 U.S.C. 552b(c)(6) and LSC's corresponding regulation 45 CFR 1622.5(e); 5 U.S.C. 552b(c)(7) and LSC's implementing regulation 45 CFR 1622.5(f)(4), and 5 U.S.C. 522b(c)(9)(B) and LSC's implementing regulation 45 CFR 1622.5(g); and 5 U.S.C. 552b(c)(10) and LSC's corresponding regulation 45 CFR 1622.5(h). A copy of the General Counsel's Certification that the closing is authorized by law will be available upon request.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Approval of agenda.
2. Approval of minutes of the Board's meeting of January 30, 2004.
3. Approval of minutes of the Board's meeting of January 31, 2004.
4. Approval of minutes of the Executive Session of the Board's meeting of January 31, 2004.
5. Approval of minutes of the Executive Session of the Board's meeting of November 22, 2003.
6. Approval of minutes of the Executive Session of the Board's meeting of November 23, 2003.
7. Chairman's Report.
8. Members' Reports.
9. President's Report.

10. Acting Inspector General's Report.
11. Consider and act on the report of the Board's Committee on Provision for the Delivery of Legal Services.
12. Consider and act on the report of the Board's Finance Committee.
13. Consider and act on the report of the Board's Operations & Regulations Committee.
14. Consider and act on the report of the Board's Search Committee for LSC President and Inspector General.
15. Consider and act on proposal concerning space at 3333 K Street, NW., Washington, DC.
16. Consider and act on the locations of the Board's meetings for the remainder of calendar year 2004.
17. Consider and act on other business.
18. Public comment.
19. Consider and act on whether to authorize an executive session of the Board to address items listed below under Closed Session.

**Closed Session**

20. Briefing by the Acting Inspector General on the activities of the Office of Inspector General.
21. Consider and act on General Counsel's report on potential and pending litigation involving LSC.
22. Consider and act on motion to adjourn meeting.

**FOR FURTHER INFORMATION CONTACT:** Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: April 21, 2004.

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary.*

[FR Doc. 04–9433 Filed 4–21–04; 1:09 pm]

BILLING CODE 7050–01–P

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Social, Behavioral and Economic Sciences; Notices of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

*Name:* Advisory Committee for Social, Behavioral, and Economic Sciences (#1171).

*Date & Time:* May 5, 2004, 1:30 p.m.–5 p.m. (SRS Breakout) Room 970; May 6, 2004, 8:30 a.m.–5 p.m., Room 1235; May 7, 2004, 8:30 a.m.–12:30 p.m., Room 1235.

*Place:* National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

*Type of Meeting:* Open.

*Contact Person:* Dr. Sally Kane, Senior Advisor, ACSBE, Directorate for Social, Behavioral, and Economic Sciences, National Science Foundation, 4201 Wilson Boulevard, Room 905, Arlington, VA 22230, (703) 292–8741.

*Summary Minutes:* May be obtained from contact person listed above.

*Purpose of Meeting:* To provide advice and recommendations to the National Science Foundation on major goals and policies pertaining to Social, Behavioral and Economic Sciences Directorate programs and activities.]

*Agenda:* Discussion on issues, role and future direction of the Directorate for Social, Behavioral, and Economic Sciences.

Dated: April 20, 2004.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 04–9293 Filed 4–22–04; 8:45 am]

BILLING CODE 7555–01–M

## NATIONAL SCIENCE FOUNDATION

### National Science Board; Committee on Nominations

*Date and Time:* April 21, 4:30 p.m. to 5:30 p.m.

*Place:* National Science Foundation, Room 1220, 4201 Wilson Boulevard, Arlington, VA 22230.

*Status:* This meeting will be closed to the public.

*Matters To Be Considered:*

**Wednesday, April 21, 2004**

*Closed Session (4:30 p.m. to 5:30 p.m.)*

Discussion of candidates for NSB Chairman and Vice Chairman.

**FOR FURTHER INFORMATION CONTACT:** Michael P. Crosby, Ph.D., Director, National Science Board Office and Executive Officer, (703) 292–7000, *http://www.nsf.gov/nsb.*

**Michael P. Crosby,**

*Director, National Science Board Office and Executive Officer.*

[FR Doc. 04–9369 Filed 4–21–04; 11:17 am]

BILLING CODE 7555–01–M

## NUCLEAR REGULATORY COMMISSION

### FirstEnergy Nuclear Operating Company

**[Docket No. 50–346-CO; ASLBP No. 04–825–01-CO]**

### Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710 (1972), and the Commission's regulations, see 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

FirstEnergy Nuclear Operating Company (Davis-Besse Nuclear Power Station, Unit 1)

The Licensing Board is being established pursuant to a March 8, 2004, notice of opportunity for hearing published in the **Federal Register** (69 FR 12357 (Mar. 16, 2004)), regarding an immediately effective confirmatory order modifying the 10 CFR part 50 operating license for the Davis-Besse Nuclear Power Plant, Unit 1, to address performance deficiencies relating to the March 2002 discovery of a corrosion-induced cavity in the Davis-Besse Unit 1 reactor pressure vessel. In response to that notice, on March 29, 2004, Michael Keegan, Joanne DiRando, Paul Gunter, and Donna Lueke submitted objections to the confirmatory order that are the subject of this proceeding.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Charles N. Kelber, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Peter S. Lam, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302.

Issued in Rockville, Maryland, this 15th day of April, 2004.

**G. Paul Bollwerk, III,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. E4–913 Filed 4–22–04; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 70–3103–ML; ASLBP No. 04–826–01–ML]**

### Louisiana Energy Services, L.P.; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

**Louisiana Energy Services, L.P. (National Enrichment Facility)**

The Licensing Board is being established pursuant to a January 30, 2004, notice of hearing (CLI–04–08, 59 NRC 10(2004); (69 FR 5873 (Feb. 6, 2004))). The hearing will consider (1) a December 15, 2003, license application submitted by Louisiana Energy Services, L.P., to possess and use source, byproduct, and special nuclear material and to enrich natural uranium to a maximum of five percent U–235 by the gas centrifuge process at a facility located in Eunice, New Mexico, and (2) intervention petitions contesting the application submitted by the New Mexico Environment Department and the Attorney General of New Mexico on March 23, 2004, and April 5, 2004, respectively.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, lll, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Charles N. Kelber, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302.

Issued in Rockville, Maryland, this 15th day of April, 2004.

**G. Paul Bollwerk, III,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. E4–912 Filed 4–22–04; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 40–8084]**

### Finding of No Significant Impact and Notice of Availability of the Environmental Assessment Addressing A License Amendment Request To Approve Rio Algom Mining Llc's Application for Alternate Concentration Limits At Its Lisbon Uranium Mill Tailings Impoundment Located in San Juan County, UT

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability of an environmental assessment and finding of no significant impact.

**FOR FURTHER INFORMATION CONTACT:** Jill Caverly, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop T8–A33, Washington, DC 20555–0001, telephone (301) 415–6699 and e-mail *jsc1@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an amendment to Rio Algom Mining LLC's (Rio Algom) Source Materials License SUA–1119. The proposed action would revise groundwater protection standards from background to alternate concentration limits (ACL) at its Lisbon Uranium Mill Tailings Impoundment located in San Juan County, Utah. The licensee's application for ACLs was made pursuant to 10 CFR part 40, Appendix A, Criterion 5 B(6), by letter dated May 22, 2002, as revised by additional information sent, at the staffs request, on January 7, 2004, January 12, 2004, and February 19, 2004. This request was previously noticed in the **Federal Register** on July 24, 2002 (67FR48495), with an opportunity to provide written comments or to request a hearing.

Pursuant to the requirements of 10 CFR Part 51, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions, the NRC has prepared an environmental assessment (EA) to evaluate the environmental impacts associated with this request. Based on this evaluation, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate for the proposed licensing action.

#### II. EA Summary

The EA was prepared to evaluate the environmental impacts associated with Rio Algom's application for ACLs for groundwater at its Lisbon uranium mill facility. Approving this action will result in the cessation of active groundwater remediation (pump and treat), allowing groundwater contamination at the site to migrate and naturally degrade over time and distance. ACLs for this groundwater will be protective at the site boundary. In addition, a post-remediation groundwater monitoring program will assure that protection of human health and the environment is maintained.

As indicated in the ACL application and the response to the staff's request for additional information (RAI), Rio Algom proposes the following revised standards (ACL) at the Point of Compliance (monitoring location):

| Aquifer | Arsenic (mg/L) | Molybdenum (mg/L) | Selenium (mg/L) | Uranium (mg/L) |
|---|---|---|---|---|
| Southern | 3.06 | 23.34 | 0.93 | 96.87 |
| Northern | 2.63 | 58.43 | 0.10 | 101.58 |

Rio Algom asserts that it has met the Federal requirements under 10 CFR part 40, Appendix A, Criterion 5 for ACLs. It has included fate and transport modeling to demonstrate that groundwater contaminant levels will degrade to acceptable levels prior to migrating to the point of exposure (POE), *i.e.*, property boundary. At this point, an exposure assessment indicates that the human dose from all viable pathways will not exceed the criteria in subpart E of 10 CFR part 20 (25 mrem/year). Additionally, a corrective action assessment indicates that the ACL approach is the only economical alternative that will be protective of human health and the environment.

The NRC staff has reviewed this request in accordance with the requirements under 10 CFR part 40,

Appendix A, Criterion 5 and NRC guidance NUREG–1620 Rev 1, "Standard Review Plan for Review of a Reclamation Plan for Mill Tailings Sites Under Title II of the Uranium Mill Tailings Radiation Control Act of 1978."

Groundwater flow and transport modeling from Rio Algom estimates that only uranium will migrate past the property boundary above background levels for the above stated constitutents during the 1,000 year compliance period. The maximum estimated uranium concentration in the groundwater will be 0.32 mg/L at the property boundary. Rio Algom has included flow and transport modeling to demonstrate that groundwater contaminant levels will degrade to acceptable levels prior to migrating to the POE, *i.e,* the property boundary.

Based on groundwater fate and transport modeling, water quality and use will not be impacted by the proposed action because the State of Utah has determined that the aquifer can be classified as a Class III, Limited Use Groundwater Aquifer under Utah Administrative Code R317–6–3.6, due to the background concentrations found in License Conditions 53B and 53C. This characterization was confirmed in a letter from the State of Utah to the U.S. NRC dated January 12, 2004. Modeling indicates that of the hazardous constituents in the groundwater contaminant plume (arsenic, selenium, molybdenum, and uranium) only uranium will migrate past the long-term care boundary. It is estimated that the uranium plume will intersect the boundary in approximately 500 to 1000 years but will be at levels consistent with the class of use and will not present a significant risk to human health or the environment. The long-term groundwater monitoring program will monitor levels within the plume and downgradient of the plume to assure protection of human health and the environment to confirm that model predictions are correct.

The State of Utah also indicated in an e-mail dated January 13, 2004, that the proposed ACL approach satisfies Utah State Rule R317–6–15 and will meet the requirements of a Class III-limited Use Aquifer. The ACL will be an acceptable corrective action if the uranium groundwater concentrations at the POE do not exceed a human dose of 25 mrem/year (10 CFR part 20, subpart E). Therefore, performing an exposure assessment at the POE conforms with guidance in NUREG–1620, section 4.3.3.2 which states that "exposure pathways should be identified and evaluated using water classification and water use standards, along with existing and anticipated water uses."

The results of Rio Algom's exposure assessment (including its bounding analyses) and the NRC staff's confirmatory analysis indicate that the dose to the critical group, *i.e.*, the offsite rancher, at the POE from site-generated uranium should not exceed 25 mrem/year, which conforms to the NRC criteria for unrestricted release of sites with residual radioactivity in 10 CFR part 20.1402.

Rio Algom conducted a corrective action assessment to identify potential remedial alternatives for the restoration of site groundwater, and to determine the costs and benefits associated with various remedial actions. Rio Algom believes that the only economically viable alternative is natural attenuation because the cost benefit ratios associated with active remedial alternatives are far too great to justify their implementation. Additionally, Rio Algom believes that the proposed action is necessary because it is technically impracticable and economically infeasible to remediate the groundwater to the background levels required by its License Condition 53. The NRC staff has reviewed and agrees with these conclusions.

## III. Finding of No Significant Impact

Pursuant to 10 CFR part 51, the NRC has prepared the EA, summarized above. The staff has determined that no significant environmental impacts are expected when groundwater pump and treat programs are terminated. There will be no significant impacts to the surface features and therefore, no effect on wildlife.

Constituents in the groundwater will migrate off site but will not pose any significant impact to the environment because attenuation of the constituents will be at levels that are consistent with the aquifer class of use as designated by the State of Utah. A dose model verified that the constituents in the groundwater will not cause additional risk to human health or the environment.

The proposed NRC approval of the action when combined with known effects on resource areas at the site, including further site remediation, is not anticipated to result in any cumulative impacts at the sites. Therefore, the NRC staff has concluded that there will be no significant environmental impacts on the quality of the human environment and, accordingly, the staff has determined that preparation of an Environmental Impact Statement is not warranted.

## IV. Further Information

The EA for this proposed action, as well as the licensee's request, as supplemented and revised, are available electronically for public inspection and copying from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html*. The ADAMS Accession Numbers for the licensee's request, as supplemented and revised, are: ML021710023, ML021710056, ML021710083, ML021710139, ML021710181, ML021710189, ML021710450, ML021710605, and ML021750010. The ADAMS Accession number for the EA is ML040990712. Most of the documents referenced in the EA are also available through ADAMS. Documents can also be viewed electronically on the public computers located at the NRC's Public Document Room, O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee. Persons who do not have access to ADAMS, should contact the NRC PDR Reference staff by telephone at l-800–397–4209, or 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated in Rockville, Maryland, this 12th day of April, 2004.

For the Nuclear Regulatory Commission.

**Jill Caverly,**

*Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. E4–910 Filed 4–22–04; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 030–12779]**

## Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for University City Science Center, Philadelphia, PA

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability of Environmental Assessment and Finding of No Significant Impact.

**FOR FURTHER INFORMATION CONTACT:** Sattar Lodhi, Nuclear Materials Safety Branch 2, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (610) 337–5364, fax (610) 337–5269, e-mail *asl@nrc.gov*.

**I. Introduction**

The Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to University City Science Center for Materials License No. 37–17452–01, to authorize release of its facilities in Philadelphia, Pennsylvania, for unrestricted use and to terminate the license. The NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The amendment will be issued following publication of this notice.

**II. EA Summary**

The purpose of the proposed action is to authorize the release of the licensee's facilities in Philadelphia, Pennsylvania, for unrestricted use. University City Science Center was authorized by NRC from May 1977 to use radioactive materials for research and development purposes at the site. In March 2003, University City Science Center requested that NRC release the facility for unrestricted use and terminate the license. University City Science Center has conducted surveys of the facility and determined that the facility meets the license termination criteria in subpart E of 10 CFR part 20.

**III. Finding of No Significant Impact**

The NRC has prepared the EA (summarized above) in support of the proposed license amendment to terminate the license and release the facility for unrestricted use. The NRC staff has evaluated University City Science Center's request and the results of the surveys and has concluded that the completed action complies with 10 CFR part 20. The staff has found that the environmental impacts from the proposed action are bounded by the impacts evaluated by the "Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities" (NUREG–1496). On the basis of the EA, NRC has concluded that the environmental impacts from the proposed action are expected to be insignificant and has determined not to prepare an environmental impact statement for the proposed action.

**IV. Further Information**

The EA and the documents related to this proposed action, including the application for the license amendment and supporting documentation, are available for inspection at NRC's Public Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html* (ADAMS Accession Nos. ML030860181, ML032520675 and ML041040751). Persons who do not have access to ADAMS, should contact the NRC PDR Reference staff by telephone at (800) 397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at King of Prussia, Pennsylvania, this 15th day of April, 2004.

For the Nuclear Regulatory Commission.

**John D. Kinneman,**

*Chief, Nuclear Materials Safety Branch 2, Division of Nuclear Materials Safety, Region I.*

[FR Doc. E4–909 Filed 4–22–04; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Appointments to Performance Review Boards for Senior Executive Service

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Appointment to Performance Review Boards for Senior Executive Service.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has announced the following appointments to the NRC Performance Review Boards.

The following individuals are appointed as members of the NRC Performance Review Board (PRB) responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level employees:

Patricia G. Norry, Deputy Executive Director for Management Services, Office of the Executive Director for Operations;

Edward T. Baker, Deputy Director, Office of International Programs;

Stephen G. Burns, Deputy General Counsel, Office of the General Counsel;

James E. Dyer, Director, Office of Nuclear Reactor Regulation;

Jesse L. Funches, Chief Financial Officer;

William F. Kane, Deputy Executive Director for Homeland Protection and Preparedness, Office of the Executive Director for Operations;

Bruce S. Mallett, Regional Administrator, Region IV;

Jacqueline E. Silber, Deputy Chief Information Officer;

Jack R. Strosnider, Deputy Director, Office of Nuclear Regulatory Research;

Martin J. Virgilio, Director, Office of Nuclear Material Safety and Safeguards;

Michael F. Weber, Deputy Director, Office of Nuclear Security and Incident Response.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Karen D. Cyr, General Counsel, Office of the General Counsel;

Ellis W. Merschoff, Chief Information Officer;

Carl J. Paperiello, Deputy Executive Director for Materials, Research, and State Programs, Office of the Executive Director for Operations.

All appointments are made pursuant to section 4314 of chapter 43 of title 5 of the United States Code.

**EFFECTIVE DATE:** April 23, 2004.

**FOR FURTHER INFORMATION, CONTACT:** Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555; (301) 415–7530.

Dated in Rockville, Maryland, this 7th day of April, 2004.

For the U.S. Nuclear Regulatory Commission.

**Carolyn J. Swanson,**

*Secretary, Executive Resources Board.*

[FR Doc. E4–911 Filed 4–22–04; 8:45 am]

BILLING CODE 7590–01–P

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission for OMB Review; Comment Request

**AGENCY:** Overseas Private Investment Corporation (OPIC).

**ACTION:** Request for comments.

**SUMMARY:** Under the provision of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form, OMB control number 3420–0001, under review is summarized below.

**DATES:** Comments must be received by June 22, 2004.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** *OPIC Agency Submitting Officer:* Bruce I. Campbell, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; 202/336–8563.

**Summary Form Under Review**

*Type of Request:* Form Renewal.
*Title:* Request for Registration for Political Risk Investment Insurance.
*Form Number:* OPIC–50.
*Frequency of Use:* Once per investor per project.
*Type of Respondents:* Business or other institution (except farms); individuals.
*Description of Affected Public:* U.S. companies or citizens investing overseas.
*Reporting Hours:* ½ hour per project.
*Number of Responses:* 343 per year.
*Federal Cost:* $1,000.00.
*Authority for Information Collection:* Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 1961, as amended.
*Abstract (Needs and Uses):* The OPIC 50 form is submitted by eligible investors to register their intent to make international investments, and ultimately, to seek OPIC political risk insurance. By submitting Form 50 to OPIC prior to making an irrevocable commitment, the incentive effect of OPIC is demonstrated.

Dated: April 20, 2004.

**Eli Landy,**

*Senior Counsel, Administrative Affairs, Department of Legal Affairs.*

[FR Doc. 04–9228 Filed 4–22–04; 8:45 am]

**BILLING CODE 3210–01–M**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49579; File No. PCAOB–2003–08]**

## Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule and Form Relating to Inspections of Registered Public Accounting Firms

April 19, 2004.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 ("Act"), notice is hereby given that on October 15, 2003, the Public Company Accounting Oversight Board ("Board" or "PCAOB") filed with the Securities and Exchange Commission ("Commission") the proposed rules described in Items I and II below, which items have been prepared by the Board and are presented here in the form submitted by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

**I. Board's Statement of the Terms of Substance of the Proposed Rules**

On October 7, 2003, the Board adopted rules related to inspections. The proposal includes ten Rules on Inspections (PCAOB Rules 4000 through 4010, reserving Rule 4005) and 2 definitions that would appear in PCAOB Rule 1001. The text of the proposed rules and definitions is as follows:

*Section 1. General Provisions*

Rule 1001. Definitions of Terms Employed in Rules

When used in Rules, unless the context otherwise requires:

(a)(xi) Appropriate State Regulatory Authority

The term "appropriate state regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(p)(vi) Professional Standards

The term "professional standards" means—

(A) accounting principles that are—

(i) Established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by the Act, or prescribed by the Commission under section 19(a) of the Securities Act of 1933 or section 13(b) of the Securities Exchange Act of 1934; and

(ii) Relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) Auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing Title II of the Act) that the Board or the Commission determines—

(i) Relate to the preparation or issuance of audit reports for issuers; and

(ii) Are established or adopted by the Board under section 103(a) of the Act, or are promulgated as rules of the Commission.

*Section 4. Inspections*

Rule 4000. General

Every registered public accounting firm shall be subject to all such regular and special inspections as the Board may from time-to-time conduct in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. Inspection steps and procedures shall be performed by the staff of the Division of Registration and Inspections, and by such other persons as the Board may authorize to participate in particular inspections or categories of inspections.

Rule 4001. Regular Inspections

In performing a regular inspection, the staff of the Division of Registration and Inspections and any other person authorized by the Board to participate in the inspection shall take such steps, and perform such procedures, as the Board determines are necessary or appropriate. Such steps and procedures must include, but need not be limited to, those set forth in Section 104(d)(1) and (2) of the Act and such other tests of the audit, supervisory, and quality control procedures of the firm as the Director of the Division of Registration and Inspections or the Board determines.

Rule 4002. Special Inspections

In performing a special inspection, the staff of the Division of Registration and Inspections and any other person authorized by the Board to participate in the inspection shall take such steps, and perform such procedures, as are necessary or appropriate concerning the issue or issues specified by the Board in connection with its authorization of the special inspection.

**Note:** Under Section 104(b)(2) of the Act, the Board may authorize a special inspection on its own initiative or at the request of the Commission.

Rule 4003. Frequency of Inspections

During each calendar year, beginning no later than the calendar year following the calendar year in which its application for registration with the Board is approved, a registered public accounting firm that, during the prior calendar year, issued audit reports with

respect to more than 100 issuers shall be subject to a regular inspection.

At least once in every three calendar years, beginning with the three-year period following the calendar year in which its application for registration with the Board is approved, a registered public accounting firm that, during any of the three prior calendar years, issued an audit report with respect to at least one but no more than 100 issuers, or that played a substantial role in the preparation or furnishing of an audit report with respect to at least one issuer, shall be subject to a regular inspection.

With respect to a registered public accounting firm that has filed a completed Form 1–WD under Rule 2107, the Board shall have the discretion to forego any regular inspection that would otherwise commence during the period beginning on the fifth day following the filing of the completed Form 1–WD and continuing until the firm's registration is deemed withdrawn or the firm withdraws the Form 1–WD.

Rule 4004. Procedure Regarding Possible Violations

If the Board determines that information obtained by the Board's staff during any inspection indicates that the registered public accounting firm subject to such inspection, any associated person thereof, or any other person, may have engaged, or may be engaged, in any act, practice, or omission to act that is or may be in violation of the Act, the rules of the Board, any statute or rule administered by the Commission, the firm's own quality control policies, or any professional standard, the Board shall, if it determines appropriate—

Report information concerning such act, practice, or omission to—the Commission; and each appropriate state regulatory authority; and

Commence an investigation of such act, practice, or omission in accordance with Section 105(b) of the Act and the Board's rules thereunder or a disciplinary proceeding in accordance with Section 105(c) of the Act and the Board's rules thereunder.

**Note:** The Board may, as appropriate, make referrals or report information to regulatory and law enforcement agencies other than those specifically described in Rule 4004.

Rule 4005. Record Retention and Availability [Reserved]

Rule 4006. Duty to Cooperate With Inspectors

Every registered public accounting firm, and every associated person of a registered public accounting firm, shall cooperate with the Board in the performance of any Board inspection. Cooperation shall include, but is not limited to, cooperating and complying with any request, made in furtherance of the Board's authority and responsibilities under the Act, to—

(1) Provide access to, and the ability to copy, any record in the possession, custody, or control of such firm or person, and

(2) Provide information by oral interviews, written responses, or otherwise.

Rule 4007. Procedures Concerning Draft Inspection Reports

(a) The Director of the Division of Registration and Inspections shall make a draft inspection report available for review by the firm that is the subject of the report. The firm may, within the 30 days after the draft inspection report is first made available for the firm's review, or such longer period as the Board may order, submit to the Board a written response to the draft report.

(b)(1) In submitting a response pursuant to paragraph (a), the firm may indicate any portions of the response for which the firm requests confidential treatment under Section 104(f) of the Act, and may supply any supporting authority or other justification for according confidential treatment to the information.

(2) The Board shall attach to, and make part of the inspection report, any response submitted pursuant to paragraph (a), but shall redact from the response attached to the inspection report any information for which the firm requested confidential treatment and which it is reasonable to characterize as confidential.

(c) After receiving and reviewing any response letter pursuant to paragraph (a) of this rule, the Board may take such action with respect to the draft inspection report as it considers appropriate, including adopting the draft report as the final report, revising the draft report, or continuing or supplementing the inspection before issuing a final report. In the event that, prior to issuing a final report, the Board directs the staff to continue or supplement the inspection or revise the draft report, the Board may, in its discretion, afford the firm the opportunity to review any revised draft inspection report.

Rule 4008. Procedures Concerning Final Inspection Reports

Promptly following the Board's issuance of a final inspection report, the Board shall—

(a) Make the final report available for review by the firm that is the subject of the report;

(b) Transmit to the Commission the final report, any additional letter or comments by the Board or the Board's inspectors that the Board deems appropriate, and any response submitted by the firm to a draft inspection report; and

(c) Transmit to each appropriate state regulatory authority, in appropriate detail, the final report, any additional letter or comments by the Board or the Board's inspectors that the Board deems appropriate, and any response submitted by the firm to a draft inspection report.

Rule 4009. Firm Response to Quality Control Defects

(a) With respect to any final inspection report that contains criticisms of, or potential defects in, the quality control systems of the firm under inspection, the firm may submit evidence or otherwise demonstrate to the Director of the Division of Registration and Inspections that it has improved such systems, and remedied such defects no later than 12 months after the issuance of the Board's final inspection report. After reviewing such evidence, the Director shall advise the firm whether he or she will recommend to the Board that the Board determine that the firm has satisfactorily addressed the criticisms or defects in the quality control system of the firm identified in the final inspection report and, if not, why not.

(b) If the Board determines that the firm has satisfactorily addressed the criticisms or defects in the quality control system, the Board shall provide notice of that determination to the Commission and to any appropriate state regulatory authority to which the Board had supplied any portion of the final inspection report.

(c) The Board shall notify the firm of its final determination concerning whether the firm has addressed the criticisms or defects in the quality control system of the firm identified in the final inspection report to the satisfaction of the Board.

(d) The portions of the Board's inspection report that deal with criticisms of or potential defects in quality control systems that the firm has not addressed to the satisfaction of the Board shall be made public by the Board—

(1) Upon the expiration of the 12–month period described in paragraph (a) of this rule if the firm fails to make any submission pursuant to paragraph (a); or

(2) Upon the expiration of the period in which the firm may seek Commission review of any board determination made under paragraph (b) of this rule, if the firm does not seek Commission review of the Board determination; or

(3) Unless otherwise directed by Commission order or rule, 30 days after the firm formally requests Commission review pursuant to Section 104(h)(1)(B) of the Act.

Rule 4010. Board Public Reports

Notwithstanding any provision of Rules 4007, 4008, and 4009, the Board may, at any time, publish such summaries, compilations, or other general reports concerning the procedures, findings, and results of its various inspections as the Board deems appropriate. Such reports may include discussion of criticisms of, or potential defects in, quality control systems of any firm or firms that were the subject of a Board inspection, *provided* that no such published report shall identify the firm or firms to which such criticisms relate, or at which such defects were found, unless that information has previously been made public in accordance with Rule 4009; by the firm or firms involved, or by other lawful means.

**II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules**

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

*A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules*

(a) Purpose

Section 104 of the Act requires the Board to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. The Board has adopted Rules 4000 through 4010, and related definitions, to provide a procedural framework for the Board's inspection program. Each of the rules and definitions is discussed below.

Rule 1001—Definitions of Terms Employed in Rules

*Appropriate State Regulatory Authority*—As discussed in more detail below, the Board has decided to add a definition of the term "appropriate state regulatory authority." The definition of that term in Rule 1001(a)(xi) is identical to the definition of the same term in Section 2(a)(1) of the Act.

*Professional Standards*—The definition of professional standards in Rule 1001(p)(vi) references that in Section 2(a)(10) of the Act. It should be noted that the term "professional standards" is broader than "auditing and related professional practice standards," which is defined in Rule 1001(a)(viii) of the Board's rules.

Rule 4000—General

Consistent with Section 104(a) of the Act, Rule 4000 subjects every registered public accounting firm to all such regular and special inspections as the Board may from time-to-time conduct in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. The rule provides that inspection steps and procedures will be performed by the staff of the Division of Registration and Inspections and by such other persons authorized by the Board. The Board anticipates that "other persons authorized by the Board" to perform an inspection will include consultants and staff of the Board, other than staff of the Board's Division of Registration and Inspections.[1] The Board does not anticipate that practicing accountants associated with public accounting firms will participate in the Board's inspections.

Rule 4001—Regular Inspections

Rule 4001 requires that in performing a regular inspection, the staff of the Division of Registration and Inspections and other authorized persons take such steps and perform such procedures as the Board determines are necessary or appropriate. The rule requires the inclusion of steps and procedures set forth in Sections 104(d)(1) and (2) of the Act and such other tests of the audit, supervisory, and quality control procedures of the firm as the Director of the Division of Registration and Inspections or the Board determines.

Section 104(d)(1) requires the Board to "inspect and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and one or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board." Section 104(d)(2) requires the Board to "evaluate the sufficiency of the quality control system of the firm, and the manner of documentation and communication of that system by the firm."

Rule 4002—Special Inspections

Rule 4002 requires that in performing a special inspection, the staff of the Division of Registration and Inspections and other authorized persons take such steps and perform such procedures, as are necessary or appropriate concerning the issue or issues specified by the Board in connection with its authorization of the special inspection. A note to the rule makes clear that under Section 104(b)(2) of the Act, the Board may authorize a special inspection on its own initiative or at the request of the Commission. Like any other Board action, the vote of a majority of the Board members present at a meeting at which a quorum of Board members is present is required to authorize a special inspection.

In order to retain flexibility and to avoid a formulaic approach to such inspections, the Board has decided not to develop a set threshold or list of criteria that may lead to the commencement of a special inspection. For example, while the Board will consider the source of information it receives, the Board may find that in certain circumstances anonymous tips or media stories may be sufficient to begin a special inspection. Similarly, in order to retain flexibility, the Board has decided not to include a specific notice provision in the rule. As a practical matter, however, the Board's staff intends to give firms subject to special inspections reasonable notice in advance of commencing such inspections.

Special inspections are not intended to serve the same function as a Board

[1] The Board anticipates using some consultants to supplement its permanent staff on certain inspections during its first cycle of inspections. All inspections will be led by a senior staff member of the PCAOB's Division of Registration and Inspections. Once the first cycle of inspections is complete and the Board has further added to its inspections staff, the Board anticipates that consultants will be primarily used as technical specialists, as needed, on discrete issues in the course of inspections. Non-staff that participate in the Board's inspections will be subject to relevant provisions of the Board's Ethics Code, including the same confidentiality requirements to which the Board's inspection staff is subject.

investigation, which will be conducted pursuant to the Board's investigative rules and procedures. Special inspections are designed to address issues that come to the Board's attention and, as a general matter, will be performed in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. Nevertheless, any inspection—whether a regular inspection or a special inspection—may result in a particular matter being turned over to the Board's enforcement staff for investigation.

Rule 4003—Frequency of Inspections

Rule 4003 sets forth the schedule for regular inspections. Rule 4003(a) is consistent with the schedule for larger registered public accounting firms set forth in Section 104(b)(1)(A) of the Act. This rule requires that beginning no later than the year after its registration with the Board has been approved, a registered public accounting firm that, during the prior calendar year, issued audit reports with respect to more than 100 issuers will be subject to a regular inspection. Rule 4003(b) is consistent with the schedule for smaller registered public accounting firms set forth in Section 104(b)(1)(B) of the Act. Rule 4003(b) requires that beginning with the three-year period following the calendar year in which its registration with the Board has been approved, a registered public accounting firm that, during any of the three prior calendar years, issued audit reports with respect to at least one, but no more than 100, issuers, or that played a substantial role in the preparation or furnishing of an audit report with respect to at least one issuer, will be subject to a regular inspection.

In accordance with Section 104(b)(2) of the Act, the Board has added Rule 4003(c) which adjusts the regular inspection schedule for a registered public accounting firm that has requested to withdraw from registration by filing a completed Form 1–WD. Specifically, the rule provides that the Board shall have discretion not to conduct a regular inspection that would otherwise commence during the period beginning on the fifth day following the filing of the completed Form 1–WD and continuing until the firm's registration is deemed withdrawn or the firm withdraws its Form 1–WD.

The Board understands that firms that register with the Board will also have practices relating to audits other than public company audits, and that state regulatory requirements continue to involve a peer review process related to those practices. The Board expects its inspections staff to make any appropriate recommendations concerning coordination with such reviews as the staff gains experience with issues relating to the implementation of the Board's inspection responsibilities.

Rule 4004—Procedure Regarding Possible Violations

Consistent with Section 104(c) of the Act, Rule 4004 sets forth procedures which the Board is required to follow with respect to possible violations by firms under inspection. Specifically, the rule requires that if the Board determines that information obtained by the Board's staff during any inspection indicates that the registered public accounting firm subject to such inspection, any associated person thereof, or any other person, may have engaged, or may be engaged in any act, practice, or omission to act that is or may be in violation of the Act, the rules of the Board, any statute or rule administered by the Commission, the firm's own quality control policies, or any professional standard, then the Board shall, if it determines it appropriate, report such possible violations to the Commission and each appropriate state regulatory authority. In addition, under Rule 4004, if the Board determines it appropriate, the Board shall commence an investigation of such act, practice, or omission in accordance with Section 105(b) of the Act and the Board's rules thereunder or commence a disciplinary proceeding in accordance with Section 105(c) of the Act and the Board's rules thereunder.

The phrase "if it determines appropriate" in Rule 4004 is meant to signal that the Board will decide which of these acts, practices and omissions would be appropriate to refer to the Commission and to the states or other authorities. In making this determination, depending on the nature of the possible violation, the Board could conclude that it may be appropriate to report information to the Commission, and not the states or other authorities, and vice versa.

A note to the rule makes clear that the Board may, as appropriate, report information and make referrals to agencies other than those specifically described in Rule 4004. The Note is intended to provide notice that Rule 4004, in implementing Section 104(c) of the Act, should not be understood as precluding the Board from exercising the Board's other statutory authority to make referrals or to report information from inspections. Neither the rule nor the note are intended to describe the limit of that authority.

Rule 4005—Record Retention and Availability

Section 104(e) of the Act provides that the "rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by Section 103 or the rules issued thereunder." The Board is reserving this rule in anticipation of issuing standards on record retention once it has experience with its inspection program.[2] The Board reminds registered public accounting firms that they should continue to comply with all other applicable federal, state and professional record retention requirements.

Rule 4006—Duty To Cooperate With Inspectors

Rule 4006 requires every registered public accounting firm and every associated person of such firm to cooperate with the Board in any Board inspection. The rule requires that such firms and persons must cooperate and comply with any request, made in furtherance of the Board's authority and responsibilities under the Act, for documents or information. Like Section 102(b)(3) of the Act, the rule describes the required cooperation in terms of cooperating and complying with any request "made in furtherance of the Board's authority and responsibilities under the Act."

Rule 4006 is intended to provide for Board access to documents and information to the full extent authorized by the Act. Among other things, that means that the scope of the rule is not limited to documents and information generated in the course of audits of issuers. Under Section 104(d) of the Act, Board inspections involve evaluations and testing of, among other things, a firm's quality control and supervisory procedures. Accordingly, the documents and information the Board is likely to request as part of its authority and responsibilities to inspect registered public accounting firms, and that therefore a firm must cooperate by providing access to, will involve more than documents and information generated in the course of audits of issuers.

[2] The Board anticipates that standards concerning record retention will continue to be codified in the standards sections of the Board's rules. Any future Rule 4005 on record retention and availability for inspections will supplement those standards.

The Act provides that, in general, "all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 * * * shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency * * *." Accordingly, documents and information received by the Board pursuant to Rule 4006 in connection with a Section 104 inspection are entitled to this statutory protection. In addition, as discussed in more detail in the Board's release adopting its investigation and adjudication rules,[3] the Board intends to recognize certain privileges recognized elsewhere in the law—specifically, privileges that, under prevailing law, would constitute a valid basis for declining to comply with a Commission subpoena. As explained in more detail in that release, however, the Board will not honor assertions of an "accountant-client" privilege. More generally, any perceived state law or professional nondisclosure requirements or other obstacles to cooperation (other than a privilege that would be a valid basis for resisting a Commission subpoena) are, in the Board's view, preempted by the Act. Accordingly, a failure to cooperate with a Board inspection on the basis of such requirements would be a violation of Rule 4006.

Rule 4007—Procedures Concerning Draft Inspection Reports

Rule 4007 describes procedures relating to a registered public accounting firm's opportunity to review and comment on a draft inspection report before the Board issues a final inspection report concerning the firm. Rule 4007(a) provides that the Director of the Division of Registration and Inspections will make a draft report available for review by the firm that is the subject of the report. Paragraph (a) provides that a firm then has 30 days, or such longer period as the Board may order, in which to submit any written response that the firm wishes to submit to the draft. A firm is not required to submit a response, and any response that a firm chooses to submit may include any comments, objections, recommended revisions, or other views on the draft report.

Rule 4007(b) concerns requests that a firm may make for confidential treatment of portions of its response to the draft. Rule 4007(b)(1) provides that a firm may request confidential treatment under Section 104(f) of the Act for any portion of the firm's response to the draft report and may supply any supporting authority or other justification for according confidential treatment to the specified information. Rule 4007(b)(2) implements Section 104(f)'s requirement that the Board shall attach to, and make part of, the inspection report, any response submitted by the firm. Further implementing Section 104(f), Rule 4007(b)(2) provides that the version of the response that becomes part of the inspection report will be redacted to exclude any information for which the firm requested confidential treatment and which it is reasonable to characterize as confidential.

The Section 105(b)(5)(A) confidentiality protection extends to documents "received by" the Board and to documents "prepared * * * specifically for" the Board. The response that a firm provides to the Board falls into both of those categories. The Board will therefore maintain the response as confidential except to the extent that the Act expressly allows or requires the Board to disclose it.

The Act expressly allows or requires the Board to disclose the firm's response in at least three ways. First, Section 104(f) of the Act requires that the text of the firm's response must be attached to and made part of the inspection report. As part of the inspection report, the response will become public if and when the relevant portion of the report becomes public. Second, Section 104(g)(1) of the Act requires that the Board transmit the firm's response to the Commission and to appropriate state regulatory authorities when the Board transmits the final report to them. Third, Section 105(b)(5)(B) allows the Board to transmit to the regulatory and law enforcement agencies specified there any materials covered by Section 105(b)(5)(A), which would include the firm's response to the draft.

Any confidential treatment that the Board grants pursuant to a firm's request under Section 104(f) would restrict disclosure of the information only in the context of the first of those three possibilities—the inclusion of the response as part of the inspection report. The only consequence of the confidential treatment afforded under Section 104(f) is that the Board will redact the confidential information from the version of the response that is attached to and made part of the inspection report. Accordingly, if the portion of the final report that includes the response eventually becomes public, it will not include any information granted confidential treatment under Section 104(f).[4] In the second and third contexts described in the preceding paragraph, however, nothing in Section 104(f) operates to limit what the Board may disclose to certain regulatory and law enforcement agencies.

Rule 4007(c) provides that after receiving the firm's response, the Board has various options. The rule permits the Board to take such action with respect to the draft report as it considers appropriate. For example, the Board may adopt the draft report as the final report, revise the draft report, or continue or supplement the inspection before issuing a final report. If the Board directs the staff to continue or supplement the inspection or revise the draft report, the Board may, in its discretion, afford the firm the opportunity to review any revised draft inspection report. Rule 4007(c) permits the Board, in its discretion, to afford firms a second opportunity to comment on an inspection report when the Board continues or supplements its inspection or revises a draft report after receiving a firm response. The Board intends to afford registered firms an opportunity to comment on revised reports when new findings or assessments have been made or, more generally, when significant changes have been made to the draft report by the Board.

Rule 4008—Procedures Concerning Final Inspection Reports

Rule 4008 describes procedures related to a final inspection report. Rule 4008(a) provides that the Board will make a final inspection report available for review by the firm that is the subject of the report. As is true of draft inspection reports under Rule 4007, Rule 4008 requires that the Board make the final report available for the firm's review, but the Board need not necessarily allow the firm to have and maintain its own copy of the full report. Rule 4008(b) provides that the Board will transmit the final report to the Commission, along with any additional letter or comments by the Board or the Board's inspectors and along with the

[3] PCAOB Release No. 2003–016, at pages A2–33—A2–34 (Sept. 29, 2003).

[4] For example, if the firm's response is directed to the portion of the report that deals with quality control defects, the response will not be made public for as long as that portion of the report is not made public. That portion of the report may be made public, however, if the firm fails to address the criticisms to the Board's satisfaction within 12 months. At that time, that portion of the report, including the firm's response, would be made public, but any part of the response that had received confidential treatment under Section 104(f) would be redacted from the report that is made public.

firm's response to any draft of the report. Rule 4008(c) provides that the Board will transmit to each appropriate state regulatory authority, in appropriate detail, the final report, any additional letter or comments by the Board or inspectors, and the firm's response to any draft of the report. The Act leaves to the Board's discretion the determination of what detail is or is not appropriate for reporting to a state regulator. The rule allows the Board the flexibility to exercise that discretion.

Section 104(g)(1) of the Act requires that the Board transmit the final report "in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm." Rules 4008(b) and 4008(c) implement that provision of the Act.

A final inspection report is a document prepared by the Board in connection with an inspection, and would therefore generally be covered by Section 105(b)(5)(A)'s confidentiality protection. A final inspection report is also likely to contain substantial information "received by" the Board in connection with an inspection, and that is independently subject to the protection of 105(b)(5)(A), as the Act explicitly notes in Section 104(g)(2).[5] A final inspection report is also unique, however, in that the Act separately contemplates, in Section 104(g)(2), that at least some portions of it will be publicly available.

The Act plainly does not require that a state regulator maintain the confidentiality of any portion of a final report that becomes publicly available pursuant to Section 104(g)(2). Any other portion of the final report, however, as well as any letter that accompanies the transmittal and any copy of the firm's response to a draft report, are subject to the protection of Section 105(b)(5)(A) and, as a consequence, a state regulator receives them subject to Section 105(b)(5)(B)'s express requirement to maintain them as confidential and privileged. Moreover, with respect to portions of the final report that address quality control defects, state regulatory authorities are equally bound by Section 104(g)(2)'s command that such portions of the report shall not be made public unless the firm fails to do certain things within 12 months of the report's issuance.[6] Any otherwise applicable state or local law that conflicts with this requirement or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress would be preempted.[7]

Rule 4009—Firm Response to Quality Control Defects

Consistent with Section 104(g)(2) of the Act, when a final inspection report contains any discussion of criticisms of, or potential defects in, the firm's quality control systems, Rule 4009(a) permits the firm to submit evidence or otherwise to demonstrate to the Director of the Division of Registration and Inspections that it has improved such quality control systems, and remedied such defects. This submission or demonstration must be made no later than 12 months after the issuance of the Board's final inspection report. The date of issuance will be the date the final inspection report is adopted by the Board as final. Absent extraordinary circumstances, the report will be available for review by the firm beginning on that date. The rule requires the Director, after reviewing the evidence, to advise the firm whether he or she will recommend to the Board that the firm has satisfactorily addressed the criticisms or defects in the quality control system of the firm identified in the final inspection report and, if not, why not.

Rule 4009(b) provides that if the Board determines that the firm has satisfactorily addressed all quality control defects and criticisms in the final report, the Board will promptly provide notice of that determination to the Commission and to any appropriate state regulatory authority to which the Board had provided any portion of the final inspection report.

Rule 4009(c) requires the Board to notify the firm of its final determination as to whether the firm has addressed to the satisfaction of the Board the criticisms or defects in the firm's quality control system.

Rule 4009(d) provides that the Board will make public those portions of a final inspection report dealing with such criticisms and defects if the firm fails to address those matters to the Board's satisfaction within 12 months of the issuance of the final inspection report. Rule 4009(d) specifically addresses the time of any such public disclosure. Under Rule 4009(d), if a firm made no submission to the Board under Rule 4009(a) concerning the firm's efforts to address the criticisms or potential defects, then the Board would make those portions of the report public upon the expiration of the 12-month period. If the firm made a submission under Rule 4009(a), but then failed to seek Commission review of an adverse Board determination concerning that submission within the time allowed to seek such review, the Board would make those portions of the report public upon the expiration of the period allowed for seeking Commission review. If the firm did timely seek Commission review; under Section 104(h)(1)(B) of the Act, of an adverse Board determination, the Board would make those portions of the report public 30 days after the firm formally requested Commission review, unless the Commission, by rule or order, directs otherwise. The Board is adopting a 30-day delay, subject to any superseding Commission rule or order, to allow the Commission an opportunity to consider whether to order a longer stay of public disclosure in a particular case, since the Act does not operate to stay such disclosure.

Rule 4010—Board Public Reports

Rule 4010 permits the Board, at any time, to publish public summaries, compilations, or other general reports concerning the procedures, findings, and results of its various inspections as the Board deems appropriate. The rule allows for these reports to include discussion of criticisms of, or potential defects in, quality control systems of any firm or firms that were the subject of a Board inspection. However, the rule prohibits these published reports from identifying the firm or firms to which these criticisms relate, or at which the defects were found, unless the information has previously been made public pursuant to the Board's rules or other lawful means. The phrase "other lawful means" refers to situations in which the covered information is made public by lawful means provided for in the Act.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

*B. Board's Statement on Burden on Competition*

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules provide a procedural framework for the program of continuing inspections that the Act requires the Board to conduct. With respect to the firms to be inspected, the proposed rules impose no

[5] *See* Section 104(g)(2) (noting that disclosure of reports to public is "subject to section 105(b)(5)(A)").

[6] The Act does not prohibit a firm from voluntarily disclosing or providing a report or any portion of a report to any person.

[7] *See Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

burden beyond the burdens clearly imposed and contemplated by the Act.

*C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others*

The Board released the proposed rules for public comment in PCAOB Release No. 2003–013 (July 28, 2003). A copy of PCAOB Release No. 2003–013 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at *www.pcaobus.org*. The Board received 16 written comments. The Board has clarified and modified certain aspects of the proposed rules in response to comments it received, as discussed below.

To address one commenter's concern about the scope of the Board's inspections, the Board clarified in the rule that registered public accounting firms will be subject to regular and special inspections "in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers."

One commenter was confused by, and asked the Board to explain, the provisions of the proposed rule that stated that, at the conclusion of each inspection, the Director would submit a draft report to the Board and then, unless the Board directed that transmittal be deferred, transmit the draft report to the firm under review. This part of the rule only described internal Board procedures. To eliminate any confusion created by this provision and to preserve the Board's flexibility to structure its internal processes, the Board deleted these provisions from the rule.

The Board also made a change concerning the amount of time within which the rule requires a firm to submit a response to a draft inspection report. Commenters suggested that the proposed period, 30 days, was too short. The Board believes that, as a general matter, 30 days allows sufficient time, but the Board added a provision that would allow the Board to grant a longer period when warranted by unusual circumstances.

One commenter suggested that the rules should more closely track the Act by expressly providing that a firm's response to a draft inspection report would be attached to, and made part of, any final report. The Board incorporated such a provision in the final rules.

One commenter noted that the Board's description of the state authorities that would receive the final inspection report under Rule 4008, as proposed, differed slightly from the authorities described in the Act's definition of "appropriate state regulatory authority." In response to this comment, the Board changed its rule to more closely track the Act. Specifically, the Board added a definition of "appropriate state regulatory authority" based on the definition of that term in the Act. The Board expects that, in most cases, the appropriate state regulatory authority to receive an inspection report will be any state, agency, board or other authority that has issued a license or certification number authorizing the firm to engage in the business of auditing or accounting.

Finally, one commenter suggested that the Board notify the Commission and each appropriate state regulatory authority to which the final inspection report was provided under Rule 4008(b) and (c) of the Board's final determination concerning whether the firm has addressed the criticisms or defects in the quality control system of the firm identified in the inspection report to the satisfaction of the Board. The Board implemented this suggestion by adding paragraph (b) to Rule 4009. Rule 4009(b) provides that if the Board determines that the firm has satisfactorily addressed all quality control defects and criticisms in the final report, the Board will promptly provide notice of that determination to the Commission and to any appropriate state regulatory authority to which the Board had provided any portion of the final inspection report.

**III. Date of Effectiveness of the Proposed Rules 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 Board consents, the Commission will:

(A) By order approve such proposed rules; or

(B) Institute proceedings to determine whether the proposed rules 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 is consistent with the requirements of Title I of 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/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number PCAOB–2003–08 on the subject line.

*Paper comments:*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number PCAOB–2003–08. 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/pcaob.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number PCAOB–2003–08 and should be submitted on or before May 14, 2004.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 04–9194 Filed 4–22–04; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49574; File No. SR–Amex–2003–110]**

### Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to Procedures Applicable to Continued Listing Evaluation and Follow-Up

April 16, 2004.

On December 12, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change clarifying the procedures applicable to listed companies with regard to continued listing evaluation and follow-up. On February 19, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 10, 2004.[4] The Commission received no comments on the proposal.

The Exchange proposes to revise Section 1009 of the Amex Company Guide ("Company Guide") to clarify that Exchange staff may establish a time period of less than 18 months for a listed company to regain compliance with some or all of the continued listing standards, if the nature and circumstances of the company's particular continued listing status warrant such shorter time period. In determining whether to establish a time period of less than 18 months for a company to regain compliance with some or all of the continued listing standards, the Exchange staff would consider whether, in view of the nature and severity of the particular continued listing deficiency, including the investor protection concerns raised, 18 months would be an inappropriately long period of time to regain compliance. While it is not possible to enumerate all possible circumstances, the following is a non-exclusive list of the types of continued listing deficiencies that, based on a particular listed company's unique situation, may result in imposition of a shorter time period: delinquencies with respect to Commission filing obligations; severe short-term liquidity and/or financial impairment; present or potential public interest concerns;[5] and/or deficiencies with respect to the requisite distribution requirements that make the security unsuitable for auction market trading.

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[6] and, in particular, the requirements of section 6(b) of the Act[7] and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(5)[8] of the Act, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

The Commission notes that the proposed rule change clarifies the Amex's existing authority to establish a time period of less than 18 months for a company to regain compliance with some or all of the Amex continued listing standards. In addition, Section 1009 of the Company Guide sets forth several factors that the Exchange would consider in its determination. Such criteria should provide transparency to the process of continued listing evaluation and follow-up, thereby benefiting listed companies and investors.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act[9], that the proposed rule change (File No. SR–Amex–2003–110), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–9193 Filed 4–22–04; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 18, 2004 ("Amendment No. 1"). In Amendment No. 1, the Amex replaced the text of the proposed rule change in its entirety.

[4] *See* Securities Exchange Act Release No. 49351 (March 2, 2004), 69 FR 11467.

[5] Public interest concerns could include, for example, situations where the company, a corporate officer or affiliate is the subject of a criminal or regulatory investigation or action; or the company's auditors have resigned and withdrawn their most recent audit opinion raising concerns regarding the internal controls and financial reporting process. However, other situations not specifically enumerated could also raise public interest concerns regarding the appropriateness of a particular company's continued listing.

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49575; File No. SR–CBOE–2004–13]**

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by the Chicago Board Options Exchange, Inc. Relating to Retroactive Crediting of DPM Principal Acting as Agent Order Transaction Fees

April 16, 2004.

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 March 9, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to 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 CBOE. On March 31, 2004, the CBOE submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to change its Fee Schedule to retroactively credit Designated Primary Market-Makers ("DPMs") for transaction fees they incur in executing outbound "principal acting as agent" ("PA") Orders, as defined in the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the "Linkage Plan").

The text of the proposed fee schedule is below. Proposed additions are in *italics*. Proposed deletions are in [brackets].

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Chris Hill, Attorney, CBOE, to Nancy Sanow, Assistant Director, Commission, dated March 26, 2004 ("Amendment No. 1"). In Amendment No. 1, the CBOE submitted a new Form 19b–4, which replaced and superceded the original filing in its entirety.

Chicago Board Options Exchange, Incorporated Rules

**FEE SCHEDULE**

May 1, 2004

1–20. (No Change).

21. DPM Fees Credit Relating to Duplicate Transactions re Linkage

Effective *July 1, 2003* [February 2, 2004], DPM transaction and trade match fees generated from "scratched" (or linked) transactions with outbound principal acting as agent (PA) orders will be credited to DPMs (currently $.24 per contract). In addition, *when DPMs incur fees to execute PA orders at other exchanges, those* DPMs will be credited *up to an additional* 50% of *the CBOE* transaction and trade match fees related to *those* outbound PA transactions, up to the amount of total *fees CBOE receives from inbound* linkage [in bound] transaction and trade match fees. At current rates, this amounts to an additional credit of up to $.12 per contract, for a total credit of up to $.36 per contract.

* * * * *

**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 CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to amend the Exchange fee schedule to retroactively establish certain fee relief that was provided prospectively in a previous CBOE rule change filing [4] and to clarify when such relief is available.

As explained in that previous proposed rule change, pursuant to Linkage Plan, CBOE DPMs are required in certain circumstances to send a PA Order to another exchange in order to obtain the National Best Bid or Offer ("NBBO") price for their customers. The DPM usually pays transaction fees to the other exchange as well as to the Options Clearing Corporation ("OCC") to execute this PA Order at the other exchange. Then, under the Linkage procedure,[5] when the DPM receives a fill of its PA Order from the other exchange, the CBOE DPM must then re-trade the order back to their customer, resulting in additional transaction fees (this time from CBOE and the OCC.) Thus, the Linkage procedure's requirement to re-trade means that DPMs who send such PA Orders to other exchanges may incur duplicate transaction and OCC fees on PA Orders that substantially increase the costs of such transactions for the DPMs.

In SR–CBOE–2004–08,[6] the Exchange established a two-phased relief to offset these additional costs. First, the CBOE established rebates for all CBOE transaction and trade match fees related to the orders that CBOE DPMs fulfill by sending PA transactions to other exchanges (*i.e.*, the fees from the "re-trade.") At current rates, this is $0.24 per contract.

Second, in order to help offset the transaction-related costs that the DPMs are assessed on PA orders sent to other exchanges by the OCC and the other exchanges, the Exchange credits CBOE DPMs who incur such costs an additional 50% of the CBOE transaction and trade match fees related to each outbound PA transaction. At current rates, this is $0.12 per contract. This second rebate will be funded by the amount of total transaction and trade match fees that CBOE receives from incoming PA orders from other exchanges ("incoming PA fees"), and the aggregate amount rebated in the second rebate will be limited to no more than the total amount of incoming PA fees.

SR–CBOE–2004–08 [7] established the fee changes described above prospectively pursuant to Section 19(b)(3)(A)(ii) of the Act [8] and Rule 19b–4(f)(2) thereunder.[9] In this filing, the Exchange proposes to extend this relief retroactively back to all applicable transactions occurring since the start of the CBOE fiscal year on July 1, 2003.

2. Statutory Basis

The CBOE believes that the proposed rule is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of section 6(b)(4) [11] in particular in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

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 CBOE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) institute proceedings to determine whether the proposed rule change, as amended, 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–CBOE–2004–13 on the subject line.*

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission,

[4] *See* Securities Exchange Act Release No. 49341 (March 1, 2004), 69 FR 10492 (March 5, 2004) (Notice of Filing and Immediate Effectiveness of SR–CBOE–2004–08).

[5] "Linkage procedure" describes the process that CBOE DPMs undergo to fulfill the Customer order underlying a PA Order after another exchange fills the PA Order. The CBOE believes that this process is uniform among exchanges that are Participants in the Linkage Plan. Telephone conversation between Chris Hill, Attorney, CBOE and Tim Fox, Attorney, Commission on April 12, 2004.

[6] *See supra* note 4.

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number SR–CBOE–2004–13. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2004–13 and should be submitted on or before May 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–9192 Filed 4–22–04; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49576; File No. SR–NASD–2004–048]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Create a Pilot Program Modifying SuperMontage Fees and Credits for Orders and Quotes Executed in the Nasdaq Closing Cross

April 16, 2004.

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 March 16, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as "establishing or changing a due, fee, or other charge" under Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing this proposed rule change to waive, for a pilot period of three months, the Nasdaq National Market Execution System (commonly called SuperMontage) execution fees and credits for those quotes and orders executed in the Nasdaq Closing Cross. The pilot program will commence when Nasdaq implements the Closing Cross. The text of the proposed rule change is set forth below. Proposed new language is in *italics*.

* * * * *

**Rule 7010. System Services**

(a)–(h) No change.

(i) Nasdaq National Market Execution System (SuperMontage)

(1) The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members:

| | |
|---|---|
| Order Entry: | |
| Non-Directed Orders (excluding Preferenced Orders) | No charge. |
| Preferenced Orders: | |
| Preferenced Orders that access a Quote/Order of the member that entered the Preferenced Order). | No charge. |
| Other Preferenced Orders | $0.02 per order entry. |
| Directed Orders | $0.10 per order entry. |
| Order Execution: | |
| Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the NNMS: | |
| Charge to member entering order: Average daily shares of liquidity provided through the NNMS by the member during the month:. | |
| 400,000 or less | $0.003 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share). |
| 400,001 to 5,000,000 | $0.0027 per share executed (but no more than $108 per trade for trades in securities executed at $1.00 or less per share). |
| 5,000,001 or more | $0.0025 per share executed (but no more than $100 per trade for trades in securities executed at $1.00 or less per share). |
| Credit to member providing liquidity | $0.002 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share). |
| Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the NNMS: | |
| Charge to member entering order: Average daily shares of liquidity provided through the NNMS by the member during the month: | |

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

| | |
|---|---|
| 400,000 or less | $0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share). |
| 400,001 or more | $0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share, and no more than $10,000 per month). |
| Directed Order | $0.003 per share executed. |
| Non-Directed or Preferenced Order entered by a member that accesses its own Quote/Order submitted under the same or a different market participant identifier of the member. | No charge. |
| Order Cancellation: | |
| Non-Directed and Preferenced Orders | No charge. |
| Directed Orders | $0.10 per order cancelled. |

(2) For purposes of assessing NNMS fees and credits hereunder, (A) a Discretionary Order that executes prior to being displayed as a Quote/Order will always be deemed to be accessing liquidity unless it is executed by (or receives delivery of) a displayed Discretionary Order at a price in the discretionary price range of the displayed Discretionary Order, and (B) a Discretionary Order that executes after being displayed as a Quote/Order will always be deemed to be providing liquidity, unless the displayed Discretionary Order executes against (or is delivered to) a Quote/Order or Non-Directed Order that has not been designated "Immediate or Cancel," at a price in its discretionary price range.

(3) Pilot-Closing Cross

*For a period of three months commencing on the date Nasdaq implements its Closing Cross (as described in Rule 4709) members shall not be charged SuperMontage execution fees, or receive SuperMontage liquidity provider credits, for those quotes and orders executed in the Nasdaq Closing Cross.*

(j)–(u) No change.

* * * * *

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Commission recently approved the Nasdaq Closing Cross, which is a new process for determining the Nasdaq Official Closing Price for the most liquid Nasdaq stocks.[5] The Nasdaq Closing Cross is designed to create a more robust close that allows for price discovery, and an execution that results in an accurate, tradable closing price. Nasdaq is proposing a three-month pilot program during which there will be no SuperMontage execution charges, and no SuperMontage liquidity provider credits, for those quotes and orders executed as part of the Nasdaq Closing Cross. The pilot program would enable Nasdaq to evaluate more accurately the effectiveness of the Closing Cross in establishing the NOCP by eliminating any pricing disincentives that could arise as a result of a price schedule not established on the basis of actual trading data. During the pilot program, Nasdaq staff would study the behavior and participation in the Closing Cross to determine the optimum pricing schedule.[6]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[7] in general, and with Section 15A(b)(5),[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. Nasdaq believes that the proposal to create the pilot program is an equitable allocation of fees because the program would apply equally to all members whose quotes and orders are executed as part of the Nasdaq Closing Cross. Furthermore. Nasdaq believes that the program is reasonable because it would allow Nasdaq, for a limited period of time, to analyze participation in the process and use the results to create an optimum fee schedule based on actual trading data.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*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

The proposed rule change has become immediately effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[9] and subparagraph (f)(2) of Rule 19b–4 thereunder,[10] because it establishes or changes a due, fee, or other charge imposed by Nasdaq. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate this proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[5] *See* Securities Exchange Act Release No. 49406 (March 11, 2004), 69 FR 12879 (March 18, 2004) (SR–NASD–2003–173); *see also* Securities Exchange Act Release No. 49534 (April 7, 2004), 69 FR 19584 (April 13, 2004) (SR–NASD–2004–060), amending the Closing Cross.

[6] Nasdaq would consider extending the pilot if more information is needed at the end of the three-month period.

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

*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–NASD–2004–048 on the subject line.

*Paper comments:*

Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–048. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. 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–NASD–2004–048 and should be submitted on or before May 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–9274 Filed 4–22–04; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Request To Release Airport Property Owned by the Cities of Winfield and Arkansas City, Winfield, Kansas

**AGENCY:** Federal Aviation Administration, (FAA), DOT.

**ACTION:** Notice of request to release airport property.

**SUMMARY:** The FAA proposes to rule and invites public comment on the release of approximately 400 acres of airport land located approximately 5 miles from the Strother Field Airport/Industrial Park under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

**DATES:** Comments must be received on or before May 24, 2004.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: Federal Aviation Administration, Central Region, Airports Division, ACE–600, 901 Locust, Kansas City, Missouri 64106–2325. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Jerald Hooley, Chairman, Strother Field Commission, at the following address: Strother Field Airport/Industrial Park, P.O. Box 747, Winfield, Kansas 67156.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Nicoletta S. Oliver, Airports Compliance Specialist, Federal Aviation Administration, Central Region, Airports Division, ACE–610C, 901 Locust, Kansas City, Missouri 64106–2325. The request to release property may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA invites public comment on the request to release property owned by the Cities of Winfield and Arkansas City, Winfield, Kansas, under the provisions of AIR21.

On April 8, 2004, the FAA determined that the request to release property owned by the Cities of Winfield and Arkansas City, Winfield, Kansas, submitted by the Strother Field Commission met the procedural requirements of the Federal Aviation Regulations, part 155.

The FAA will approve or disapprove the request, in whole or in part, no later than June 30, 2004.

The following is a brief overview of the request.

The Strother Field Commission requests the release of approximately 400 acres of airport property on the East Auxiliary Site, which was acquired through the Surplus Property Act of 1944. This land is located approximately 5 miles from the airport and was used by the Army during World War II as an auxiliary landing site. Current use of the property is a farming operation. Because of the location of the land, the property is not involved in the current operation of the airport. The release of the property will allow for the sale of the land to generate revenue for use at the Strother Field Airport/Industrial Park. Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may inspect the request, notice and other documents germane to the request in person at the Strother Field Airport/Industrial Park.

Issued in Kansas City, Missouri, on April 8, 2004.

**George A. Hendon,**

*Manager, Airports Division, Central Region.*

[FR Doc. 04–9195 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–13–M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on November 10, 2003 [68 FR 63845].

**DATES:** Comments must be submitted on or before May 24, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeff Woods at the National Highway Traffic Safety Administration (NHTSA), Office of Crash Avoidance Standards, 202–366–6206. By mail: NVS–122, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**National Highway Traffic Safety Administration**

*Title:* Brake Hose Manufacturing Identification, Federal Motor Vehicle Safety Standard (FMVSS) No. 106.

*OMB Control Number:* 2127–0052

*Type of Request:* Request for public comment on a previously approved collection of information.

*Abstract:* Each manufacturer of brake hoses is required to register their manufacturing identification marks with NHTSA, in accordance with requirements in FMVSS No. 106, Brake Hoses. Manufacturer markings are typically put on motor vehicle brake hoses so that the manufacturer can be identified if a safety problem occurs with brake hoses installed on vehicles. Brake hose manufacturers register approximately 20 new identification marks each year, by submitting a request letter sent via U.S. mail, facsimile, or e-mail.

*Affected Public:* Business or other for-profit.

*Estimated Total Annual Burden:* 30 hours and $3,000.

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

*Comments Are Invited On:*

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate for the burden of the proposed information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on: April 8, 2004.

**Stephen R. Kratzke,**

*Associate Administrator for Safety Performance Standards.*

[FR Doc. 04–9258 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF TRANSPORTATION

**Research and Special Programs Administration**

**[Docket RSPA–98–4957]**

**Renewal of Existing Information Collection**

**AGENCY:** Office of Pipeline Safety, Research and Special Programs Administration, DOT.

**ACTION:** Request for public comments and OMB approval.

**SUMMARY:** As required by the Paperwork Reduction Act of 1995, the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) published a notice on January 22, 2004 (69 FR 3194) requesting public comments on a request for renewal of an information collection, *Drug and Alcohol Testing of Pipeline Operators.* This information collection requires that pipeline operators submit drug and alcohol test results for their employees. RSPA/OPS believes that alcohol and drug testing requirements are an important tool for operators to monitor drug and alcohol usage in the industry. RSPA/OPS has found that the drug and alcohol usage rate among employees in the pipeline industry is less than 1%. This notice requests approval of the renewal from the Office of Management and Budget (OMB) and additional comments from the public.

**DATES:** Comments on this notice must be received by May 24, 2004, to be assured of consideration.

**ADDRESSES:** Comments should identify the docket number of this notice, RSPA–98–4957, and be mailed directly to OMB, Office of Information and Regulatory Affairs (OIRA), 726 Jackson Place, NW., Washington, DC 20503, ATTN: Desk Officer for the Department of Transportation (DOT).

**FOR FURTHER INFORMATION CONTACT:** Marvin Fell, OPS, RSPA, DOT, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–6205 or by electronic mail at *marvin.fell@rspa.dot.gov.*

**SUPPLEMENTARY INFORMATION:**

**Discussion of Comment**

A comment was received from a drug and alcohol testing company that provides services to pipeline operators. This commenter raised the issue of the reporting of test results from contractors. This commenter has raised this issue with DOT and RSPA/OPS on other occasions. However, this issue is a matter of policy and is outside the scope of the renewal of this information collection. The purpose of this notice is to allow the public an additional 30 days to comment on the information collection renewal and to request approval of the renewal from OMB.

*Abstract:* Drug and alcohol abuse is a major societal problem and it is reasonable to assume the problem exists in the pipeline industry as it does in society as a whole. The potential harmful effect of drug and alcohol abuse on safe pipeline operations warrants imposing comprehensive testing regulations on the pipeline industry. These rules are found in 49 CFR part 199.

*Title:* Drug and Alcohol Testing of Pipeline Operators.

*OMB Number:* 2137–0579.

*Type of Request:* Renewal of an existing information collection.

*Estimate of Burden:* 1.22 hour per operator.

*Respondents:* Gas and hazardous liquid pipeline operators.

*Estimated Number of Respondents:* 2,419.

*Estimated Total Annual Burden on Respondents:* 2,963 hours.

Comments are invited on: (a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC, on April 16, 2004.

**Richard D. Huriaux,**

*Regulations Manager, Office of Pipeline Safety.*

[FR Doc. 04–9197 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF TRANSPORTATION

**Research and Special Programs Administration**

**[Docket No. RSPA–04–17401; Notice 1]**

**Pipeline Safety: Development of Class Location Change Waiver Guidelines**

**AGENCY:** Office of Pipeline Safety, Research and Special Programs Administration, DOT.

**ACTION:** Notice; information on class location waiver guideline development.

**SUMMARY:** On December 15, 2003, the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) issued a final rule on gas pipeline integrity management that established a policy to grant waivers of the pipe replacement or pressure reduction requirements after a change in Class Location if an operator can demonstrate an alternative integrity management program for the waiver segment. A pipeline Class Location increase results from an increase in population adjacent to a pipeline segment. RSPA/OPS held a meeting on April 14–15, 2004, in Washington, DC, to discuss the criteria for gas pipeline Class Location change waivers. Waivers will only be granted when pipe condition and active integrity management provides a level of safety greater than or equal to a pipe replacement or pressure reduction.

**FOR FURTHER INFORMATION CONTACT:** Joy Kadnar, (tel: 202–366–0568); e-mail *joy.kadnar@tsi.jccbi.gov* regarding the subject matter of this notice. Additional information about RSPA/OPS" Class Location waiver guidelines development can be found at *http://primis.rspa.dot.gov/gasimp*. You can read comments and other material in the docket on the Internet at: *http://dms.dot.gov*.

**ADDRESSES:** You may submit comments [identified by DOT DMS Docket Number RSPA–04–17401] by any of the following methods:

- Web Site: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov*. including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

*Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–40 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

**SUPPLEMENTARY INFORMATION:** The Pipeline Safety Improvement Act of 2002 (codified at 49 U.S.C. 60101) required RSPA/OPS to issue regulations to require pipeline operators to conduct risk analyses and to adopt and implement integrity management programs. On December 15, 2003, RSPA/OPS issued a final rule on gas transmission pipeline integrity management in high consequence areas (68 FR 69778). The cost-benefit analysis included in this final rule noted that another benefit to be realized from implementing integrity management is reduced cost to the pipeline industry for ensuring safety in populated areas along pipelines. The improved knowledge of pipeline integrity that will result from implementing this rule will provide a technical basis for providing relief to operators from current requirements to replace pipe or to reduce operating stresses in pipelines when population near them increases, *i.e.* when the Class Location increases from Class 2 to Class 3.

The pipeline safety regulations require that pipelines routed through areas with higher local population density operate at lower pressures. This is intended to provide an extra safety margin in those areas. Operators typically replace pipeline when population increases, because reducing pressure to reduce stresses reduces the ability of the pipeline to carry gas. Areas with population growth typically require more, not less, gas.

However, replacing pipelines can be very costly. Providing safety in another manner, such as by implementing the integrity management rule principles, could allow RSPA/OPS to waive some pipe replacement or pressure reductions for pipelines in areas of population growth that are changing from Class 2 to Class 3. RSPA/OPS estimated that such waivers could result in a reduction in costs to industry of $1 billion over the next 20 years, with no adverse effects on public safety.

Although guidelines for granting such waivers in high consequence and other areas have not yet been completed, RSPA/OPS has granted a limited number of waivers of the Class Location change rules in our approval of certain risk management demonstration programs. There also have been recent waiver requests to allow pipe to remain at existing hoop stresses although the maximum allowable operating pressure (MAOP) is no longer commensurate with the requirement for the new Class Location.

The Interstate Natural Gas Association of America (INGAA) submitted a proposal to RSPA/OPS in January for development of guidelines for the granting of Class Location waivers based on integrity management principles. INGAA also discussed a proposal for a pilot program that would designate ten "waiver sites" that would be considered by RSPA/OPS after the establishment of criteria for a waiver in the guidelines.

The INGAA proposal was discussed in February, 2004, at the Technical Pipeline Safety Standards Committee (TPSSC), the statutorily mandated gas pipeline advisory committee. The proposal was also discussed with state and federal regulators at the Interstate Summit meeting on February 26, 2004.

Most recently, RSPA/OPS held a meeting on April 14–15, 2004, in Washington, DC to discuss the criteria for consideration of gas pipeline Class Location change waiver requests. Because a pipeline Class Location increase results from an increase in population adjacent to a pipeline segment, waivers will only be granted when pipe condition and active integrity management provides a level of safety greater than or equal to a pipe replacement or pressure reduction. The April meetings focused on RSPA/OPS" criteria for pipeline characteristics and integrity management processes to identify projects that would have a high probability of waiver approval. Representatives from RSPA/OPS headquarters and regions, industry, and State pipeline safety agencies with proposed waiver sites in their States attended the meeting.

Information on the INGAA proposal, development of Class Location waiver guidance, and the pilot program is available in the docket referenced above.

**Authority:** 49 U.S.C. 60102, 60109, 60117.

Issued in Washington, DC, on April 16, 2004.

**Richard D. Huriaux,**

*Regulations Manager, Office of Pipeline Safety.*

[FR Doc. 04–9202 Filed 4–22–04; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34488]**

### Union Pacific Railroad Company—Trackage Rights Exemption—Soo Line Railroad Company d/b/a Canadian Pacific Railway

The Soo Line Railroad Company d/b/a Canadian Pacific Railway (CPR) has agreed to renew local trackage rights to Union Pacific Railroad Company (UP). The trackage rights extend from UP milepost 306.5 near Comus, MN, and UP milepost 333.5, near Rosemount, MN, a distance of approximately 27 miles.

These trackage rights represent a renewal of trackage rights originally granted to UP by a CPR predecessor in an agreement dated November 23, 1901. The original term of the 1901 Agreement has expired, but UP and CPR have agreed to an extension of the 1901 Agreement until June 30, 2004.

The transaction is scheduled to be consummated on May 1, 2004.

The purpose of the trackage rights is to renew UP's local trackage rights over the joint line by replacing the 1901 Agreement with a trackage rights agreement dated April 7, 2004.

Any employees affected by the subject transaction will be protected by the labor conditions prescribed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34488, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Robert T. Opal, 1416 Dodge Street, Room 830, Omaha, NE 68179.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: April 19, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 04–9250 Filed 4–22–04; 8:45 am]

BILLING CODE 4915–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[PS–73–89]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, PS–73–89 (T.D. 8370), Excise Tax on Chemicals That Deplete the Ozone Layer and on Products Containing Such Chemicals (§§ 52.4682–1(b), 52.4682–2(b), 52,4682–2(d), 52.4682–3(c), 52.4682–3(g), and 52.4682–4(f)).

**DATES:** Written comments should be received on or before June 22, 2004, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulations should be directed to Larnice Mack at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Larnice.Mack@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Excise Tax on Chemicals That Deplete the Ozone Layer and on Products Containing Such Chemicals.

*OMB Number:* 1545–1153.

*Regulation Project Number:* PS–73–89.

*Abstract:* This regulation imposes reporting and recordkeeping requirements necessary to implement Internal Revenue Code sections 4681 and 4682 relating to the tax on chemicals that deplete the ozone layer and on products containing such chemicals. The regulation affects manufacturers and importers of ozone-depleting chemicals, manufacturers of rigid foam insulation, and importers of products containing or manufactured with ozone-depleting chemicals. In addition, the regulation affects persons, other than manufacturers and importers of ozone-depleting chemicals, holding such chemicals for sale or for use in further manufacture on January 1, 1990, and on subsequent tax-increase dates.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents/Recordkeepers:* 150,316.

*Estimated Time Per Respondent/Recordkeeper:* 30 minutes.

*Estimated Total Annual Burden Hours:* 75,142.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of

information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 16, 2004.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 04–9309 Filed 4–22–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 1139; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to notice and request for comments.

**SUMMARY:** This document contains a correction to a notice and request for comments, which was published in the **Federal Register** on Friday, January 16, 2004 (69 FR 2648). This notice relates to a comment request on proposed collection on form 1139.

**FOR FURTHER INFORMATION CONTACT:** Allan Hopkins (202) 622–6665 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### Background

The notice and request for comments that is the subject of this correction is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

#### Need for Correction

As published, the comment request for Form 1139 contains an error which may prove to be misleading and is in need of clarification.

#### Correction of Publication

Accordingly, the publication of the comment request for Form 1139, which was the subject of FR Doc. 04–1055, is corrected as follows:

1. On page 2648, column 1, under the paragraph heading **SUPPLEMENTARY INFORMATION,** the language, "*OMB Number:* 1545–1582" is corrected to read "*OMB Number:* 1545–0582".

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 04–9310 Filed 4–22–04; 8:45 am]

BILLING CODE 4830–01–P

# Corrections

Federal Register
Vol. 69, No. 79
Friday, April 23, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

### Required Advance Electronic Presentation of Cargo Information: Compliance Dates for Rail Carriers

*Correction*

In notice document 04–8199 beginning on page 19207 in the issue of Monday, April 12, 2004, make the following correction:

On page 19207, in the second column, in the second paragraph, in the seventh line, "affected 3 carriers" should read "affected carriers."

[FR Doc. C4–8199 Filed 4–22–04; 8:45 am]

BILLING CODE 1505–01–D

## NUCLEAR REGULATORY COMMISSION

### Review and Status of Surface and Volumetric Survey Design and Analysis Using Spatial Analysis and Decision Assistance (SADA) Methods; Public Workshop

*Correction*

In notice document 04–8634 beginning on page 20651 in the issue of Friday, April 16, 2004, make the following corrections:

1. On page 20652, in the first column, under the heading "**DATES**", in the fourth line, "*http://www.tiem.utk.edu/-sada/*" should read "*http://www.tiem.utk.edu/~sada/*".

2. On the same page, in the same column, under the heading "**FOR FURTHER INFORMATION CONTACT**", in the last line, "*www.tiem.utk.edu/-sada/*" should read "*http://www.tiem.utk.edu/~sada/*".

[FR Doc. C4–8634 Filed 4–22–04; 8:45 am]

BILLING CODE 1505–01–D


Federal Register

Friday,
April 23, 2004

Part II

# Department of Labor

Wage and Hour Division

29 CFR Part 541

**Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule**

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Part 541**

**RIN 1215–AA14**

## Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This document provides the text of final regulations under the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the "white collar" exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in pertinent sections of these regulations.

**EFFECTIVE DATE:** These rules are effective on August 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–0745 (this is not a toll-free number). For an electronic copy of this rule, go to DOL/ESA's Web site (*http://www.dol.gov/esa*), select "**Federal Register**" under "Laws and Regulations," and then "Final Rules." Copies of this rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling our toll-free help line at 1–866–4USWAGE (1–866–487–9243) between 8 a.m. and 5 p.m., in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm*.

**SUPPLEMENTARY INFORMATION:**

### I. Summary of Major Changes and Economic Impact

The minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) are among the nation's most important worker protections. These protections have been severely eroded, however, because the Department of Labor has not updated the regulations defining and delimiting the exemptions for "white collar" executive, administrative and professional employees. By way of this rulemaking, the Department seeks to restore the overtime protections intended by the FLSA.

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. The minimum salary level was last updated in 1975, almost 30 years ago, and is only $155 per week. The job duty requirements in the regulations have not been changed since 1949—almost 55 years ago.

Revisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades. In addition, workplace changes over the decades and federal case law developments are not reflected in the current regulations. Under the existing regulations, an employee earning only $8,060 per year may be classified as an "executive" and denied overtime pay. By comparison, a minimum wage employee earns about $10,700 per year. The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption. The existing regulations are very difficult for the average worker or small business owner to understand. The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for jobs of the 21st Century.

Confusing, complex and outdated regulations allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer. In addition, more and more, employees must resort to lengthy court battles to receive their overtime pay. In the Department's view, this situation cannot be allowed to continue. Allowing more time to pass without updating the regulations contravenes the Department's statutory duty to "define and delimit" the section 13(a)(1) exemptions "from time to time."

Accordingly, on March 31, 2003, the Department published a Notice of Proposed Rulemaking (68 FR 15560) suggesting changes to the Part 541 regulations, including the largest increase of the salary levels in the 65-year history of the FLSA. The proposed changes to the duties tests were designed to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.

During a 90-day comment period, the Department received 75,280 comments from a wide variety of employees, employers, trade and professional associations, small business owners, labor unions, government entities, law firms and others. In addition, the Department's proposal prompted vigorous public policy debate in Congress and the media. The public commentary revealed significant misunderstandings regarding the scope of the "white collar" exemptions, but also provided many helpful suggestions for improving the proposed regulations.

After carefully considering all of the relevant comments, and as detailed in this preamble, the Department has made numerous changes from the *proposed* rule to the final rule, including the following:

*Scope of the Exemptions*

- New section 541.3(a) states that exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers have always been, and will continue to be, entitled to overtime pay.
- New section 541.3(b) states that the exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections

for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work.

• New section 541.4 clarifies that the FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply with State laws providing additional worker protections (a higher minimum wage, for example), and the Act does not preclude employers from entering into collective bargaining agreements providing wages higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example).

*Salary*

• The final rule nearly triples the current $155 per week minimum salary level required for exemption to $455 per week—a $30 per week increase over the proposal and a $300 per week increase over the existing regulations.

• The "highly compensated" test in the final rule applies only to employees who earn at least $100,000 per year, a $35,000 increase over the proposal.

• The "highly compensated" test in the final rule applies only to employees who receive at least $455 per week on a salary basis.

• The final regulation adds a new requirement that exempt highly compensated employees also must "customarily and regularly" perform exempt duties.

*Executive*

• The final rule deletes the special rules for exemption applicable to "sole charge" executives.

• The final rule adds the requirement that employees who own at least a bona fide 20-percent equity interest in an enterprise are exempt only if they are "actively engaged in its management."

• The final rule retains the "long" duties test requirement that an exempt executive must have authority to "hire or fire" other employees or must make recommendations as to the "hiring, firing, advancement, promotion or any other change of status" which are "given particular weight," but provides a new definition of "particular weight."

*Administrative*

• The final rule eliminates the proposed "position of responsibility" test for the administrative exemption.

• The final rule eliminates the proposed "high level of skill or training" standard under the administrative exemption.

• The final rule retains the existing requirement (deleted in the proposed regulations) that exempt administrative employees must exercise discretion and independent judgment.

*Professional*

• The final section 541.301(e)(2) states that licensed practical nurses and other similar health care employees do not qualify as exempt professionals. The final rule retains the provisions of the existing regulations regarding registered nurses.

• As intended in the proposal, the final rule does not make any changes to the educational requirements for the professional exemption. Further, the Department never intended to allow the professional exemption for any employee based on veterans' status. The final rule has been modified to avoid any such misinterpretations. The references to training in the armed forces, attending a technical school and attending a community college have been removed from final section 541.301(d).

• The final rule defines "work requiring advanced knowledge," one of the three essential elements of the professional primary duties test, as "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment."

As a result of these changes, made in response to public commentary, the final Part 541 regulations strengthen overtime protections for millions of low-wage and middle-class workers, while reducing litigation costs for employers. Both employees and employers benefit from the final rules. Employees will be better able to understand their rights to overtime pay, and employees who know their rights are better able to complain if they are not being paid correctly. Employers will be able to more readily determine their legal obligations and comply with the law. The Department's Wage and Hour Division will be better able to vigorously enforce the law.

The economic analysis found in section VI of this preamble concludes that the final rule guarantees overtime protection for all workers earning less than the $455 per week ($23,660 annually), the new minimum salary level required for exemption. Because of the increased salary level, overtime protection will be strengthened for more than 6.7 million salaried workers who earn between the current minimum salary level of $155 per week ($8,060 annually) and the new minimum salary level of $455 per week ($23,660 annually). These 6.7 million salaried workers include:

• 1.3 million currently exempt white-collar workers who will gain overtime protection;

• 2.6 million nonexempt salaried white-collar workers who are at particular risk of being misclassified; and

• 2.8 million nonexempt workers in blue-collar occupations whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current rules, will be automatic under the final rules regardless of their job duties.

The standard duties tests adopted in the final regulation are equally or more protective than the short duties tests currently applicable to workers who earn between $23,660 and $100,000 per year. The final "highly compensated" test might result in 107,000 employees who earn $100,000 or more per year losing overtime protection.

Because the rules have not been adjusted in decades, the final rule does impose additional costs on employers, including up to $375 million in additional annual payroll and $739 million in one-time implementation costs. However, updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least an additional $252.2 million every year that could be used to create new jobs. The final rule is not likely to have a substantial impact on small businesses, state and local governments, or any other geographic or industry sector.

## II. Background

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked, and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a single workweek. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)." 29 U.S.C. 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant. The legislative history indicates that the

section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

Pursuant to Congress' specific grant of rulemaking authority, the Department of Labor has issued implementing regulations, at 29 CFR Part 541, defining the scope of the section 13(a)(1) exemptions. Because the FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of these exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9 (1977).

The existing Part 541 regulations generally require each of three tests to be met for the exemption to apply: (1) The employee must be paid a predetermined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet minimum specified amounts (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations (the "duties tests").[1]

The major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years. The FLSA became law on June 25, 1938, and the first version of Part 541 was issued later that year in October. 3 FR 2518 (Oct. 20, 1938). After receiving many comments on the original regulations, the Wage and Hour Division issued revised regulations in 1940. 5 FR 4077 (Oct. 15, 1940). *See also*, "Executive, Administrative, Professional * * * Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("1940 Stein Report"). The Department issued the last major revision of the duties test regulatory provisions in 1949. 14 FR 7705 (Dec. 24, 1949). Also in 1949, an explanatory bulletin interpreting some of the terms in the regulatory provisions was published as Subpart B of Part 541. 14 FR 7730 (Dec. 28, 1949). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report"). In 1954, the Department issued the last major revisions to the regulatory interpretations of the "salary basis" test. 19 FR 4405 (July 17, 1954). After the initial minimum salary levels were set at $30 per week in 1938, the Department revised the Part 541 regulations to increase the salary levels in 1940, 1949, 1958, 1963, 1970 and 1975. 5 FR 4077 (Oct. 15, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 28 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7092 (Feb. 15, 1975). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report").[2]

The framework of the existing Part 541 regulation is based upon the 1940 Stein Report, the 1949 Weiss Report and the 1958 Kantor report, which reflect the best evidence of the American workplace a half-century ago. The existing regulation, therefore, reflects the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long been altered. As the workplace and structure of our economy has evolved, so, too, must Part 541 be modernized to remain current and relevant. This necessary adaptation forms the philosophical underpinnings of this update and reflects the Department's efforts to remain true to the intent of Congress, which mandated that the DOL "from time to time" define and delimit these exemptions and the myriad terms contained therein.

The Department notes, however, that much of the reasoning of the Stein, Weiss and Kantor reports remains as relevant as ever. This preamble notes such instances, and articulates why the reasoning is still sound. However, while the Department carefully has reviewed these reports in undertaking this update, it is not bound by the reports. The Department is responsible for updating regulations that, with each passing decade of inattention, have become increasingly out of step with the realities of the workplace. Indeed, under this rulemaking, the Department is charged with utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * * in exercising its discretion to update the terms of this Part.

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades, including public comments responding to an Advance Notice of Proposed Rulemaking issued by the Department in November 1985,[3] a March 1995 oversight hearing by the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities, U.S. House of Representatives, a report issued by the General Accounting Office (GAO) in September 1999,[4] and a May 2000 hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives. In its 1999 report to Congress and at the May 2000 hearing, the GAO chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In general, the employers contacted by the GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern workplace, and create potential liability for violations when errors in classification occur. Employers were particularly concerned about potential liability for violations of the complex "salary basis" test, and complained that the "discretion and independent judgment" standard for administrative employees is confusing and applied inconsistently by the Wage

[1] A number of states arguably have more stringent exemption standards than those provided by Federal law. The FLSA does not preempt any such stricter State standards. If a State or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies. *See* Section 18 of the FLSA, 29 U.S.C. § 218.

[2] Revisions to increase the salary rates in January 1981 were stayed indefinitely. 46 FR 11972 (Feb. 12, 1981). The Department also revised the regulations to accommodate statutory amendments to the FLSA in 1961, 1967, 1973, and 1992. 26 FR 8635 (Sept. 15, 1961); 32 FR 7823 (May 30, 1967); 38 FR 11390 (May 7, 1973); 57 FR 37677 (Aug. 19, 1992); 57 FR 46744 (Oct. 9, 1992).

[3] 50 FR 47696 (Nov. 11, 1985).

[4] *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place*, GAO/HEHS–99–164, September 30, 1999 (GAO Report).

and Hour Division. They also noted the traditional limits of the exemptions have blurred in the modern workplace. Employee representatives contacted by the GAO, in contrast, were most concerned that the use of the exemptions be limited to preserve existing overtime work hour limits and the 40-hour standard workweek for as many employees as possible. They believed the tests have become weakened as applied today by judicial rulings and do not adequately restrict employers' use of the exemptions. When combined with the low salary test levels, the employee representatives felt that few protections remain, particularly for low-income supervisory employees. The GAO Report noted that the conflicting interests affected by these rules have made consensus difficult and that, since the FLSA was enacted, the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions. To resolve the issues presented, the GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the workplace. The GAO recommended that the Secretary of Labor comprehensively review the regulations and restructure the exemptions to better accommodate today's workplace and to anticipate future workplace trends.

Responding to the extensive public commentary, on March 31, 2003, the Department published proposed revisions to these regulations in the **Federal Register** inviting public comments for 90 days (see 68 FR 15560; March 31, 2003). In response to the proposed rule, the Department received a total of 75,280 comments during the official comment period. The Department received comments from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others.

Most of the comments received were form letters submitted by e-mail or facsimile. Form letters expressing general support of the proposal were received, for example, from members of the Society for Human Resource Management and from individuals who identified themselves as being in agreement with the HR Policy Association or the National Funeral Directors Association. More than 90 percent of the comments were form letters generated by organizations affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) expressing general opposition to the proposal. These largely identical submissions raise concerns that the proposal would, for example, "diminish the application of overtime pay and seriously erode the 40 hour workweek" and lead to "[c]utting overtime pay" which "would really hurt America's working families." The form letters, however, do not address any particular aspect of the changes being proposed to the existing regulations. Indeed, some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions.

Approximately 600 of the comments include substantive analysis of the proposed revisions. Virtually all of these 600 comments favor some change to the existing regulations. Among the commenters there are a wide variety of views on the merits of particular sections of the proposed regulations. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered all of the comments and the arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some editorial suggestions, some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to better organize or structure the regulatory text. Finally, a number of comments were received on issues that go beyond the scope or authority of these regulations (such as eliminating all exemptions from overtime, lowering the overtime threshold to fewer hours worked per week or per day, banning all mandatory overtime, and basing overtime on a two-week/80-hour limit), which the Department will not address in the discussion that follows.

### III. Authority of the Secretary of Labor

Section 13(a)(1) of the FLSA provides exemptions from the minimum wage and overtime requirements for employees "employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman * * *." 29 U.S.C. 213(a)(1). Congress included these exemptions in the original enactment of the FLSA in 1938, but the statute contains no definitions, guidance or instructions as to their meaning.

Rather than define the section 13(a)(1) exemptions in the statute, Congress granted the Secretary of Labor broad authority to "define and delimit" these terms "from time to time by regulations." *Id.* A unanimous Supreme Court reaffirmed the broad nature of this delegation in *Auer* v. *Robbins*, 519 U.S. 452, 456 (1997), stating that the "FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative and professionals employees." *See also Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 613 n.6 (1944) (authority given to define and delimit the terms "bona fide executive, administrative, professional"); *Spradling* v. *City of Tulsa, Oklahoma*, 95 F.3d 1492, 1495 (10th Cir. 1996) (the Department "is responsible for determining the operative definitions of these terms through interpretive regulations"), *cert. denied*, 519 U.S. 1149 (1997); *Dalheim* v. *KDFW–TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) (the FLSA "empowers the Secretary of Labor" to define by regulation the terms executive, administrative, and professional).

Several commenters, including the AFL–CIO, claim that the proposal exceeds the authority of the Secretary and will not be entitled to judicial deference. They assert that the proposal improperly broadens the exemptions, fails to safeguard employees from being misclassified, and is not consistent with Congressional intent. As an initial matter, the Supreme Court's decision in *Auer* confirmed the Secretary's "broad authority" to define and delimit these exemptions. 519 U.S. at 456. Moreover, as this preamble establishes, the final rule will simplify, clarify and better organize the regulations defining and delimiting the exemptions for administrative, executive and professional employees. Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classifications because both employees and employers will be better able to understand and follow the regulations.

Other commenters contend that the proposal violates the rule of interpretation articulated in *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), that FLSA exemptions are to be "narrowly construed." However, in *Auer* v. *Robbins*, 519 U.S. at 462–63, the Supreme Court addressed the difference between the "narrowly construed" rule of judicial interpretation and the broad

authority possessed by the Secretary to promulgate these regulations:

Petitioners also suggest that the Secretary's approach contravenes the rule that FLSA exemptions are to be "narrowly construed against * * * employers" and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960). But that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary's power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.

Thus, the commenters' contentions are unfounded because the "narrowly construed" standard does not govern or limit the Secretary's broad rulemaking authority.

## IV. Summary of Major Comments

### *Effective Date*

There were very few comments concerning the effective date of the regulations. The National Association of Convenience Stores (NACS) recommends that the rules become effective 180 days after they are published, but in no event before the passage of 90 days. NACS asserts that "employers will need considerable time to make and implement important business decisions about how to arrange their affairs in light of the revisions," and that a "relatively long period is certainly justified." The Department has set an effective date that is 120 days after the date of publication of these final regulations. The Department believes that a period of 120 days will provide employers ample time to make any changes necessary to ensure compliance with the final regulations. Moreover, a 120-day effective date exceeds the 30-day minimum required under the Administrative Procedure Act, 5 U.S.C. 553(d), and the 60 days mandated for a "major rule" under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A).

The law firm of Morgan Lewis & Bockius and the Information Technology Industry Council request that the Department establish a "short-term 'amnesty' program" that would exist for two years after the regulations" effective date. The program, the commenters suggest, would either allow or require employees seeking unpaid overtime wages based on a misclassification occurring prior to the effective date of the final regulations to submit their claims to the Department for resolution. Under the program, the Department would request that the employer conduct a self-audit of past compliance concerning the positions at issue and would supervise payments of up to two years of back wages, excluding liquidated damages. The statute of limitations would be tolled during this administrative procedure. If the employer refused to perform a self-audit, or did not pay the back wages due, the employee could then bring a lawsuit. The commenters cite FLSA section 16(b) as the source of the Department's authority to implement such a program. Section 16(b) provides aggrieved employees a private right of action that terminates upon the Department's filing a lawsuit for back wages for such employees under section 17. Nothing in section 16(b) or in any other section of the statute authorizes the Department to create the proposed amnesty program.

### *Structure and Organization*

The existing Part 541 contains two subparts. Current Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Current Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin in 1949 (effective in January 1950) to provide guidance to the public on how the Wage and Hour Division interpreted and applied the exemption criteria when enforcing the FLSA.

The Department proposed to eliminate this distinction between the "regulations" in Subpart A and the "interpretations" in Subpart B. The proposed rule also reorganized the subparts according to each category of exemption, eliminated outdated and uninformative examples, updated definitions of key terms and phrases, and consolidated provisions relevant to several or all of the exemption categories into unified, common sections to eliminate unnecessary repetition (*e.g.*, a number of sections pertaining to salary issues were proposed to be consolidated into a new Subpart G, Salary Requirements, discussed below). The proposed rule also streamlined, reorganized, and updated the regulations in other ways. The proposed regulations utilized objective, plain language in an attempt to make the regulations more understandable to employees and employee representatives, small business owners and human resource professionals. This proposed restructuring of Part 541 was intended to consolidate and streamline the regulatory text, reduce unnecessary duplication and redundancies, make the regulations easier to understand and decipher when applying them to particular factual situations, and eliminate the confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed regulations also streamlined the existing regulations by adopting a single standard duties test for each exemption category, rather than the existing "long" and "short" duties tests structure. Because of the outdated salary levels, the "long" duties tests have, as a practical matter, become effectively dormant. As the American Payroll Association states, the "long" duties tests have "become 'inoperative' because of the extremely low minimum salary test ($155 per week) and federal courts' refusal to apply the percentage restrictions on nonexempt work in the modern workplace." The U.S. Chamber of Commerce similarly notes that the "elements unique to the long test have largely been dormant for some time due to the compensation levels." The U.S. House of Representatives' Committee on Education and the Workforce also comments that the "long" duties tests have "become rarely, if ever, used." The Fisher & Phillips law firm notes that "the 'long' test has played little role in the executive exemption's application for many years." Similarly, the American Bakers Association notes that the "long" duties tests "lack[] current relevance." Finally, the National Association of Federal Wage Hour Consultants states that the "long" duties tests are "seldom used today in the business community." Faced with this reality, the Department decided that elimination of most of the "long" duties tests requirements is warranted, especially since the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the "long" duties tests, will gain stronger protections under the increased minimum salary level which, under the final rule, guarantees overtime protection for all employees earning less than $455 per week ($23,660 annually). Further, as explained in the preamble to the proposed rule, the former tests are complicated and require employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek. Reintroducing these effectively dormant requirements now would add new complexity and burdens to the exemption tests that do not currently apply. For example, employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (see 29 CFR 516.3), nor are they required to

perform a moment-by-moment examination of an exempt employee's specific duties to establish that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long" duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the "long" test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes. Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. *See, e.g., Jones* v. *Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"). Accordingly, given these developments, the Department believed that the percentage limitations on particular duties formerly applied under the "long" tests were not useful criteria that should be reintroduced for defining the "white collar" exemptions in today's workplace, and that employees who would have been tested under the "long" tests are better protected by the final rule's guarantee of overtime protection to all employees earning less than $455 per week.

Most comments addressing the structure and organization of the proposed rule generally favor the proposed restructuring, indicating the consolidation of the former regulations and interpretations into a unified set of rules and other proposed changes provide needed simplification and more clarity to a complex regulation. The weight of comments support replacing the former "long" and "short" test structure with the proposed standard tests and deleting the former "long" test percentage limits on performing nonexempt duties.[5] For example, the U.S. Chamber of Commerce comments that it was their members' experience that the percentage limitations have been difficult to apply and have been of little utility. The Associated Prevailing Wage Contractors states that the percentage requirements created additional and needless recordkeeping requirements. The National Small Business Association comments that a move away from a percentage basis test will alleviate the burden on small business owners.

However, some commenters oppose these changes, asserting that they weakened the requirements for exemption, would allow manipulation of job titles to evade paying overtime to lower-level employees, would open the floodgates to misclassification of employees, and lead to more lawsuits. Some commenters state that the proposed language is too simple for this complex subject or that the proposed language continues to be vague in some areas, making it susceptible to differing interpretations and a continuation of an overly complex subject under the law. Other dissenting comments point to a loss of judicial and opinion letter interpretative precedent that would occur by changing the duties tests as the Department proposed.[6]

The Department has carefully considered these arguments, and continues to believe that reducing the inherent complexity of the exemption criteria by replacing the subjective and effectively dormant "long" test requirements is an essential goal to be pursued in this rulemaking. Streamlining and simplification of the applicable standards is critical to ensuring correct interpretations and proper application of the exemptions in the workplace today. It serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct, conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings. The extensive public comments on the difficulties experienced under the existing regulatory standards amply demonstrate the need for change, in the Department's view. The comments suggesting there is no need to change the current regulatory "long" and "short" test structure are not persuasive when contrasted with the described difficulties under the existing regulatory standards, as confirmed by many other commenters. The Department also does not agree with the comments suggesting that elimination of the "long" test percentage limitations on nonexempt work, which are rarely applied today, and retention of the primary duty approach as currently interpreted by federal courts, will somehow increase litigation or decrease the protections currently afforded to employees. Rather, we believe that employees are more clearly protected by the final rule, which guarantees overtime protection to all employees earning less than $455 per week, than by the existing rule which contains confusing and differing requirements for employees earning between $155 and $455 per week. Moreover, as explained in more detail in Subpart B of the preamble, the Department's final "standard" duties test for the executive exemption incorporates the "authority to hire or fire" requirement from the existing long test.

A number of commenters suggest that the 20-percent limitation on nonexempt work is mandated by the FLSA itself because, when amending the FLSA in 1961 to cover retail and service establishments, Congress added in section 13(a)(1) that "an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities

[5] *See, e.g.*, Comments of American Bakers Association; American Corporate Counsel Association; American Hotel and Lodging Association; American Insurance Association; American Nursery and Landscape Association; American Payroll Association; American Network of Community Options and Resources (ANCOR); Associated Builders and Contractors; Associated Prevailing Wage Contractors; Colley & McCoy Company; Contract Services Association of America; Financial Services Roundtable; Grocery Manufacturers of America; National Association of Chain Drug Stores; National Association of Manufacturers; National Council of Agricultural Employers; National Grocers Association; National Newspaper Association; National Restaurant Association; National Small Business Association; New Jersey Restaurant Association; Pennsylvania Credit Union Association; Public Sector FLSA Coalition; Society for Human Resource Management; State of Oklahoma Office of Personnel Management; Tennessee Valley Authority; the U.S. Chamber of Commerce; and Virginia Department of Human Resource Management.

[6] *See, e.g.*, Comments of 9–5 National Association of Working Women; AFL-CIO; American Federation of State, County and Municipal Employees; American Federation of Teachers; Building and Construction Trades Department, AFL-CIO; Communication Workers of America; International Association of Fire Fighters; International Association of Machinists and Aerospace Workers; International Federation of Professional & Technical Engineers; National Employment Law Project; New York State Public Employees Federation; United Food and Commercial Workers Union; Weinberg, Roger and Rosenfeld; and World at Work.

not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities."

The Department does not believe that eliminating the 20-percent rule from the new standard test contravenes Congress' intent. By adding the 40-percent language in 1961, Congress intended that the 20-percent limitation in the "long" tests would not be used to prohibit employers from applying the exemption to retail and service employees, even if they spent more than 20 percent of their time in nonexempt work. Thus, this statutory language is a limitation on the Department's authority to define certain employees as *nonexempt*—not a Congressional declaration that the Department can never reconsider the 20-percent limitation. Congress could have imposed the 20-percent rule on all employees in 1961, but it did not. In fact, the primary duty approach of the final regulations was first adopted by the Department as part of the "short" tests in 1949. When Congress amended the FLSA in 1961, the primary duty tests were in effect and did not contain mandatory percentage limitations on nonexempt work. *See* 29 CFR 541.103 (50 percent is "rule of thumb"); *Jones,* 2003 WL 21699882, at *3 (the 50-percent "rule of thumb" is not dispositive). Congress did not act to abrogate the primary duty tests, and the Department believes that the "short" duties tests are in no way inconsistent with section 13(a)(1) of the Act.

In reaching its regulatory decisions, the Department is mindful of its obligations under the delegated statutory authority applicable in this situation, and other laws and Executive Orders that apply to the regulatory process, to define and delimit the "white collar" exemption criteria in ways that reduce unnecessary burdens (*e.g.*, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders 12866, 13272, and 13132). Under currently applicable guidelines, implementation of regulatory standards should, to the maximum extent possible within the limits of controlling statutory authority and intent, strike an appropriate balance and be compatible with existing recordkeeping and other prudent business practices, not unduly disruptive of them. Regulatory standards should also strive to apply plain, coherent, and unambiguous terminology that is easily understandable to everyone affected by the rules. Consequently, the Department has decided to adopt the proposed restructuring of the regulations into separate subparts containing standard tests under each category of the exemption, which do not include the former "long" test requirements that require calculating the 20-percent (or 40-percent in retail or service establishments) limits on the amount of time devoted to nonexempt tasks.

*Subpart A, General Regulations*

Proposed Subpart A included several general, introductory provisions scattered throughout the existing regulations. Proposed section 541.0 combined an introductory statement from existing section 541.99 and information currently located at section 541.5b regarding the application of the equal pay provisions in section 6(d) of the FLSA to employees exempt from the minimum wage and overtime provisions of the FLSA under section 13(a)(1). Proposed section 541.0 also provided new language to reflect legislative changes to the FLSA regarding computer employees and information regarding the new organizational structure of the proposed regulations. Proposed section 541.1 provided definitions of "Act" and "Administrator" from their current location in section 541.0. Finally, proposed section 541.2 provided a general statement that job titles alone are insufficient to establish the exempt status of an employee. This fundamental concept, equally applicable to all the exemption categories, currently appears in section 541.201(b) of the existing regulations regarding administrative employees.

The Department received few comments on these general regulations. Thus, Subpart A is adopted as proposed, except for the addition of a new section 541.3 entitled "Scope of the section 13(a)(1) exemptions" and a new section 541.4 entitled "Other laws and collective bargaining agreements." The Department adds these new sections in response to public commentary which evidenced general confusion, especially among employees, regarding the scope of the exemptions and the impact of these regulations on state laws and collective bargaining agreements.

The subsection 541.3(a) clarifies that the section 13(a)(1) exemptions and the Part 541 regulations do not apply to manual laborers or other "blue collar" workers who "perform work involving repetitive operations with their hands, physical skill and energy." Such employees "gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required of exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be."

The new § 541.3(a) responds to comments revealing a fundamental misunderstanding of the scope and application of the Part 541 regulations among employees and employee representatives. To ensure employees understand their rights, the new subsection 541.3(a) clearly states that manual laborers and other "blue collar" workers cannot qualify for exemption under section 13(a)(1) of the FLSA. The description of a "blue collar" worker as an employee performing "work involving repetitive operations with their hands, physical skill and energy" was derived from a standard dictionary definition of the word "manual." *See, e.g., Adam* v. *United States,* 26 Cl. Ct. 782, 792–93 (1992) ("dictionary definition of 'manual' is, 'requiring or using physical skill and energy' "). The illustrative list of such "blue collar" occupations included in this subsection is the same language included in the proposed and final section 541.601 on highly compensated employees.

Section 541.3(b)(1) provides that the section 13(a)(1) exemptions and these regulations also do not apply to "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation

or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or similar work." Final subsection 541.3(b)(2) provides that such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under section 541.100. Thus, for example, "a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire." Final subsection 541.3(b)(3) provides that such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under section 541.200. Final subsection 541.3(b)(4) provides that such employees do not qualify as exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under section 541.300. Final subsection 541.3(b)(4) also states that "although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations."

This new subsection 541.3(b) responds to commenters, most notably the Fraternal Order of Police, expressing concerns about the impact of the proposed regulations on police officers, fire fighters, paramedics, emergency medical technicians (EMTs) and other first responders. The current regulations do not explicitly address the exempt status of police officers, fire fighters, paramedics or EMTs. This silence in the current regulations has resulted in significant federal court litigation to determine whether such employees meet the requirements for exemption as executive, administrative or professional employees.

Most of the courts facing this issue have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees. In *Department of Labor* v. *City of Sapulpa, Oklahoma,* 30 F.3d 1285, 1288 (10th Cir. 1994), for example, the court held that fire department captains were not exempt executives because they were not in charge of most fire scenes; had no authority to call additional personnel to a fire scene; did not set work schedules; participated in all the routine manual station duties such as sweeping and mopping floors, washing dishes and cleaning bathrooms; and did not earn much more than the employees they allegedly supervised. In *Reich* v. *State of New York,* 3 F.3d 581, 585–87 (2nd Cir. 1993), *cert. denied,* 510 U.S. 1163 (1994), the court granted overtime pay to police investigators whose duties included investigating crime scenes, gathering evidence, interviewing witnesses, interrogating and fingerprinting suspects, making arrests, conducting surveillance, obtaining search warrants, and testifying in court. The court held that such police officers are not exempt administrative employees because their primary duty is conducting investigations, not administering the affairs of the department itself. *See also Bratt* v. *County of Los Angeles,* 912 F.2d 1066, 1068–70 (9th Cir. 1990) (probation officers who conduct investigations and make recommendations to the court regarding sentencing are not exempt administrative employees), *cert. denied,* 498 U.S. 1086 (1991); *Mulverhill* v. *State of New York,* 1994 WL 263594 (N.D.N.Y. 1994) (investigators of environmental crimes who carry firearms, patrol a sector of the state and conduct covert surveillance, and rangers who prevent and suppress forest fires, are not exempt administrative employees).

Similarly, federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work in a "field of science or learning" requiring knowledge "customarily acquired by a prolonged course of specialized intellectual instruction" as required under the current and final section 541.301 of the regulations. The paramedic plaintiffs in *Vela* v. *City of Houston,* 276 F.3d 659, 674–676 (5th Cir. 2001), for example, were required to complete 880 hours of classroom training, clinical experience and a field internship. The EMT plaintiffs were required to complete 200 hours of classroom training, clinical experience and a field internship. The court held that the paramedics and EMTs were not exempt professionals because they were not required to have a college degree. *See also Dybach* v. *State of Florida Department of Corrections,* 942 F.2d 1562, 1564–65 (11th Cir. 1991) (probation officer held not exempt professional because the required college degree could be in any field—"'nuclear physics, or * * * corrections, or * * * physical education or basket weaving'"—not in a specialized field); *Fraternal Order of Police, Lodge 3* v. *Baltimore City Police Department,* 1996 WL 1187049 (D. Md. 1996) (police sergeants and lieutenants held not exempt professionals, even though some possessed college degrees, because college degrees were not required for the positions); *Quirk* v. *Baltimore County, Maryland,* 895 F. Supp. 773, 784–86 (D. Md. 1995) (certified paramedics required to have a high school education and less than a year of specialized training are not exempt professionals].

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay. Police sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment.[7]

Finally, such police officers, fire fighters, paramedics, EMTs and other public safety employees also cannot qualify as exempt under the highly compensated test in final section 541.601. As discussed below, final section 541.601(b) provides that the highly compensated test "applies only to employees whose primary duty includes performing office or non-manual work." Federal courts have recognized that

[7] In addition to the case law and comments cited above, when drafting this new section, the Department also looked to the definitions of "fire protection activities" and "law enforcement activities" contained in Sections 3(y) and 7(k) of the FLSA, and their implementing regulations at 29 CFR 553.210 and 553.211, which allow public agencies to pay overtime to fire and law enforcement employees based on a 7 to 28 day period, rather than the 40-hour workweek. These sections do not govern exempt status under section 13(a)(1) and, thus, are illustrative but not determinative of duties performed by nonexempt fire and law enforcement employees. *See* 29 CFR 553.216.

such public safety employees do not perform "office or non-manual" work. *Adam* v. *United States*, 26 Cl. Ct. at 792–93, for example, involved border patrol agents who spent a significant amount of time in the field, wore "uniforms and black work boots," and used "a handgun, a baton, night-vision goggles, and binoculars." Their work required "frequent and recurring walking and running over rough terrain, stooping, bending, crawling in restricted areas such as culverts, climbing fences and freight car ladders, and protecting one's self and others from physical attacks." Their work also involved "high speed pursuits, boarding moving trains and vessels, and physical threat while detaining and arresting illegal aliens, smugglers, and other criminal elements." The court held that these border patrol agents are not exempt from the FLSA overtime requirements, stating that the "level of physical effort required in the environment described plainly cannot be characterized as 'office or other predominately nonmanual work.' A dictionary definition of 'manual' is, 'requiring or using physical skill and energy.' * * * Non-manual work, therefore, would not call for significant use of physical skill or energy. Certainly, the agents' job duties do not fit that definition." *See also, Roney* v. *United States*, 790 F. Supp. 23, 25 (D.D.C. 1992) (Deputy U.S. Marshal entitled to overtime pay where position requires " 'physical strength and stamina to perform such activities as long periods of surveillance, pursuing and restraining suspects, carrying heavy equipment' " and the employee " 'may be subject to physical attack, including the use of lethal weapons' ") (citation omitted).

Federal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, such as directing the work of two or more other full time employees as required for the executive exemption, their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed. *See, e.g., West* v. *Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir.) (EMT captains and lieutenants), *cert. denied*, 525 U.S. 1048 (1998); *Smith* v. *City of Jackson, Mississippi*, 954 F.2d 296 (5th Cir. 1992) (fire chiefs); *Masters* v. *City of Huntington*, 800 F. Supp. 363 (S.D.W. Va. 1992) (fire deputy chiefs and captains); *Simmons* v. *City of Fort Worth, Texas*, 805 F. Supp. 419 (N.D. Tex. 1992) (fire deputy and district chiefs); *Keller* v. *City of Columbus, Indiana*, 778 F. Supp. 1480 (S.D. Ind. 1991) (fire captains and lieutenants). Another important fact considered in at least one case is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed. *See, e.g., Anderson* v. *City of Cleveland, Tennessee*, 90 F. Supp.2d 906, 909 (E.D. Tenn. 2000) (police lieutenants "monitor the radio in order to keep tabs on their men and determine where their assistance is needed").[8]

A new section 541.4 highlights that the FLSA establishes a minimum standard that may be exceeded, but cannot be waived or reduced. *See Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706 (1945). Section 18 of the FLSA states that employers must comply "with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum * * * or a maximum workweek lower than the maximum workweek established under the Act." 29 U.S.C. 218. Similarly, employers, on their own initiative or in collective bargaining negotiations with a labor union, are not precluded by the FLSA from providing a wage higher than the statutory minimum, a shorter workweek than provided by the FLSA, or a higher overtime premium (double time, for example) than provided by the FLSA. *See, e.g., Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.' ") (citation omitted); *NLRB* v. *R & H Coal Co.*, 992 F.2d 46 (4th Cir. 1993) (purpose of FLSA is to guarantee minimum level of compensation to workers, regardless of outcome of bargaining process; by contrast, purpose of National Labor Relations Act is to facilitate collective bargaining process and ensure that its outcome is enforced). Thus, the new section 541.4 states: "The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements."

*Subpart B, Executive Employees*

Section 541.100 General Rule for Executive Employees

The Department's proposal streamlined the existing regulations by adopting a single standard duties test in proposed section 541.100. The proposed standard duties test provided that an exempt executive employee must: have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; customarily and regularly direct the work of two or more other employees; and have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other

[8] Some police officers, fire fighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test that an exempt executive must have the authority to "hire or fire" other employees or make recommendations given particular weight on hiring, firing, advancement, promotion or other change of status.

employees. This standard test, consisting of the current short test requirements plus a third objective requirement taken from the long test, was more protective than the existing "short" duties test applied to employees earning $250 or more per week ($13,000 annually).

The Department has retained this standard test for the final rule but has made minor changes to section 541.100(a)(2). Subsection 541.100(a)(2) has been modified now to read "whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof." This change was made in response to several commenters, such as the AFL–CIO, who felt that the change from "whose" primary duty as written in the existing regulations to "a" primary duty as written in the proposal weakened this prong of the test by allowing for more than one primary duty and not requiring that the most important duty be management. As the Department did not intend any substantive change to the concept that an employee can only have one primary duty, the final rule uses the introductory phrasing from the existing regulations.

Several commenters state that the phrases "change in status" and "particular weight" contained in both the existing regulations and proposed 541.100(a)(4) are vague and should be defined. The Department has added a definition of "particular weight" based on case law, which now appears in section 541.105, as discussed below. Although the Department has not added a definition of "change of status" to the final regulation, the Department intends that this phrase be given the same meaning as that given by the Supreme Court in defining the term "tangible employment action" for purposes of Title VII liability. In *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742, 761–62 (1998), the Supreme Court defined "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Department believes that this discussion provides the necessary guidance to reflect the types of employment actions a supervisor would have to make recommendations regarding, other than hiring, firing or promoting, to meet this prong of the executive test. Because the Department intends to follow the Supreme Court's disjunctive definition of "tangible employment action" in *Ellerth,* we also reject comments from the AFL–CIO and others requesting that proposed subsection 541.100(a)(4) be changed to requiring "hiring *or* firing *and* advancement, promotion or any other change of status." An employee who provides guidance on any one of the specified changes in employment status may meet the section 541.100(a)(4) requirement.

The New York State Public Employees Federation suggests that the Department should provide a definition of the phrase "authority to hire or fire" which would require that a significant part of the employee's responsibility must involve either hiring or firing. The Department believes that these terms are straightforward and should be interpreted in accordance with their customary definition, *i.e.*, to engage or disengage an individual for employment. Therefore, the Department has determined that such a definition need not be incorporated into the final regulation.

Several commenters from the public sector, such as the Metropolitan Transportation Authority, the New York State Police, and the Public Sector FLSA Coalition, indicate that the requirement in the proposal that an employee have the authority to hire or fire will cause many exempt employees to lose exempt status since employees in the public sector do not have authority to make such decisions. According to the Metropolitan Transportation Authority, "the authority to hire or fire (or to have his recommendation to change an employee's employment status given strong consideration) only exists at the highest levels in public employment" because of such factors as "unionization within the state and local public sector and statutory constraints, such as civil service laws, which have been developed to protect employees in the public sector from various factors, including the political process, favoritism or for other reasons." The Society for Human Resource Management (SHRM) similarly states that this requirement would be "particularly troublesome" for public entities governed by civil service rules that dictate the use of a board to make hiring or firing decisions. SHRM recommends that this requirement be deleted or that the Department define the term "particular weight" in the regulations. The Johnson County Government also asks for clarification of the term "particular weight." The Department has evaluated these comments and, as noted above, has included a definition of the term "particular weight" in section 541.105. That definition clarifies that an executive does not have to possess full authority to make the ultimate decision regarding an employee's status, such as where a higher level manager or a personnel board makes the final hiring, promotion or termination decision. With this clarification, and with the clarification that this rule encompasses other tangible employment actions, we have determined that this requirement should not pose a hardship since public sector supervisory employees provide recommendations as to hiring, firing or other personnel decisions that are given "particular weight" to the extent allowed under civil service laws and thus may meet this requirement for exemption. As the National School Board Association comments, although state law may vest the school board with the exclusive authority to discharge an employee, such an action is precipitated by a department supervisor who evaluates the employee's performance and recommends the action, and the superintendent's recommendation to the board is based on the department supervisor's recommendations. In addition, such employees may also qualify for exemption as administrative or professional employees.

A number of employer groups urge the Department to eliminate proposed 541.100(a)(4) entirely. These commenters argue that this requirement will cause many employees to lose their exempt executive status because the "hire or fire" requirement is not contained in the current short test and therefore has been effectively dormant for practical purposes as a measure of exempt executive status. The Department carefully reviewed these comments and believes that this requirement may result in some currently exempt employees becoming nonexempt; however, the number is too small to estimate quantitatively. Subsection 541.100(a)(4) is an important and objective measure of executive exempt status which is simple to understand and easy to administer. As the 1940 Stein Report stated at page 12: "[i]t is difficult to see how anyone, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to whom the hiring and firing functions are delegated." Although this new requirement may exclude a few employees from the executive exemption, the Department has determined that it will have a minimal impact on employers. Most supervisors

and managers should at least have their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees be given particular weight. Further, employees who cannot meet the "hire or fire" requirement in section 541.100(a)(4) may nonetheless qualify for exemption as administrative or professional employees.

Section 541.101 Business Owner

Section 541.101 of the proposed rule provided that an employee "who owns at least a 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization," is exempt as an executive employee.

The Department made two modifications to the provision in the final rule. First, we inserted the term "bona fide" before the phrase "20-percent equity interest." Second, we added a duties requirement that the 20-percent business owner must be "actively engaged in its management."

These changes were made to address commenter concerns that this section could be subject to abuse. For example, the McInroy & Rigby law firm argues that the exemption would be subject to "great abuse." The firm speculates that "[s]mall business employers could grant employees an illusory ownership interest and avoid having to even pay the minimum wage to such employees. One would anticipate many sham transactions conveying illusory ownership interests if the provision is adopted." Adding the modifier "bona fide" before the phrase "20-percent equity interest" serves to emphasize that the employee's ownership stake in the business must be genuine. The AFL–CIO argues that this section "cannot stand" because it would allow the exemption for employees who perform no management duties: "an individual may have a 20 percent interest in an independent gas station, or a small food mart. In order to break even, the business stays open through the night, and as the minority owner that person keeps the operations going during those hours. He makes no management decisions, supervises no one, and has no authority over personnel, and could make less than the minimum wage. Under the Department's proposal, this employee meets the test for the bona fide executive." The Department agrees that such an employee should not qualify for the exemption. Thus, we have added the duties requirement that the 20-percent owner be actively engaged in management. *See* 1949 Weiss Report at 42 (section is "intended to recognize the special status of an owner, or partial owner, of an enterprise *who is actively engaged in its management")* (emphasis added).

The proposed rule contained no salary level or salary basis requirements for the business owner. The Department requested comments on whether the salary level and/or salary basis tests should be included in the provision. 65 FR 15560, 15565 (March 31, 2003). Commenters typically favor the exemption and agree with the Department that the salary requirements are not necessary, given the likelihood that an employee who owns a bona fide 20-percent equity interest in the enterprise will share in its profits. Thus, this ownership interest is an adequate substitute for the salary requirements. Additionally, several commenters, for example, the Workplace Practices Group, note that business owners at this level are able to receive compensation in other ways and have sufficient control over the business to prevent abuse. Thus, in the final rule, as in the proposal, the salary requirements do not apply to a 20-percent equity owner. However, requiring a "bona fide" ownership interest and that the 20-percent owner be actively engaged in management will prevent abuses such as that described by commenters and in *Lavian* v. *Haghnazari*, 884 F. Supp. 670, 678 (E.D.N.Y. 1995). In *Lavian*, an uncle invested more than $70,000 in his nephew's pharmacy business in exchange for a promise of 49 percent stock ownership interest in the closely-held corporation. After working at the pharmacy for two years without compensation, and never receiving share certificates, the uncle sued. The court denied a motion to dismiss an FLSA claim, noting that the court must accept as true the uncle's allegations that his duties were "clerical, and lacking in actual supervisory and discretionary authority in relation to the enterprise." *Id.*, at 680. The final rule ensures that employees with such limited job duties in a company would not meet the definition of "actively engaged in its management."

Section 541.102 Management (Proposed § 541.103, "Management of the Enterprise" and Proposed § 541.102, "Sole Charge Executive")

The proposed regulations at section 541.102 provided a modified test for the executive exemption for an employee who is in sole charge of an independent establishment or a physically separated branch establishment. Proposed section 541.103 defined the term "management of the enterprise." For the reasons discussed below, the final rule deletes the "sole charge" provision and renumbers the remaining sections of Subpart B.

Under proposed section 541.102, an employee in sole charge of an independent or branch establishment would qualify for the executive exemption if the employee (1) is compensated on a salary basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) is the top and only person in charge of the company activities at the location where employed; and (3) has authority to make decisions regarding the day-to-day operations of the establishment and to direct the work of any other employees at the establishment or branch. Under the proposal, an "independent establishment or physically separated branch establishment" was defined as "an establishment that has a fixed location and is geographically separated from other company property." The proposal permitted a leased department to qualify as a physically separated branch establishment when the lessee operated under a separate trade name, with its own separate employees and records, and in other respects conducted its business independent of the lessor's with regard to such matters as hiring and firing of employees, other personnel policies, advertising, purchasing, pricing, credit operations, insurance and taxes.

The final rule deletes this section in its entirety.

Commenters such as the AFL–CIO, the National Employment Law Project, the National Employment Lawyers Association and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm object to this provision as allowing the exemption for employees who perform mostly nonexempt tasks (such as opening and closing up the location, ringing up cash register sales, stocking shelves, answering phones, serving customers, etc.) and few, if any, management functions. These commenters also believe that, when no other employees worked at the establishment, the provision would allow an employee to qualify for the exemption without having supervisory responsibility for any other employees. The International Association of Fire Fighters expresses strong concerns that the sole charge provision would exempt a low-ranking officer in charge of a fire station during a particular shift, even though a higher ranking officer is in charge of the overall management of the station. The Department agrees with these commenter concerns. In addition,

the Department recognizes that, although not intended, section 541.102 as proposed could be construed as allowing the exemption for fairly low-level employees with fewer management duties than those required for "highly compensated" employees in final section 541.601.

Before deciding to eliminate this section entirely, the Department considered comments of groups such as the U.S. Chamber of Commerce, the National Retail Federation, the National Association of Convenience Stores, the Fisher & Phillips law firm, the National Association of Chain Drug Stores, the FLSA Reform Coalition, the Illinois Credit Union League, the Food Marketing Institute, the National Grocers Association, the International Mass Retail Association, the League of Minnesota Cities and others that request changes to expand the "sole charge" provision. For example, these commenters suggest eliminating the salary level and salary basis requirements; including in the exemption all employees who are in charge of an establishment at any time during the day or week; allowing more than occasional visits by the sole charge executive's superior; eliminating the requirement that the independent establishment must be geographically separate from other company property; and eliminating the requirements that a leased department must operate under a separate trade name and be responsible for its own insurance, advertising, taxes, purchasing, pricing and credit operations. In the existing regulations, the "sole charge" rule is an exception from the 20-percent restriction on nonexempt work in the "long" duties test. After considering all comments, and for the reasons stated above, the Department concludes that this rule is not appropriate as a stand-alone test for the executive exemption.

Proposed section 541.103, defining the term "management of the enterprise" as used in subsection 541.100(a)(2), has been renumbered as final section 541.102. The proposed definition of "management" included the following list of activities that would generally meet this definition: "interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety of the employees or the property."

In response to comments, the Department has amended section 541.102 to rename the section as "management," add language to make clear that the list is not exhaustive, and add the management functions of "planning and controlling the budget" and "monitoring or implementing legal compliance measures."

Comments from the Fisher & Phillips law firm and the National Association of Convenience Stores ask the Department to change the phrase "management of the enterprise" to "management," pointing out that the current regulatory section is simply entitled "management" and the name "management of the enterprise" suggests that these management duties apply to an entity broader than that required by section 541.100. Because section 541.100(a)(2) requires that the primary duty of the employee involve management of the "enterprise or of a customarily recognized department or subdivision thereof," the Department has renamed the section "management" to avoid any confusion.

The Department also received a number of comments, including from the Fisher & Phillips law firm, the National Retail Federation, the National Association of Federal Wage Hour Consultants, the National Council of Chain Restaurants and the National Association of Chain Drug Stores, asking the Department to make clear that the list was not exhaustive and other types of functions could constitute "management" activities. The Department believes that such a change is consistent with the current interpretive guidelines which make clear the factors listed are just examples, and the final rule has been revised accordingly.

Several commenters did ask that specific functions be added to the list. The Morgan Lewis & Bockius law firm comments that the examples used in this section were too focused on supervision and suggested that this section should recognize management of processes, projects and contracts in addition to employees. The Department agrees that management activities are not limited to supervisory functions. Accordingly, the final rule adds the management functions of "planning and controlling the budget" and "monitoring or implementing legal compliance measures." Further, the Department notes that management of processes, projects or contracts are also appropriately considered exempt administrative duties. The National Retail Federation asks that the list be "augmented to confirm that additional duties are exempt when performed by retail employees in the course of managing: such as walking the floor, interacting with customers to determine satisfaction * * *, team building, conducting inspections, evaluating efficiency, monitoring or implementing legal compliance measures, training * * *, attending management meetings, planning meetings and developing meeting materials, planning and conducting marketing activities * * *, and investigating or otherwise addressing matters regarding personnel, proficiency, productivity, staffing or management issues." The National Council of Chain Restaurants suggests that "handling customer complaints" is just as much a management function as handling employee complaints and therefore should be added to the list of examples, along with "coaching employees in proper job performance techniques and procedures." The Department believes that it is not appropriate to further augment the list. Although many of these suggestions are appropriate examples of "management" functions, some appear duplicative of functions already included in the section and others, such as "handling customer complaints" and "conducting inspections," are functions that could qualify as either management or production type functions depending on the specific facts involved. A case-by-case analysis would be more appropriate to determine whether such functions meet the definition of "management." Moreover, because the Department has added language to make clear that the list is not exhaustive, such functions could be considered management functions in appropriate circumstances. For example, a customer service representative may routinely handle customer complaints but not be acting in a management capacity. In contrast, a manager in a restaurant may be the person responsible for handling such complaints as the individual responsible for the functioning of the operation and therefore would be operating in a management capacity.

Finally, the management function listed as "appraising their productivity and efficiency" has been augmented with the phrase from the current regulations, "for the purpose of recommending promotions or other changes in their status." The AFL-CIO argues that the elimination of this

phrase would allow the definition of management to include low-level personnel functions. As the Department did not intend to change the meaning of this phrase, this language has been added to the final rule.

Section 541.103 Department or Subdivision (Proposed § 541.104)

Proposed section 541.104 stated that the phrase "department or subdivision" is "intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function." The section defined "department or subdivision" as requiring "a permanent status and a continuing function." Proposed subsection 541.104(b) recognized that "when an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise." Proposed subsection 541.104(c) stated that "a recognized department or subdivision need not be physically within the employer's establishment and may move from place to place" and provided that the "mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit." Finally, proposed subsection 541.104(d) stated that "continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function."

The only changes to proposed section 541.104 are to renumber the section as 541.103 in the final rule, and to delete the sentence in subsection (b) that "[t]he employee also may qualify for the sole charge exemption, if all of the requirements of § 541.102 are satisfied." This sentence is no longer necessary because of the deletion of the "sole charge" exemption in proposed section 541.102. No other changes have been made.

Several commenters request that the Department expand or clarify the phrase "department or subdivision." The Morgan Lewis & Bockius law firm asks the Department to expand the phrase "department or subdivision" to include "grouping." The Public Sector FLSA Coalition suggests that the phrase be broadened to account for a functional unit which would provide for a more flexible or fluid organizational philosophy. The National Council of Chain Restaurants asks for confirmation of the Department's historic enforcement position that "front of the house" and "back of the house" are recognized subdivisions. The U.S. Chamber of Commerce states that the phrase "department or subdivision" is outdated and the applicable units should provide for project teams. Finally, the League of Minnesota Cities questions whether a subdivision would include supervision of a day shift.

The Department has decided not to expand the term "department or subdivision" because the phrase has not caused confusion or excessive litigation. Expanding the definition would unduly complicate this requirement and likely lead to unnecessary litigation. Indeed, the courts already have provided clarification of the phrase on a number of occasions. For example, several courts have stated that a shift can constitute a department or subdivision, which responds to the question raised by the League of Minnesota Cities. *See West* v. *Anne Arundel County, Maryland*, 137 F.3d 752, 763 (4th Cir. 1998); *Joiner* v. *City of Macon*, 647 F. Supp. 718, 721–22 (M.D. Ga. 1986); *Molina* v. *Sea Land Services, Inc.*, 2 F. Supp. 2d 185, 188 (D.P.R. 1998). The Department notes that the issue identified by the National Retail Federation as to whether "front of the house" in a store constitutes a department or subdivision was answered by at least one court in the affirmative. *See Debartolo* v. *Butera Finer Foods*, 1995 WL 516990, at *4 (N.D. Ill. 1995). Finally, the Department observes that "groupings" or "teams" may constitute a department or subdivision under the existing definition, but a case-by-case analysis is required. *See Gorman* v. *Continental Can Co.*, 1985 WL 5208, at *6 (N.D. Ill. 1985) (department or subdivision can "include small groups of employees working on a related project within a larger department, such as a group leader of four draftsmen in the gauge section of a much larger department"). The Department believes these cases correctly define and delimit the term "department or subdivision."

Section 541.104 Two or More Other Employees (Proposed § 541.105)

Proposed section 541.105 defined the term "two or more other employees" to mean "two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent." Proposed section 541.105(b) stated that the "supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers." However, under proposed subsections (c) and (d), an "employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement," and "[h]ours worked by an employee cannot be credited more than once for different executives." Thus, "a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement."

Except for renumbering the section as 541.104, no other changes were made.

In its proposal, the Department invited comments on whether the supervision of "two or more employees" required for exemption should be modified to include "the customary or regular leadership, alone or in combination with others, of two or more other employees." *See* 61 FR 15565 (March 31, 2003). In response to this request, the Department received a large number of comments both in support of and against the modification. Commenters such as the U.S. Chamber of Commerce, the National Association of Manufacturers, the League of Minnesota Cities, the Financial Services Roundtable, the National Automobile Dealers Association, the State of Oklahoma, the State of Kansas Department of Administration Division of Personnel Services, the Tennessee Valley Authority, the Public Sector FLSA Coalition, and the FLSA Reform Coalition support the modified language as more applicable to the realities of the modern workforce. In contrast, other commenters believe this language would compromise the executive exemption or create confusion. For example, the National Employment Lawyers Association "disputes that there is any need for modification changing the long-established requirement that an exempt executive must supervise two or more employees" because those "who supervise fewer than two employees are, as [a] practical matter, clearly not performing exempt activity at a level that could conceivably justify their characterization as bona

fide executives." The Contract Services Association of America states that the "word 'leadership' has too many connotations to be practical in the work environment."

After full consideration of these comments, the Department has decided to retain the existing and proposed language that the employee direct the work of "two or more other employees" to qualify as an executive under the final rule. The Department agrees with the comments opposing this change, and has rejected the "leadership" modification because the present requirement provides a well established, easily applied, bright-line test for exemption, and the ambiguity attached to the term "lead," the Department believes, could spark needless litigation. Also, an employee whose primary duty is management and who customarily and regularly leads other employees, alone or with another, may qualify for exemption under the administrative exemption.

The Department also received a number of other comments and requests for clarification on this section. The FLSA Reform Coalition asks that the Department clarify what the term "full-time" means, and requests that the clarification include a statement that the term should be defined by the employer's practices. The Department does not believe additional clarification is necessary, and stands by its current interpretation that an exempt supervisor generally must direct a total of 80 employee-hours of work each week. As the Wage and Hour Division's Field Operations Handbook (FOH) states, however, circumstances might justify lower standards. For example, firms in some industries have standard workweeks of 37½ hours or 35 hours for their full-time employees. In such cases, supervision of employees working a total of 70 or 75 hours in a workweek will constitute the equivalent of two full-time employees. FOH 22c00.

Several commenters, such as the Financial Services Roundtable and the Mortgage Bankers Association of America, urge the Department to clarify the phrase "in the manager's actual absence" in subsection (c). The Department continues to believe that the phrase provides useful guidance in defining the exempt executive, and intends that this phrase be interpreted to mean that an employee who simply supervises on a short-term basis, such as during a lunch break or while a manager is on vacation, is not meeting the requirement of customarily and regularly supervising two or more employees.

Several commenters ask that the requirement of directing two or more employees be eliminated. Other commenters state that the requirement should be lowered to directing only one other employee. Yet others argue that the number of employees supervised should be raised. For example, the National Association of Federal Wage Hour Consultants states that the requirement should be five employees while the Labor Board, Inc. suggests the number should be four employees. The Department continues to believe that the current requirement of directing two or more employees is an appropriate measure of exempt status and to raise the threshold would disproportionately harm small businesses that may not have a large number of employees. *See* 1940 Weiss Report at 45–46.

Several commenters question whether the requirement that an employee direct two or more other "employees" includes employees of a contractor. Several commenters also urge the Department to expand this requirement to two or more "individuals" so as to count the supervision of volunteers, contractors, and other non-employees. The Department has evaluated these comments and determined that no changes should be made. The FLSA itself defines the term "employee" as an "individual employed by an employer," and this definition has been subject to extensive judicial interpretation. *See* 29 U.S.C. § 203(e)(1). The Department also observes, however, that the administrative exemption may apply to the employee who supervises contractors, volunteers or other non-employees if the other requirements for that exemption are met.

Section 541.105 Particular Weight

Section 541.105 of the final rule contains a new definition of the phrase "particular weight" as follows:

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

This definition has been added in response to comments received from groups such as the Society for Human Resource Management, Leggett & Platt, the Food Marketing Institute, the League of Minnesota Cities and the American Council of Engineering Companies, who indicate that this phrase is extremely vague and needs clarification. As one of the Department's goals is to provide clarity to the terms contained in the regulations, we have defined "particular weight" by incorporating factors relied on by the courts to define this term under the current regulations. *See, e.g., Baldwin* v. *Trailer Inns, Inc.*, 266 F.3d 1104, 1116 (9th Cir. 2001); *Molina* v. *Sea Land Services, Inc.*, 2 F. Supp. 2d 185, 188 (D.P.R. 1998); *Wendt* v. *New York Life Insurance Co.*, 1998 WL 118168, at *6 (S.D.N.Y. 1998); *Passer* v. *American Chemical Society*, 749 F. Supp. 277, 280 (D.D.C. 1990); *Wright* v. *Zenner & Ritter, Inc.*, 1986 WL 6152, at *2 (W.D.N.Y. 1986); *Kuhlmann* v. *American College of Cardiology*, 1974 WL 1344, at *1 (D.D.C. 1974); *Marchant* v. *Sands Taylor & Woods Co.*, 75 F. Supp. 783, 786 (D. Mass. 1948); *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 781 (D. Minn. 1945).

As illustrated by these cases, factors such as the frequency of making recommendations, frequency of an employer's relying on an employee's recommendations, as well as evidence that the employee's job duties explicitly include the responsibility to make such recommendations, are important considerations in determining whether "particular weight" is given to the employee's recommendations. Thus, for example, an employee who provides few recommendations which are never followed would not meet the "hire or fire" requirement in final section 541.100(a)(4). Evidence that an employee's recommendation are given "particular weight" could include witness testimony that recommendations were made and considered; the exempt employee's job description listing responsibilities in this area; the exempt employee's performance reviews documenting the employee's activities in this area; and other documents regarding promotions, demotions or other change of status that reveal the employee's role in this area.

Section 541.106 Concurrent Duties (Proposed §§ 541.106 and 541.107)

Proposed section 541.106 entitled "Working supervisors" stated: "Employees, sometimes called 'working foremen' or 'working supervisors,' who

have some supervisory functions, such as directing the work of other employees, but also perform work unrelated or only remotely related to the supervisory activities are not exempt executives if, instead of having management as their primary duty as required in § 541.100, their primary duty consists of either the same kind of work as that performed by their subordinates; work that, although not performed by their own subordinates, consists of ordinary production or sales work; or routine, recurrent or repetitive tasks." Proposed section 541.107 entitled "Supervisors in retail establishments" stated: "Supervisors in retail establishments often perform work such as serving customers, cooking food, stocking shelves, cleaning the establishment or other nonexempt work. Performance of such nonexempt work by a supervisor in a retail establishment does not disqualify the employee from the exemption if the requirements of § 541.100 are otherwise met. Thus, an assistant manager whose primary duty includes such activities as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, authorizing payment of bills or performing other management functions may be an exempt executive even though the assistant manager spends the majority of the time on nonexempt work."

As the Department explained in the preamble to the proposed rule, both proposed section 541.106 and proposed section 541.107 were meant to address the difficult issue of classifying employees who have both exempt supervisory duties and nonexempt duties. The Department invited comments on whether these sections have appropriately distinguished exempt and nonexempt employees. 61 FR 15565.

Based on the comments received, the Department has decided to combine these two proposed sections into one section entitled "concurrent duties." The Department believes that a unified section on this topic will better illustrate when an employee satisfies the requirements of the executive exemption. The final section 541.106 incorporates the general principles and examples from both proposed section 541.106 and proposed section 541.107. The final section 541.106(a) thus provides: "Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met." To further distinguish exempt executives from nonexempt workers, the final subsection 541.106(a) also states: "Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive." Final subsections 541.106(b) and (c) contain examples to further illustrate these general principles.

The final section provides, as in the current regulations, that an employee with a primary duty of ordinary production work is not exempt even if the employee also has some supervisory responsibilities. As explained in the preamble to the proposed rule, this situation often occurs in a factory setting where an employee who works on a production line also has some responsibility to direct the work of other production line workers. Another example is an employee whose primary duty is to work as an electrician, but who also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor. Nonexempt employees do not become exempt executives simply because they direct the work of other employees upon occasion or provide input on performance issues from time to time because such employees typically do not meet the other requirements of section 541.100, such as having a primary duty of management.

The Department decided to combine proposed sections 541.106 and 541.107 into one section on "concurrent duties" in response to a number of comments indicating that the proposed separate sections were duplicative and not helpful in understanding the distinction between exempt and nonexempt employees. The National Council of Chain Restaurants argues that proposed section 541.106 should be eliminated because of confusion created by having two separate sections. The Fisher & Phillips law firm and the National Association of Convenience Stores argue that proposed section 541.106 should be eliminated as no longer necessary because that section has always related to the percentage limitations on nonexempt work from the existing long test. Similar comments were received from the U.S. Chamber of Commerce. The Workplace Practices Group argues for the elimination of proposed section 541.106 and suggests that proposed section 541.107 apply to all supervisors, as both working supervisors and retail supervisors have the same or very similar responsibilities such as scheduling employees, assigning work and overseeing product quality. The County of Culpeper, Virginia, argues that proposed section 541.106 ignored the realities of small governments where department heads have to perform both exempt management duties and nonexempt work.

Some commenters, including the New Jersey Business & Industry Association, the National Retail Federation and the HR Policy Association, commend the Department for recognizing the special circumstances of retail supervisors. In contrast, the Society for Human Resource Management, Senator Orrin G. Hatch and others argue that a distinction between retail and non-retail supervisors does not exist. The American Hotel & Lodging Association, the International Franchise Association, the FLSA Reform Coalition, the National Association of Chain Drug Stores and the International Mass Retail Association argue that proposed section 541.107 should be modified to cover both retail and service establishments.

Other commenters state that the description of "working supervisors" was too broad. Such commenters argue that fast-food managers who spend the majority of their time on nonexempt work should not be exempt. The National Employment Law Project states that the proposed language would make it possible to exempt all line employees, provided they met the requirements of proposed section 541.100. The McInroy & Rigby law firm argues that proposed section 541.107 should be eliminated since there was no policy justification for assistant managers in fast-food establishments to be exempt from FLSA requirements. The Communications Workers of America similarly opposes any diminution of the existing regulatory standards for exempt executives.

The Department believes that the proposed and final regulations are consistent with current case law which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption. Numerous courts have determined that an employee can have a primary duty of management while concurrently performing nonexempt duties. *See, e.g., Jones* v. *Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of

her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); *Murray* v. *Stuckey's, Inc.*, 939 F.2d 614, 617–20 (8th Cir. 1991) (store managers who spend 65 to 90 percent of their time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt executives); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"); *Horne* v. *Crown Central Petroleum, Inc.*, 775 F. Supp. 189, 190 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the store clerks in waiting on customers"). Moreover, courts have noted that exempt executives generally remain responsible for the success or failure of business operations under their management while performing the nonexempt work. *See Jones* v. *Virginia Oil Co.*, 2003 WL 21699882, at *4 ("Jones" managerial functions were critical to the success' of the business); *Donovan* v. *Burger King Corp.*, 675 F.2d 516, 521 (2nd Cir. 1982) (the employees' managerial responsibilities were "most important or critical to the success of the restaurant"); *Horne* v. *Crown Central Petroleum, Inc.*, 775 F. Supp. at 191 (nonexempt tasks were "not nearly as crucial to the store's success as were the management functions").

The Department continues to believe that this case law accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce, particularly in restaurant and retail settings. Since all of the prongs of the executive test need to be met to classify an employee as an exempt executive, the Department believes the final rule has sufficient safeguards to protect nonexempt workers.

The Department also received more specific comments on the language contained in proposed sections 541.106 and 541.107. The National Retail Federation argues that the time spent "multi-tasking" should also be considered exempt work. A comment from the Food Marketing Institute argues that it is critically important that proposed section 541.107 state unequivocally that managers shall not be subject to arbitrary percentage time limits on nonexempt work. The Department believes that sufficient language already is included in this section to make clear that, as stated in current case law, an otherwise exempt supervisory employee does not lose the exemption simply because the employee is simultaneously performing exempt and nonexempt work. The Department also believes that the final section 541.700, defining "primary duty," states clearly that there is no strict percentage limitation on the performance of nonexempt work.

One commenter suggests that the Department include in the final rule language from the current interpretive guidelines at 541.119(c) stating that the short test for highly compensated executives cannot be applied to the trades. The final rule, however, includes even stronger language in new section 541.3, which states that none of the section 13(a)(1) exemptions apply to the skilled trades, no matter how highly compensated they are. Thus, the Department believes that no further clarification is needed.

The State of Kansas Department of Administration, Division of Personnel Services, argues that proposed section 541.107 conflicts with language under the administrative exemption regarding project leaders. The Department does not believe that there is any conflict because the executive and administrative exemptions are independently defined and applied, and whether one or both of the exemptions apply will depend on the specific job duties the employee performs.

The Information Technology Industry Council, the U.S. Chamber of Commerce and the Morgan Lewis & Bockius law firm argue that language regarding performance of production or sales work should be eliminated from proposed section 541.106, as it continues to emphasize the production versus staff dichotomy. This language has been removed from the final rule. The Department has combined and streamlined proposed sections 541.106 and 541.107, and we do not believe that this phrase was instructive in clarifying the concept of concurrent duties.

*Subpart C, Administrative Employees*

Section 541.200 General Rule for Administrative Employees

As in the executive exemption, the proposed regulations streamlined the current regulations by adopting a single standard duties test in proposed section 541.200. The proposed standard duties test provided that an exempt administrative employee must have "a primary duty of the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers," and hold "a position of responsibility with the employer."

The final rule modifies both of the proposed requirements for the administrative exemption. First, the final rule provides that an exempt administrative employee is one "whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." Second, the final rule deletes the proposed "position of responsibility" requirement and instead reinserts the current requirement that an exempt administrative employee's primary duty include "the exercise of discretion and independent judgment with respect to matters of significance."

In addition to the "discretion and independent judgment" requirement discussed more fully below, the final rule makes two changes to the proposed primary duty test. *First*, as under the executive exemption, the AFL-CIO and other commenters state that changing from "whose" primary duty as written in the current regulations to the proposed language of "a" primary duty was a major weakening of the test because it allows for more than one primary duty. As the Department did not intend any substantive change, the final rule uses the existing language "whose primary duty." *Second*, the final rule reinserts language from the current regulation that the work must be "*directly*" related to management or general business operations. Commenters such as the National Treasury Employees Union, the National Employment Lawyers Association, the American Federation of Television and Radio Artists, the Stoll, Stoll, Berne, Lokting & Shlachter law firm, and the Rudy, Exelrod & Zieff law firm oppose the deletion of the word "directly," stating that an employee whose duties relate only indirectly or tangentially to administrative functions should not qualify for exemption. As the Department did not intend any substantive change by deletion of the word "directly," we have reinserted this term to ensure that the administrative primary duty test is not interpreted as allowing the exemption to apply to employees whose primary duty is only remotely or tangentially related to exempt work. The same change has been made in other sections where the term is used.

The final rule, however, retains the proposed primary duty language that the exempt employee's work must be related to "management or general business operations," rather than the

"management policies" language of the existing regulations. Although some commenters object to this change, other commenters, such as the FLSA Reform Coalition, the HR Policy Association, and the Fisher & Phillips law firm, approve of the proposed deletion of the word "policies" as recognizing that while management policies are one component of management, there are many other administrative functions that support managing a business. The Department agrees and has retained the proposed language in the final regulation. As explained in the 1949 Weiss Report, the administrative operations of the business include the work of employees "servicing" the business, such as, for example, "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 1949 Weiss Report at 63. Much of this work, but not all, will relate directly to management policies. As the current regulations state at section 541.205(c), exempt administrative work includes not only those who participate in the formulation of management policies or in the operation of the business as a whole, but it "also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." Therefore, the Department considers the primary duty test for the administrative exemption to be as protective as the existing regulations.

In addition to the primary duty test, the proposed general rule for the administrative exemption also required that an employee hold a "position of responsibility." The proposal at section 541.202 further defined "position of responsibility" as performing "work of substantial importance" or "work requiring a high level of skill or training." The proposal also eliminated the current requirement that an exempt administrative employee perform work "requiring the exercise of discretion and independent judgment." The Department specifically invited comments on these changes, including whether the "discretion and independent judgment" requirement should be deleted entirely; retained as a third alternative for meeting the "position of responsibility" requirement; or retained in place of the "position of responsibility requirement," but modified to provide better guidance on distinguishing exempt administrative employees.

The Department received numerous, widely divergent comments on these proposed changes. Commenters such as the FLSA Reform Coalition, the U.S. Chamber of Commerce, the HR Policy Association, the National Retail Federation, the Morgan, Lewis & Bockius law firm, and the National Association of Federal Wage Hour Consultants generally approve of the "position of responsibility" requirement, preferring it to the mandatory "discretion and independent judgment" requirement of the existing regulations. They support, in particular, the proposal that employees with a "high level of skill or training" can qualify as exempt administrative employees, even if they use reference manuals to provide guidance in addressing difficult or novel circumstances. For example, the Morgan, Lewis & Bockius law firm states that, "in today's regulatory climate, few employers can leave highly complex issues totally to the discretion of even high level employees." The HR Policy Association states that this "new requirement that an employee have a 'high level of skill or training' distinguishes employees who are merely looking up information from those who use the information in an analytical way."

However, even commenters who generally support the "position of responsibility" structure also express concerns about the vagueness and subjectivity of the new terms. For example, the National Association of Manufacturers (NAM) states that it "is not sure what 'position of responsibility' means and fears that the Department is substituting one vague term for another." NAM also notes that, "using the term 'skill' in the administrative employee definition can be problematic. The term is often associated with nonexempt trade occupations—*i.e.*, people who perform work and are not exempt from the FLSA's wage and overtime rules." NAM states that "care should be used when introducing into the white-collar exemption definitions a term that has been historically associated with nonexempt workers." Similarly, the American Bakers Association states that the position of responsibility standard "is somewhat vague and subjective" and that it "appears to invite another generation of court litigation to clarify the meaning of its key terms." The FLSA Reform Coalition expresses concern that the standard would be applied to the disadvantage of large companies, stating that "small fish in big ponds" might not be found exempt even if they had the same degree of responsibility as employees working for small companies. Other commenters object to the implication that some employees do not have responsibility at work. For example, the Society for Human Resource Management states that, "each and every position in an organization is one of responsibility * * *." Similarly, the Workplace Practices Group recommends eliminating the term "position of responsibility" because a "basic tenet of modern management philosophy is empowering employees to see their position in an organization, whatever it might be, as one of responsibility. This is true whether the position held is receptionist or customer service agent." Finally, the American Corporate Counsel Association, while approving of the abandonment of the "discretion and independent judgment" requirement, suggests that the "position of responsibility" test has "the potential to result in significant uncertainty and continued litigation. Employers often seek to foster an atmosphere and develop workplace programs emphasizing that the work of every employee involves a degree of responsibility and contributes something substantially important to the success of the enterprise. Thus, it appears to us that both 'white collar' and 'blue collar' positions may be positions of responsibility for which work of substantial importance is being performed."

Other commenters strongly oppose the new "position of responsibility" requirement as inappropriately weakening the requirements for exemption. For example, the AFL-CIO states that neither "work of substantial importance" nor "work requiring a high level of skill or training" was an adequate substitute for the "discretion and independent judgment" test. Similarly, the Rudy, Exelrod & Zieff law firm states that the FLSA does not exempt highly skilled or trained employees, and such a regulatory change would allow employers to misclassify employees with duties related to the production of the company's goods and services. In addition, the firm argues that such a provision effectively and unreasonably broadens the professional exemption, by eliminating the advanced degree requirement. Professor David Walsh similarly comments that the proposed language is not more easily applied than the existing standard and "seems to conflate the administrative and professional exemptions." Commenters such as the American Federation of

State, County and Municipal Employees, the Communications Workers of America, the National Treasury Employees Union, the American Federation of Television and Radio Artists, the National Employment Lawyers Association, and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm express similar views, stating that the "position of responsibility" test is not an equivalent substitute for the "discretion and independent judgment requirement." These commenters also state that all workers possess skills and training in one form or another.

Many commenters view the "discretion and independent judgment" standard of the existing regulations as vague, ambiguous and unworkable. Commenters such as the FLSA Reform Coalition, the Society for Human Resource Management, the HR Policy Association, the Fisher & Phillips law firm, the National Retail Federation, the National Association of Chain Drug Stores, and the National Council of Chain Restaurants state that the "discretion and independent judgment" requirement is the cause of confusion and unnecessary litigation. Such commenters commend the Department for eliminating "discretion and independent judgment" as a required element of the test for exemption. The Fisher & Phillips law firm, for example, states that this standard "has been an unending source of confusion, ambiguity, and dispute."

Nevertheless, many of these same commenters support inclusion of the "discretion and independent judgment" standard as a third alternative to satisfy the "position of responsibility" test. For example, the National Association of Manufacturers suggests that the Department retain "discretion and independent judgment" as an optional independent alternative to the "position of responsibility" requirement. These commenters state that decades of court decisions and opinion letters provide guidance on its interpretation. Retaining the standard as an alternative would thus provide a level of continuity between the existing regulations and the new regulations, and avoid re-litigation of jobs already held to be exempt under the current "discretion and independent judgment" test.

Other commenters such as the AFL–CIO, the American Federation of State, County and Municipal Employees, the Communications Workers of American, the National Treasury Employees Union, the New York Public Employees Federation, the National Employment Lawyers Association, the Rudy, Exelrod & Zieff law firm and Women Employed oppose the deletion of the "discretion and independent judgment" standard as a required element for exemption. Such commenters view deletion of this test as a substantial expansion of the exemption. They cite the 1940 Stein Report and 1949 Weiss Report as stating that the "discretion and independent judgment" requirement was necessary to minimize the opportunity for employer abuse in categorizing the diverse group of employees who might be labeled as administrative. Moreover, such commenters generally view the requirement as considerably more precise than the proposed "position of responsibility" replacement, and note that the "discretion and independent judgment" concept is also used under the National Labor Relations Act. Such commenters often state that the need to address developing case law prohibiting the use of manuals by exempt employees does not necessitate the entire abandonment of the "discretion and independent judgment" standard. Finally, these commenters also state that decades of jurisprudence would be lost if the "discretion and independent judgment" requirement is eliminated. Accordingly, the commenters recommend retention of the "discretion and independent judgment" standard as an independent requirement for exemption.

The commenters' widely divergent views demonstrate the difficult task of clearly defining and delimiting the administrative exemption. The GAO Report documented the difficulty of applying the "discretion and independent judgment" standard consistently, causing uncertainty for good faith employers attempting to classify employees correctly. Even the 1949 Weiss Report noted that this standard "is not as precise and objective as some other terms in the regulations." 1949 Weiss Report at 65. Numerous commenters concur with our observation in the proposal that this requirement has generated significant confusion and litigation. However, most commenters generally view both the "position of responsibility" and the "high level of skill or training" standards as similarly vague, ambiguous and subjective. Most of the commenters state that the "discretion and independent judgment" standard should be retained in some form, although there was sharp disagreement on whether the standard should be a mandatory requirement. Despite sharp criticism of both the current "discretion and independent judgment" requirement and the proposed "position of responsibility" standard, the comments contain very few suggestions for clear and objective alternative language.

After careful consideration of the public comments submitted, the Department agrees that the "position of responsibility" standard does little to bring clarity and certainty to the administrative exemption. In the proposal, the Department attempted to articulate a clear, simple, common sense test for exemption, but most commenters believe that we were not fully successful. Further, many commenters believe that the term "position of responsibility" greatly expanded the scope of the exemption—a result which the Department did not intend. In addition, the Department agrees with the concerns of the National Association of Manufacturers and other commenters that the "high level of skill or training" standard is problematic because it is too closely associated with nonexempt "blue collar" skilled trade occupations.

Accordingly, the final rule deletes the proposed "position of responsibility" requirement and its definition at proposed section 541.202 as "work of substantial importance" or "work requiring a high level of skill or training." Instead, as the second requirement for the administrative exemption, the final rule requires that exempt administrative employees exercise "discretion and independent judgment with respect to matters of significance." Thus, consistent with the current short test, the final rule contains two independent, yet related, requirements for the administrative exemption. First, the employee must have a primary duty of performing office or non-manual work "directly related to management or general business operations." This first requirement refers to the type of work performed by the employee, and is further defined at section 541.201. Second, the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance." As discussed below, the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The term "matters of significance" refers to the level of importance or consequence of the work performed. These terms are further defined at final section 541.202. *See, e.g., Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120, 1125–26 (9th Cir. 2002) (looking to both the "types of activities" and the importance of the work).

Section 541.201 Directly Related to Management or General Business Operations

The proposed section 541.201 defined the phrase "related to the management or general business operations" as referring "to the type of work performed by the employee" and requiring that the exempt administrative employee "perform work related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product." The proposal also provided examples of the types of work that generally relate to management or general business operations, including work in areas such as tax, finance, accounting, auditing, quality control, advertising, marketing, research, safety and health, personnel management, human resources, labor relations, and others. Finally, the proposal stated that an employee also may qualify for the administrative exemption if the "employee performs work related to the management or general business operations of the employer's customers," such as employees acting as advisers and consultants to their employer's clients or customers.

The Department made two changes in the final subsection 541.201(a). *First*, for the reasons discussed above, the final rule reinserts the word "directly" throughout this section. Some commenters argue that the deletion of the word "directly" from the existing regulations would allow the exemption for an employee whose duties relate only indirectly or tangentially to administrative functions. The Department did not intend any substantive change by deletion of the word "directly" in the proposal, and thus has reinserted this term to ensure that the administrative duties test is not interpreted as allowing the exemption to apply to employees whose primary duty is only remotely or tangentially related to exempt work. *Second*, the words "retail or service establishment" have been reinserted from the current rule in the phrase: "as distinguished, for example, from working on a manufacturing production line or selling a product *in a retail or service establishment*." This addition returns the regulatory text more closely to the current section 541.205(a): "as distinguished from 'production' or, in a retail or service establishment, 'sales' work." Commenters state that deletion of the words "retail or service establishment" could be interpreted as denying the administrative exemption to any employee engaged in any sales, advertising, marketing or promotional activities. Because no such categorical change was intended, or is supported by current case law, the Department has restored the language from the current regulations. *See, e.g., Reich* v. *John Alden Life Insurance Co.*, 126 F.3d 1, 9–10 (1st Cir. 1997) (promoting sales in the insurance industry is exempt administrative work). The Department also notes that this phrase begins with the words "for example." This final phrase in section 541.201(a) provides non-exclusive examples. Thus, the concern of commenters such as the Rudy, Exelrod & Zieff law firm that the reference to "working on a manufacturing production line" suggests that "working on what might be termed a 'white collar production line' is different from working on a manufacturing production line for purposes of the exemption" is unfounded.

The primary focus of most comments on subsection 541.201(a) dealt with the so-called 'production versus staff' dichotomy. The preamble to the proposal stated that the Department intended "to reduce the emphasis on the so-called "production versus staff" dichotomy in distinguishing between exempt and nonexempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer's customers."

Many commenters, including the Society for Human Resource Management (SHRM), the FLSA Reform Coalition, the National Association of Manufacturers (NAM), the U.S. Chamber of Commerce (Chamber), the HR Policy Association, the Morgan, Lewis & Bockius law firm and the Fisher & Phillips law firm, strongly support the proposal's intended diminution of the production versus staff dichotomy, which they believe has little value in today's service-oriented economy. For example, the Chamber states that the dichotomy "does not fit in today's workplace" because the "decline in manufacturing and the rise in the service and information industries has rendered the production dichotomy an artifact of a different age." SHRM "applauds the Department's elimination of much of the 'production v. staff' language" but also "recognizes that the production versus staff in some circumstances can be a helpful aid in determining whether an employee fits under the administrative exemptions and, therefore, supports the proposed language. * * * This language strikes a proper balance between retaining this concept and ensuring that it is not so strictly construed so as to deny the exemption to an employee who should be exempt." Similarly, NAM supports the proposed rule's attempt to "reduce the emphasis on the production versus staff dichotomy."

However, many of these commenters believe that the proposal did not go far enough, and that the final rule should strive to eliminate the dichotomy entirely. For example, the FLSA Reform Coalition states that the dichotomy should be eliminated by allowing an employee to qualify for the exemption either by performing work related to management or general business operations, or by doing any work that includes the exercise of discretion and independent judgment: "Thus, even if the employee's work could arguably be characterized as "production," he or she would nonetheless be an exempt administrative employee if his or her job is a responsible, non-manual one that includes the exercise of 'discretion and independent judgment.'" Similarly, the HR Policy Association recommends that the Department "eliminate the production dichotomy from the administrative exemption" because the confusion it causes is too great and it is difficult to apply with uniformity. The Fisher & Phillips law firm also states that the Department should "eliminate the 'dichotomy' altogether."

The primary focus of these comments was the last sentence in proposed subsection (a), which states that the administrative exemption does not apply if an employee is "working on manufacturing production line or selling a product." Numerous commenters ask for clarification about the scope and meaning of the statement. For example, the Morgan, Lewis & Bockius law firm requests clarification that not all sales work is excluded from exemption, such as advertising, marketing and promotional activities, and for confirmation that some individuals who work on a production line, such as a safety and health administrator or quality control specialist, may still be exempt. The U.S. Chamber of Commerce also states that the Department should "revisit its approach, especially with regard to treatment of employees who may be involved in some aspect of sales," and should clarify that sales work is not inherently inconsistent with exempt work. The HR Policy Association recommends that the Department delete the "working on a manufacturing production line or selling a product" phrase, or else clarify its meaning either in the regulations or this preamble.

A large number of commenters have the opposite view about the "production versus staff" dichotomy, stating that minimizing or deleting the dichotomy would deprive the administrative exemption of its meaning. Such commenters, including the AFL–CIO, the National Treasury Employees Union, the American Federation of State, County and Municipal Employees, the Rudy, Exelrod & Zieff law firm, the National Employment Lawyers Association, the American Federation of Television and Radio Artists, the National Partnership for Women and Families and the Stoll, Stoll, Berne Lokting & Shlachter law firm, believe that the courts have found the dichotomy to be a useful and appropriate tool in analyzing workers in a broad variety of non-manufacturing contexts. They oppose any indication that the Department is minimizing the dichotomy.

For example, the AFL–CIO notes that the 1949 Weiss report explained that the phrase "directly related to management policies or general business operations" describes those activities "relating to the administrative as distinguished from the 'production' operations of a business." Similarly, the 1940 Stein Report described administrative exempt employees as "those who can be described as staff rather than line employees, or functional rather than departmental heads." The AFL–CIO quotes *Reich* v. *New York*, 3 F.3d 581, 588 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994), stating that the dichotomy "has repeatedly proven useful to courts in a variety of non-manufacturing settings," and cites a number of court decisions applying the dichotomy in a variety of government and service sector contexts. The National Treasury Employees Union states that the "distinction which the Department would so casually discard is a key tool to help identify the specific class of office workers that Congress intended to exempt: support staff contributing to business operations and management. It is imperative to keep this narrow focus rather than blur the distinction between support staff and line workers * * *." The Rudy, Exelrod & Zieff law firm notes that, prior to 1940, the Department did not separately define the administrative exemption from the executive exemption, because the Department recognized that the administrative exemption "was intended to cover no more than a small subclass of 'executive' employees." The firm states that the 1940 Stein Report concluded that the employees whom the administrative exemption was intended to cover had "functional rather than departmental authority," meaning they did not "give orders to individuals." The firm argues that nothing in the modern workplace, involving production of services instead of manufactured goods, makes it improper to continue to draw the line between employees who help to administer an employer's general business operations and those employees whose duties are related to the day-to-day production of the goods or services the employer sells.

Commenters, thus, have very different perspectives about how the Department should approach the "production versus staff" dichotomy and apply it to the modern workplace. Except as stated above, we have not adopted any of the commenters' suggestions for substantial changes to the primary duty standard in section 541.201(a). The Department believes that our proposal struck the proper balance on the "production versus staff" dichotomy. We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption, but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption. The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption. As the Department recognized in the 1949 Weiss Report at 63, this exemption is intended to be limited to those employees whose duties relate "to the administrative as distinguished from the 'production' operations of a business." Thus, it relates to employees whose work involves servicing the business itself—employees who "can be described as staff rather than line employees, or as functional rather than departmental heads." 1940 Stein Report at 27. The 1940 Stein Report further described the exemption as being limited to employees who have "miscellaneous policy-making or policy-executing responsibilities" but who do not give orders to other employees. 1940 Stein Report at 4. Based on these principles, the Department provided in proposed section 541.201(a) that the administrative exemption covers only employees performing a particular type of work—work related to assisting with the running or servicing of the business. The examples the Department provided in proposed section 541.201(b) were intended to identify departments or subdivisions that generally fit this rule.

The Department's view that the "production versus staff" dichotomy has always been illustrative—but not dispositive—of exempt status is supported by federal case law. In *Bothell* v. *Phase Metrics*, Inc., 299 F.3d 1120 (9th Cir. 2002), for example, the Ninth Circuit found the dichotomy "useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.'" *Id.* at 1126 (citation omitted). The court further stated:

> The other pertinent cases from our sister circuits similarly regard the administration/production dichotomy as but one piece of the larger inquiry, recognizing that a court must 'construe the statutes and applicable regulations as a whole.' Indeed, some cases analyze the primary duty test without referencing the § 541.205(a) dichotomy at all. This approach is sometimes appropriate because, as we have said, the dichotomy is but one analytical tool, to be used only to the extent that it clarifies the analysis. Only when work falls 'squarely on the production side of the line,' has the administration/production dichotomy been determinative.
> * * * * *
> Moreover, the distinction should only be employed as a tool toward answering the ultimate question, whether work is 'directly related to management policies or general business operations,' not as an end in itself.

*Id.* at 1127 (citations omitted). *See, e.g., Piscione* v. *Ernst & Young, L.L.P.*, 171 F.3d 527, 538–39 (7th Cir. 1999) (even though the employee "produced" some reports and filings, and such work might be viewed as production work, the work was directly related to the management or general business operations); *Spinden* v. *GS Roofing Products Co.*, 94 F.3d 421, 428 (8th Cir. 1996) (employee held administratively exempt despite the fact that he "produced" certain specific outputs), *cert. denied*, 520 U.S. 1120 (1997).

The final regulation is consistent with the Ninth Circuit's approach in *Phase Metrics:* the "production versus staff" dichotomy is "one analytical tool" that should be used "toward answering the ultimate question," and is only determinative if the work "falls squarely on the production side of the line."

As noted above, proposed section 541.201(b) provided an illustrative list of the types of functional areas or departments, including accounting, auditing, marketing, human resources and public relations, typically administrative in nature. The commenters generally found this illustrative list to be accurate and helpful. For example, the FLSA Reform Coalition states that it supported the Department's efforts to clarify the administrative exemption by "focusing on the function performed by the employee and providing examples of exempt, administrative functions." The AFL–CIO comments that the list includes areas "which are clearly

encompassed within the servicing functions of a business, and which substantially overlap with the servicing examples set forth in current section 541.205(b)." The U.S. Chamber of Commerce also notes that the list is similar to the examples in the existing regulations and agrees that all of the areas listed in the proposed regulation "are proper illustrations of exempt administrative work." Some commenters suggest a variety of additional areas of work that should be added to the illustrative list. However, the National Treasury Employees Union cautions against exempting workers based upon their job area or title. Other commenters similarly suggest that the Department should include fewer categories in the list, because employees doing routine work may be misperceived as exempt simply because they work in an area like marketing, human resources, or research.

In light of these comments, we have added the language, "but is not limited to," to emphasize that the list is intended only to be illustrative. It is not intended as a complete listing of exempt areas. Nor is it intended as a listing of specific jobs; rather, it is a list of functional areas or departments that generally relate to management and general business operations of an employer or an employer's customers, although each case must be examined individually. Within such areas or departments, it is still necessary to analyze the level or nature of the work (*i.e.*, does the employee exercise discretion and independent judgment as to matters of significance) in order to assess whether the administrative exemption applies. Commenters recommend the inclusion of several areas that we think are appropriate as additional examples of areas that generally relate to management and general business operations. Therefore, we are adding computer network, internet and database administration; legal and regulatory compliance; and budgeting to the illustrative list.

Finally, proposed section 541.201(c) provided that employees who perform work related to the management or general business operations of the employer's customers, such as advisers and consultants, also may qualify for the administrative exemption. The proposed rule included language from existing sections 541.2(a)(2) and 541.205(d), and no substantive changes were intended. The commenters express few substantive concerns with this provision. A small number of commenters suggest that the regulation should provide that the employer's customer could be an individual, while commenter Karen Dulaney Smith urges the Department to insert the word 'business' to clarify that the exemption does not apply to "individuals, whose "business" is purely personal." The Department has not made either change. Nothing in the existing or final regulations precludes the exemption because the customer is an individual, rather than a business, as long as the work relates to management or general business operations. As stated by commenter Smith, the exemption does not apply when the individual's 'business' is purely personal, but providing expert advice to a small business owner or a sole proprietor regarding management and general business operations, for example, is an administrative function. The 1949 Weiss Report stated that the administrative exemption should not be read to exclude "employees whose duties relate directly to the management policies or to the general business operations of their employers' customers. For example, many bona fide administrative employees perform important functions as advisors and consultants but are employed by a concern engaged in furnishing such services for a fee * * *. Such employees, if they meet the other requirements of the regulations, should qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of the employers' clients or customers, or those of their employer." 1949 Weiss Report at 65. Weiss also noted that a consultant employed by a firm of consultants is exempt if the employee's "work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client." 1949 Weiss Report at 56. This provision is meant to place work done for a client or customer on the same footing as work done for the employer directly, regardless of whether the client is a sole proprietor or a Fortune 500 company, as long as the work relates to "management or general business operations."

Section 541.202 Discretion and Independent Judgment (Proposed "Position of Responsibility")

As discussed above, the Department has decided to eliminate the proposed "position of responsibility" requirement. Thus, the final rule deletes proposed section 541.202 defining "position of responsibility," proposed section 541.203 defining "substantial importance," and proposed section 541.204 defining "high level of skill or training." Instead, the final rule reinserts the "discretion and independent judgment" requirement, and defines that term at final section 541.202. Some of the language in proposed sections 541.203 and 541.204 was retained from the existing regulations and also appears in the final regulations as described below. The language from proposed section 541.204 regarding the use of manuals has been moved to a new section in Subpart H, Definitions and Miscellaneous Provisions, and is discussed under that subpart.

The Department continues to believe, as most commenters confirm, that the current discretion and independent judgment standard has caused confusion and unnecessary litigation. Even in the 1949 Weiss Report, the Department recognized that the "discretion and independent judgment" standard was somewhat subjective, and the difficulty of applying the standard consistently has increased with the passing decades. As evidenced by the increasing court litigation, it has become progressively more difficult to apply the standard with the creation of many new jobs that did not exist 50 years ago. Nonetheless, the vast majority of commenters express concern that abandoning the "discretion and independent judgment" standard entirely would create even more uncertainty and litigation. We also recognize the benefit of retaining the standard in some form so as not to jettison completely decades of federal court decisions and agency opinion letters.

Accordingly, while retaining this standard from the existing regulations, final section 541.202 clarifies the definition of discretion and independent judgment to reflect existing federal case law and to eliminate outdated and confusing language in the existing interpretive guidelines. The Department intends the final rule to clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace.

Final section 541.202(a) thus restates the requirement that the exempt administrative employee's primary duty must "include" the exercise of discretion and independent judgment and includes the general definition of this term, taken word-for-word from the existing interpretive guideline at subsection 541.207(a): "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The requirement that the primary duty must "include" the

exercise of discretion and independent judgment—rather than "customarily and regularly" exercise discretion and independent judgment—is not a change from current law. Although the Department is aware that there has been some confusion regarding the appropriate standard under the existing "short" duties test, federal court decisions have recognized that the current "short" duties test does not require that the exempt employee "customarily and regularly" exercise discretion and independent judgment, as does the effectively dormant "long" test. *See, e.g., O'Dell* v. *Alyeska Pipeline Service Co.*, 856 F.2d 1452, 1454 (9th Cir. 1988) (district court erred in not applying more lenient "includes" standard under short test which made a difference in determining whether employee was exempt); *Dymond* v. *United States Postal Service*, 670 F.2d 93, 95 (8th Cir. 1982) (while the "long" duties test for the administrative exemption requires that the employee "customarily and regularly" exercise discretion and independent judgment, when an employee makes more than $250 a week, "that requirement is reduced to requiring that the employee's primary duty simply 'includes work requiring the exercise of discretion and independent judgment'").

Also retained from existing subsection 541.207(a), the final subsection 541.202(a) provides that discretion and independent judgment must be exercised "with respect to matters of significance." Final subsection 541.202(a) states that the term "matters of significance" refers to "the level of importance or consequence of the work performed." This concept of the importance or high level of work performed does not appear as a regulatory requirement in existing section 541.2, but is included twice in the existing interpretive guidance. Existing section 541.205(a), defining the primary duty requirement, states that the administrative exemption is limited "to persons who perform *work of substantial importance* to the management or operation of the business." This language was the basis of the "work of substantial importance" option in the proposed definition of "position of responsibility." Existing section 541.207(a), defining the term "discretion and independent judgment" provides that an exempt administrative employee "has the authority or power to make an independent choice, free from immediate direction or supervision and *with respect to matters of significance.*"

The existing regulations use these two different phrases found in two different sections to describe the same general concept—that the work performed by an exempt administrative employee must be significant, substantial, important, or of consequence. *See, e.g., Piscione* v. *Ernst & Young, L.L.P.*, 171 F.3d 527, 535–43 (7th Cir. 1999). The words "substantial" and "significant" are synonyms. Existing section 541.207(d) describes the "matters of significance" concept as requiring that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." Further, existing section 541.205 and existing section 541.207 use some of the same examples (*i.e.*, personnel clerks, inspectors, buyers) to illustrate the meaning of "substantial importance" and the meaning of "matters of significance."

Describing the same concept using two different phrases in two different sections of the existing interpretive guidelines is duplicative and confusing. Accordingly, the final rule chooses one phrase—"matters of significance"—and makes that phrase part of the regulatory test for the administrative exemption, rather than merely interpretive guidance. As described below, final subsections 541.202(b) through (f) combine language from existing section 541.205, existing section 541.207, and current case law to more clearly define and delimit this concept.

Final subsection 541.202(b) begins with language from existing section 541.207(b) stating that the phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises." Final subsection 541.202(b) then contains the following non-exclusive list of factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance:

> [W]hether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

These factors were taken from the existing regulations, *see* 541.205(b), 541.205(c) and 541.207(d), or developed from facts which federal courts have found relevant when determining whether an employee exercises discretion and independent judgment. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required. *See, e.g., Bondy* v. *City of Dallas*, 2003 WL 22316855, at *1 (5th Cir. 2003) (making recommendations to management on policies and procedures); *McAllister* v. *Transamerica Occidental Life Insurance Co.*, 325 F.3d 997, 1000–02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *Cowart* v. *Ingalls Shipbuilding*, Inc., 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Piscione*, 171 F.3d at 535–43 (making recommendations to management on policies and procedures); *Haywood* v. *North American Van Lines, Inc.*, 121 F.3d 1066, 1071–73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority; independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *O'Neill-Marino* v. *Omni Hotels Management Corp.*, 2001 WL 210360, at *8–9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority; developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Stricker* v. *Eastern Off-Road Equipment, Inc.*, 935 F. Supp. 650, 656–59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); *Reich* v. *Haemonetics Corp.*, 907 F. Supp. 512, 517–18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority; authority to commit employer in matters that have financial impact); *Hippen* v. *First National Bank*, 1992 WL 73554, at *6 (D. Kan. 1992) (authority to commit employer in matters that have

financial impact). Other factors which federal courts have found relevant in assessing whether an employee exercises discretion and independent judgment include the employee's freedom from direct supervision, personnel responsibilities, troubleshooting or problem-solving activities on behalf of management, use of personalized communication techniques, authority to handle atypical or unusual situations, authority to set budgets, responsibility for assessing customer needs, primary contact to public or customers on behalf of the employer, the duty to anticipate competitive products or services and distinguish them from competitor's products or services, advertising or promotion work, and coordination of departments, requirements, or other activities for or on behalf of employer or employer's clients or customers. *See, e.g., Hogan* v. *Allstate Insurance Co.*, 2004 WL 362378 (11th Cir. 2004); *Demos* v. *City of Indianapolis*, 302 F.3d 698 (7th Cir. 2002); *Lutz* v. *Ameritech Corp.*, 2000 WL 245485 (6th Cir. 2000); *Lott* v. *Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326 (5th Cir. 2001); *Heidtman* v. *County of El Paso*, 171 F.3d 1038 (5th Cir. 1999); *Piscione* v. *Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999); *Shockley* v. *City of Newport News*, 997 F.2d 18 (4th Cir. 1993); *West* v. *Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir.), *cert. denied*, 525 U.S. 1048 (1998); *Reich* v. *John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997); *Wilshin* v. *Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002); *Roberts* v. *National Autotech, Inc.*, 192 F. Supp. 2d 672 (N.D. Tex. 2002); *Orphanos* v. *Charles Industries, Ltd.*, 1996 WL 437380 (N.D. Ill. 1996).

Most of the remaining subsections in final 541.202 contain language from the existing regulations. Final subsection 541.202(c) contains language from existing section 541.207(a) and existing section 541.207(e) providing that "discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision." However, "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." Final subsection (c) also retains the credit manager and management consultant examples from existing section 541.207(e)(2). Final subsection 541.202(d) contains language from existing section 541.205(c)(6) providing that the "fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." Final subsection 541.202(e) contains language from existing sections 541.207(c)(1) and 541.207(c)(2) stating that the exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." As in existing section 541.205(c), final subsection 541.202(e) provides that the exercise of discretion and independent judgment "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work." Final subsection 541.202(f) includes language from existing section 541.205(c)(2) that an employee "does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly."

In sum, as in the existing regulations, the final administrative exemption regulations establish a two-part inquiry for determining whether an employee performs exempt administrative duties. First, what *type* of work is performed by the employee? Is the employee's primary duty the performance of work directly related to management or general business operations? Second, what is the *level* or *nature* of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance? *See, e.g., Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120, 1125–26 (9th Cir. 2002) (looking to both the type of work and the importance of the work). By retaining the "discretion and independent judgment" standard from the existing regulations, as clarified to reflect current case law, and combining the existing concepts of "substantial importance" and "matters of significance," the final rule provides clarity while at the same time maintaining continuity with the existing regulations.

Section 541.203 Administrative Exemption Examples

The final regulations include a new section 541.203 which includes illustrations of the application of the administrative duties test to particular occupations. Many of the examples are from sections 541.201, 541.205 and 541.207 of the existing regulations. Other examples reflect existing case law.

Final subsection 541.203(a) provides that insurance claims adjusters "generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." This section was moved from proposed section 541.203(b)(2). Commenters, such as National Employment Lawyers Association (NELA), the Rudy, Exelrod & Zieff law firm and the Stoll, Stoll, Berne, Lokting & Shlachter law firm, state that the Department should not single out insurance claims adjusters in the regulations. NELA states that this example "flies in the face of the basic rule that titles are not dispositive in determining whether employees are exempt. Many insurance claims adjusters perform routine production work." Such commenters state that the work of many adjusters involves the day-to-day work of the company, such as whether to repair or replace a dented fender, rather than work related to the management or general business operations of the firm such as the overall methods used to process claims generally. However, this provision of the proposed rule is consistent with existing section 541.205(c)(5) and an Administrator's opinion letter issued on November 19, 2002, to which the court in *Jastremski* v. *Safeco Insurance Cos.*, 243 F. Supp. 2d 743, 753 (N.D. Ohio 2003), deferred because it was a "thorough, well reasoned, and accurate interpretation of the regulations." *See also Palacio* v. *Progressive Insurance Co.*, 244 F. Supp. 2d 1040 (C.D. Cal. 2002). The final subsection 541.203(a)—like the opinion letter and the case law—does not rely on the "claims adjuster" job title alone. Rather, there must be a case-by-case assessment to determine whether the employee's duties meet the requirement for exemption. Thus, the final subsection (a) identifies the typical duties of an exempt claims adjuster as, among others, preparing damage estimates, evaluating and making recommendations regarding coverage of the claim, determining liability and total value of the claim, negotiating settlements, and making

recommendations regarding litigation. The courts have evaluated such factors to assess whether the employee is engaged in servicing the business itself. Moreover, as the court in *Palacio* emphasized, claims adjusters are not production employees because the insurance company is "in the business of writing and selling automobile insurance," rather than in the business of producing claims. *Id.* at 1046. Because the vast majority of customers never make a claim against the policy they purchase, the court concluded that claims adjusters do "not produce the very goods and services" that the employer offered to the public. *Id.* at 1047. Similarly, federal courts have evaluated such factors to assess whether the employee's exercises discretion and independent judgment. *See, e.g., Palacio,* 244 F. Supp. 2d at 1048 (claims agent who spent half her time negotiating with claimants and attorneys, who had independent authority to settle claims between $5,000 and $7,500, and whose recommendations regarding offers for larger claims often were accepted exercised discretion and independent judgment); *Jastremski,* 243 F. Supp. 2d at 757 (claims adjuster who planned and carried out investigations, determined whether the loss was covered by the policy, negotiated settlements, had independent settlement authority up to $15,000 and could recommend settlements, which were usually accepted, above his authority level exercised discretion and independent judgment).

Consistent with existing case law, final subsection 541.203(b) provides that employees in the financial services industry "generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption." Several commenters request a section regarding various occupations in the financial services industry because of growing litigation in this area.

In cases such as *Reich* v. *John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), *Hogan* v. *Allstate Insurance Co.*, 2004 WL 362378 (11th Cir. 2004), and *Wilshin* v. *Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002), federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, even though the employees also engaged in some inside sales activities. In contrast, the court in *Casas* v. *Conseco Finance Corp.*, 2002 WL 507059, at *9 (D. Minn. 2002), held that the administrative exemption was not available for employees who had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers and failed to exercise discretion and independent judgment.

The *John Alden* case involved the exempt status of marketing representatives working for a company that designed, created and sold insurance products, primarily for businesses that were purchasing group coverage for their employees. The marketing representatives did not sell through direct contacts with the ultimate customers, but instead relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of such independent sales agents to keep them apprised of the employer's financial products, to inform them of changes in prices, and to discuss how the products might fit their customers' needs. The marketing representatives also would inform the employer of anything they learned from the independent sales agents, such as information about a competitor's products or pricing. The First Circuit ruled that these activities were directly related to management policies or general business operations and that the marketing representatives were exempt. Their activities involved "servicing" of the business because their work was "in the nature of 'representing the company' and 'promoting sales' of John Alden products, two examples of exempt administrative work provided by § 541.205(b) of the interpretations." 126 F.3d at 10. Thus, the court concluded that the marketing representatives' contact with the independent sales agents involved 'something more than routine selling efforts focused simply on particular sales transactions.' Rather, their agent contacts are 'aimed at promoting (*i.e.*, increasing, developing, facilitating, and/or maintaining) customer sales *generally*,' activity which is deemed administrative sales promotion work under section 541.205(b)." *Id.* (citations omitted, emphasis in original), quoting *Martin* v. *Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3rd Cir. 1991), *cert. denied*, 503 U.S. 936 (1992).

In *Hogan* v. *Allstate Insurance Co.*, 2004 WL 362378, at *4 (11th Cir. 2004), the Eleventh Circuit held that insurance agents who "spent the majority of their time servicing existing customers" and performed duties including "promoting sales, advising customers, adapting policies to customer's needs, deciding on advertising budget and techniques, hiring and training staff, determining staff's pay, and delegating routine matters and sales to said staff " were exempt administrative employees. The court held the insurance agents exempt even though they also sold insurance products directly to existing and new customers.

The court in *Wilshin* v. *Allstate Insurance Co.*, 212 F. Supp. 2d 1360, 1377–79 (M.D. Ga. 2002), held that a neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included such activities as recommending products and providing claims help to different customers, as well as using his own personal sales techniques to promote and close transactions. He also was required to represent his employer in the market, and be knowledgeable about the market and the needs of actual and potential customers. The *Wilshin* court found that selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—was not enough of a distinction to negate his exempt status.

In contrast, the district court in *Casas* v. *Conseco Finance Corp.*, 2002 WL 507059 (D. Minn. 2002), held that loan originators were not exempt because they had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers. 2002 WL 507059, at *9. The employees called potential customers from a list provided to them by the employer and, using the employer's guidelines and standard operating procedures, obtained information such as income level, home ownership history, credit history and property value; ran credit reports; forwarded the application to an underwriter; and attempted to match the customer's needs with one of Conseco's loan products. If the underwriter approved the loan, the originator gathered documents for the closing, verified the information, and ordered the title work and appraisals. The court concluded that this was the ordinary production work of Conseco, which has the business purpose of designing, creating, and selling home lending

products, making them nonexempt production employees. The court also found that the plaintiffs lacked discretion and independent judgment necessary to qualify for the exemption since they followed strict guidelines and operating procedures, and had no authority to approve loans.

The Department agrees that employees whose primary duty is inside sales cannot qualify as exempt administrative employees. However, as found by the *John Alden, Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

Accordingly, consistent with this case law, the final rule distinguishes between exempt and nonexempt financial services employees based on the primary duty they perform. Final section 541.203(b) thus provides:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

The Department believes this approach also is consistent with the case law and the final rule regarding insurance claims adjusters, which emphasizes that employees performing duties related to servicing the company, such as representing the company in evaluating the merits of claims against it and in negotiating settlements, generally qualify for exemption. We also believe that this approach is consistent with the existing and final regulations providing that advisory specialists and consultants to management, such as tax experts, insurance experts, or financial consultants, who are employed by a firm that furnishes such services for a fee, should be treated the same as an in-house adviser regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer. *See* final rule section 541.201(c); existing sections 541.201(a)(2), 541.205(c)(5) and 541.205(d); and *Piscione* v. *Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999). Finally, our approach is consistent with existing section 541.207(d)(2), which provides that "a customer's man in a brokerage house" exercises discretion and independent judgment "in deciding what recommendations to make to customers for the purchase of securities," but reflects the modernization of this existing subsection for the 21st Century workforce.

Consistent with *Hogan*, the final rule rejects the view that selling financial products directly to a consumer automatically precludes a finding of exempt administrative status. Application of the exemption should not change based only on whether the employees' activities are aimed at an end user or an intermediary. The final rule distinguishes the exempt and nonexempt financial services employees based on the duties they perform, not the identity of the customer they serve. For example, a financial services employee whose primary duty is gathering and analyzing facts and providing consulting advice to assist customers in choosing among many complex financial products may be an exempt administrative employee. An employee whose primary duty is inside sales is not exempt.

Final subsection 541.203(c) provides that an employee "who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team." This modification of proposed section 541.203(b)(3) responds to commenters who express concern that the executive exemption fails to reflect the modern practice of a company forming cross-functional or multi-department teams to complete major projects. Several commenters suggest that the manager or leader of such teams should be treated as exempt even if the leader did not have traditional supervisory authority over the other members of the team. Although, as stated above, the Department does not believe that the executive exemption applies, an employee who leads teams to complete major projects may qualify for exemption under the existing administrative regulations. *See* current 29 CFR 541.205(c) (exemption applies to employees who "carry out major assignments in conducting the operations of the business"). The final subsection (c) merely updates this concept with a more modern example.

Final subsection 541.203(d) includes the example regarding executive assistants and administrative assistants derived from existing sections 541.201(a)(1), 541.207(d)(2) and 541.207(e), and proposed at section 541.203(b)(4). Final subsection 541.203(e) distinguishes exempt human resources managers from nonexempt personnel clerks. The language in this subsection appears in existing sections 541.205(c)(3) and 541.207(c)(5), and was proposed at sections 541.203(b)(4) and 541.203(c). Final subsection 541.203(f) includes the purchasing agent example from proposed section 541.203(b)(4), which was derived from existing sections 541.205(c)(4), 541.207(d)(2) and 541.207(e)(2). Final subsection 541.203(g) contains the inspection work example from existing section 541.207(c)(2) and proposed section 541.204(c). Final section 541.203(h) contains the examples regarding examiners and graders from existing sections 541.207(c)(3) and (4) and proposed section 541.204(c). Final subsection 541.203(i) includes the comparison shopping example from existing section 541.207(c)(6). No substantive changes from current law are intended in these examples.

The Department received no substantive comments with respect to the examples of nonexempt work. With respect to administrative or executive assistants, a number of commenters assert that these employees should be exempt if they assist a senior executive in a corporation below the level of proprietor or chief executive of a business. Other commenters express a countervailing concern that these terms could be applied too broadly to employees with nonexempt duties, such as secretarial employees. The final rule makes no changes to current law, and thus this example should not expand the exemption to include secretaries or other clerical employees. We do not believe expansion of this example beyond current law is warranted on the record evidence.

Final subsection 541.203(j) contains a new example providing that "[p]ublic sector inspectors or investigators of

various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met." This new example responds to comments from public sector employees and employer groups. The Public Sector FLSA Coalition, for example, comments that because the existing rules were written with only the private sector in mind, the proposed revisions offer an opportunity for the Department to include language addressing issues unique to public sector concerns. The Public Sector FLSA Coalition states that, although the discretion and independent judgment requirement is vague and unworkable, this standard retains the benefit of being the subject of several court decisions and opinion letters. These interpretations have provided some guidance for Public Sector FLSA Coalition members in assessing the exempt status of certain positions in the public sector. Similarly, the Wisconsin Department of Employment Relations suggests that the final regulations include specific examples from the public sector relating to the discretion and independent judgment standard. Various public sector unions and employees express concern that employees such as investigators, inspectors and parole officers would newly qualify for the administrative exemption under the proposed regulations. Thus, the final rule has been modified to add examples of various types of inspection work found in the public sector that typically fail the requirement for exercising discretion and independent judgment. The examples are straightforward and drawn from previous Wage and Hour opinion letters in which, based on the facts presented, the work involved was considered to be based on the employee's use of skills and technical abilities, rather than exercising the requisite discretion and independent judgment specified in the regulations. *See, e.g.*, Wage and Hour Opinion Letter of 4/17/98, 1998 WL 852783 (investigators); Wage and Hour Opinion Letter of 3/11/98, 1998 WL 852755 (inspectors); and Wage and Hour Opinion Letter of 12/21/94, 1994 WL 1004897 (probation officers).

Section 541.204 Educational Establishments (Proposed § 541.205)

The proposed rule established a separate exemption test for employees whose primary duty is "performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof." Such employees are separately identified in section 13(a)(1) of the FLSA and are separately addressed in the existing regulation. The proposed rule defined the terms used and gave examples of employees who are engaged in academic administrative functions and employees who are not so engaged. Under the proposed rule, the term "educational institution" was defined as an "elementary or secondary school system, an institution of higher education or other educational institution."

As discussed below, the Department has added a list of relevant factors for determining whether post-secondary career programs qualify as "other educational institutions" to final subsection 541.204(b), and added "academic counselors" to the list of examples of exempt academic administrative employees in final subsection 541.204(c). Except for adjustment of the salary levels, the Department has made no other substantive changes to this section.

As the preamble to the proposed rule stated, this provision simply consolidated into a single section of the regulations a few provisions in the existing regulation pertaining to the administration of educational institutions, with no substantive changes intended. The Department received very few comments on this section.

A few commenters, including the Morgan, Lewis & Bockius law firm, the Air Force Labor Advisors and the Career College Association, suggest that the regulations contain some additional guidance regarding "other educational institutions" such as schools that provide adult continuing education or post-secondary technical and vocational training programs such as aircraft flight schools. Opinion letters currently provide guidance about such institutions. For example, the Department has stated that a flight instruction installation approved by the Federal Aviation Administration under that agency's regulations would constitute an educational establishment. Wage and Hour Opinion Letter of April 2, 1970 (1970 WL 26390). *See also* 2000 WL 33126562. Factors that are relevant in assessing whether such post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. *Gonzales* v. *New England Tractor Trailer Training School,* 932 F. Supp. 697 (D. Md. 1996). Because such questions must be answered on a case-by-case basis, it would not be prudent for the Department to list just a few types of schools that could qualify as educational institutions. However, we have included the above factors in final subsection 541.204(b).

The American Council of Education suggests that we include admissions counselors and academic counselors on the list of examples of exempt academic administrative employees. The Department has provided guidance on these positions in opinion letters dated February 19, 1998 (1998 WL 852683), and April 20, 1999 (1999 WL 1002391). In those letters, the Department addressed the exempt status of academic counselors and enrollment or admissions counselors. Those letters elaborate on the regulatory requirement that the *academic* administrative exemption is limited to employees engaged in work relating to the academic operations and functions of a school rather than work relating to the general business operations of the school. Thus, academic counselors performing the job duties listed in the 1998 opinion letter were found to qualify for the academic administrative exemption because their primary duty involved work such as administering the school's testing programs, assisting students with academic problems, advising students concerning degree requirements, and performing other functions directly related to the school's educational functions. In contrast, enrollment counselors who engage in general outreach and recruitment efforts to encourage students to apply to the school did not qualify for the academic administrative exemption because their work was not sufficiently related to the school's *academic* operations. However, the 1999 letter noted that, depending upon the employees' duties, they might qualify for the general administrative exemption because their work related to the school's general business operations and involved work in the nature of general sales promotion work.

Consistent with these opinion letters, we have added academic counselors as an example of exempt academic administrative employees in final subsection 541.204(c), but not admissions counselors.

*Subpart D, Professional Employees*

Section 541.300 General Rule for Professional Employees

The proposed general rule for the professional exemption also streamlined the current regulations by adopting a single standard duties test. The proposed standard duties test provided that an exempt professional employee must have "a primary duty of performing office or non-manual work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

The final rule modifies the proposed professional duties test in three ways, ensuring that the final professional test is as protective as the existing short duties test under which most employees are tested for exemption today. *First*, as under the other exemptions, the final rule changes the phrase "a primary duty" back to the current language of "whose primary duty" in response to commenter concerns that this change weakened the test for exemption. *Second*, consistent with the existing regulations, the final rule deletes the phrase "office or non-manual" work. This revision was made in response to commenter concerns about the confusion that would result from applying the "office and non-manual" requirement to the professional exemption for the first time. Employer commenters express concerns that occupations clearly satisfying the requirements of the existing tests for learned or creative professionals would not be exempt under the proposal because some aspect of the employee's duties requires "manual" work, such as a surgeon using a scalpel or a portrait artist using a brush. The Department did not intend this result, and thus has removed the "office and non-manual" language from the professional exemption. *Third*, the final rule deletes from subsection 541.300(a)(2)(i) the phrase, "but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience." As discussed more fully under section 541.301 below, some commenters view the addition of this language as a significant expansion of the learned professional exemption. No such result was intended. Rather, this proposed language was merely an attempt to streamline and summarize the discussion of the word "customarily" in subsection 541.301(d) of the current regulations.

Section 541.301 Learned Professionals

Proposed section 541.301(a) restated the duties tests for the learned professional exemption and defined "advanced knowledge" as "knowledge that is customarily acquired through a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience." The proposed subsection (a) also included a list of traditional fields of science or learning such as law, medicine, theology and teaching "that have a recognized professional status based on the acquirement of advanced knowledge and performance of work that is predominantly intellectual in character as opposed to routine, mental, manual, mechanical or physical work." The remaining subsections in proposed section 541.301 defined the key terms in the duties test and provided examples of occupations which generally meet or do not meet the duties requirements for the learned professional exemption.

The final section 541.301(a) has been modified to track the existing learned professional duties test, and then list separately the three elements of this duties test: "(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." Other text from proposed subsection (a) has been moved as appropriate to final subsection (b) defining the phrase "advanced knowledge," final subsection (c) defining the phrase "field of science or learning," and final subsection (d) defining the phrase "customarily acquired by a prolonged course of specialized intellectual instruction." The final subsection (e) contains examples, consistent with existing case law as detailed below, illustrating how the learned professional duties test applies to specific occupations. The language in proposed subsection (f) has been deleted as redundant with the new section 541.3, and proposed subsection (g) has been renumbered.

Commenters on the learned professional exemption focus most of their discussion on the educational requirements for the exemption. Proposed section 541.301(a) provided that the advanced knowledge required for exemption is "customarily acquired through a prolonged course of specialized intellectual instruction," but may also "be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience." Similarly, proposed section 541.301(d) provided: "However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction." This new "equivalent combination" language generated sharp disagreement among the commenters.

Many commenters, including the FLSA Reform Coalition, the National Restaurant Association, the Food Marketing Institute, the State of Oklahoma Office of Personnel Management, the Johnson County Government Human Resources Department and Henrico County, Virginia, generally support the proposal as more appropriately focusing on an employee's knowledge level and application of such knowledge. Such commenters state that the proposal reflects the realities of the modern workplace where employees may take an alternative educational path, but perform the same duties as the degreed professionals. Comments filed by the HR Policy Association, for example, recognize that the current regulations allow some non-degreed employees to be classified as exempt learned professionals by providing that the requisite knowledge is "customarily" acquired by a prolonged course of intellectual instruction. However, the HR Policy Association writes that the Department has not provided sufficient guidance, under the current or proposed regulations, on the application of this "customarily" language. The HR Policy Association endorses the Department's proposal as providing a workable and reasonable standard which recognizes that more workers today perform work requiring professional knowledge without possessing a formal professional degree. The Society for Human Resource Management (SHRM)

expresses concern that the existing test requires an employer to classify and pay employees differently even if they who perform the same work and if they acquired their knowledge in different ways. SHRM supports the proposal because it would allow employers to classify and pay employees the same when they have the same knowledge level and perform the same work. The Workplace Practices Group similarly notes that the existing rule arguably creates difficulties for an employer who must treat differently two employees who perform the same work but acquired their knowledge in different manners. The National Association of Manufacturers (NAM) states that the proposal reflects the realities of the 21st century workplace while remaining consistent with the purposes of the FLSA. NAM agrees with the Department's proposal, stating that the regulations should focus on the employee's knowledge and application of that knowledge, not on how the employee acquired such knowledge. Comments filed by the U.S. Chamber of Commerce (Chamber) supporting the proposal discuss how the professions and professional education have evolved since the current regulations were promulgated in 1940. The current focus of the regulations, the Chamber notes, is inconsistent with this evolution in how knowledge is acquired.

Other commenters, however, argue that the proposed "equivalent combination" language would greatly and unjustifiably expand the scope of the professional exemption. The AFL–CIO acknowledges that "on its face," the proposal "does not permit occupations that currently do not meet the test for learned professionals to qualify for the exemption under the new alternative educational requirement." The AFL–CIO notes that the 1940 Stein Report recognized a need for flexibility in the professional duties test to allow the exemption for the occasional employee who did not acquire the requisite knowledge for exemption through a formal degree program. The AFL–CIO also acknowledges that the court in *Leslie* v. *Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578 (S.D. Miss. 1995), focused on the knowledge level to find that an engineer without a formal degree was an exempt professional. Nonetheless, the AFL–CIO argues that the proposal would have the practical effect of allowing employers to classify as exempt any employee who has some post-high school education and job experience. According to the AFL–CIO, entire occupations such as medical technicians, licensed practical nurses, engineering technicians and other technical workers could be classified as exempt employees under the proposal. The American Federation of State, County and Municipal Employees claims that the Department's proposed rule would replace an existing "bright line" test with a confusing standard. The National Treasury Employees Union argues that the proposal creates a new category of exempt technical professionals, which the Department lacks the statutory authority to do. The American Federation of Government Employees (AFGE) describes the proposal as substituting "a vague and unworkable "knowledge" test" for an existing "workable educational requirement." The AFGE also claims that the proposed professional exemption "utterly destroys" the requirement that an exempt professional be in a recognized profession and eliminates any requirement for an advanced education degree. The International Association of Machinists and Aerospace Workers claims the proposal is an "unwarranted relaxation of FLSA standards." The International Federation of Professional and Technical Engineers argues that the proposal opens the door to classifying beauticians, barbers, radiological technicians and technicians that test or repair mechanical or electric equipment as exempt learned professionals.

The Department believes the proposal was consistent with current case law, and that the proposal would not have caused substantial expansion of the professional exemption. Nonetheless, after careful consideration of all the comments, the Department has modified sections 541.301(a) and (d) to ensure our intent cannot be so misconstrued. The Department did not and does not intend to change the long-standing educational requirements for the learned professional exemption. Rather, the revisions to these subsections were intended to provide additional guidance on the existing language, "customarily acquired" by a prolonged course of specialized intellectual instruction.

The Department has modified proposed section 541.301(a) in response to the comments evidencing confusion regarding the different elements of the primary duty test for the learned professional exemption. As noted above, some commenters express concern that allowing the exemption for employees with "an equivalent combination of intellectual instruction and work experience" would result in significant expansion of the exemption to new occupations never before considered to be professions, such as licensed practical nursing, the skilled trades, and various engineering and repair technicians. These concerns are unfounded because they incorrectly conflate the three separate elements of the learned professional duties test as described in the 1940 Stein Report:

> The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high-school level. Second, it must be knowledge in a field of science or learning. This in itself is not entirely definitive but will serve to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning. * * * The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study.

1940 Stein Report at 38–39. All three of these essential elements must be satisfied before an employee qualifies as an exempt learned professional under the existing, proposed and final rule. Thus, for example, a journeyman electrician may acquire advanced knowledge and skills through a combination of training, formal apprenticeship, and work experience, but can never qualify as an exempt learned professional because the electrician occupation is not a "field of science or learning" as required for exemption. A licensed practical nurse may work in a "field of science or learning," but cannot meet the requirements for the professional exemption because the occupation does not require knowledge "customarily acquired by a prolonged course of specialized intellectual instruction."

The proper focus of inquiry is upon whether all three required elements have been satisfied, not upon any job title or "status" the employee might have. Rather, only occupations that customarily require an advanced specialized degree are considered professional fields under the final rule. For example, no amount of military training can turn a technical field into a profession. Similarly, a veteran who received substantial training in the armed forces but is working on a manufacturing production line or as an engineering technician cannot be considered a learned professional because the employee is not performing professional duties.

The Department intended, and still intends, that these three essential elements, as set forth in the 1940 Stein Report, remain applicable and relevant today. Accordingly, final section 541.301(a) now separately lists the three elements, thus ensuring that nothing in

this section can be interpreted as allowing the professional exemption to be claimed for licensed practical nurses, skilled tradespersons, engineering technicians and other occupations that cannot meet all three of the elements.

Although the Department has removed the "equivalent combination" language from the final section 541.301(a), the references to the educational requirements for the professional exemption and the term "customarily" are discussed in subsection (d). As the AFL–CIO notes, the 1940 Stein Report recognized a need for flexibility in the professional duties test to allow the exemption for the occasional employee who does not possess the specialized academic degree usually required for entry into the profession. This flexibility is discussed in the existing regulations at section 541.301(d) which states, in part:

> Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption.

Thus, the existing section 541.301(d) states, the learned professional exemption is "available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry."

The final section 541.301(d), defining the phrase "customarily acquired by a prolonged course of specialized intellectual instruction," retains these general concepts while providing additional guidance to clarify when an employee working in a "field of science or learning," but without a formal degree, can qualify as an exempt learned professional. The final subsection (d) requires two separate inquiries. *First*, as in the existing regulations, the occupation must be in a field of science or learning where specialized academic training is a standard prerequisite for entrance into the profession. Thus, the learned professional exemption is available for lawyers, doctors and engineers, but not for skilled tradespersons, technicians, beauticians or licensed practical nurses, as none of these occupations require specialized academic training at the level intended by the regulations as a standard prerequisite for entrance into the profession. *Second*, employees within such a learned profession can then only qualify for the learned professional exemption if they either possess the requisite advanced degree or "have substantially the same knowledge level and *perform substantially the same work* as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction."

The final subsection (d) thus recognizes, as evidenced by many comments and recognized in the existing regulations, that some employees, occasional though they may be, have the same knowledge level and perform the same work as degreed employees but obtain that advanced knowledge by a non-traditional path."[9] An employee with the same knowledge level and performing the same work in a professional field of science or learning as the degreed professionals should be classified and paid in the same manner as those degreed professionals. This principle does not expand the learned professional exemption to new quasi-professional fields. Rather, it merely ensures, as in the current regulations, that employees performing the same work, and who met the other requirements for exemption, are treated the same—a common theme in employment law today.

To ensure that the final rule is not interpreted to exempt entire occupations previously considered nonexempt by the Department, the final rule deletes the phrase in proposed section 541.301(d) that equivalent knowledge may be obtained "through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction." Instead, final section 541.301(d) provides that the word "customarily" means "that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction."

Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces. The International Federation of Professional & Technical Engineers, for example, describes its members as technicians who test and repair electronic or mechanical equipment using knowledge gained through on-the-job training, military training and technical or community colleges. This commenter states that such technicians "generally do not have specialized college degrees in engineering or scientific fields, and do not have the detailed and sophisticated knowledge that scientists or engineers possess." Such technical workers are entitled to overtime under the existing and final regulations because their work does not require advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

To further avoid any misunderstanding of our intent, the final rule adds the following additional language to subsection (d):

> Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

Some jobs require only a four-year college degree in any field or a two-year degree as a standard prerequisite for entrance into the field. Other jobs require only completion of an apprenticeship program or other short course of specialized training. The final section 541.301(d), drawn from existing subsection 541.301(d) and proposed section 541.301(f), makes clear that such occupations do not qualify for the learned professional exemption.

The decision in *Palardy* v. *Horner*, 711 F. Supp. 667 (D. Mass. 1989) (applying Office of Personnel Management and FLSA regulations), cited by the AFL–CIO, would not

[9] The preamble to the proposal, 68 FR at 15568, invited comments on whether the regulations should specify equivalencies of work experience and other intellectual instruction that could substitute for a specialized advanced degree. A few commenters supported various specific equivalencies, but most commenters opposed them because equivalencies might vary by industry or be an "arbitrary exercise subject to abuse." The Department has decided not to impose inflexible equivalencies in the final regulations. However, we have added the phrase "and performs substantially the same work" to the final section 541.301(d), which should be a better guide for the regulated community in determining when a non-degreed employee working in a recognized professional field of science or learning can qualify as an exempt learned professional by focusing the inquiry on the actual work performed by the employee. *See, e.g., Leslie* v. *Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578 (S.D. Miss. 1995).

change if analyzed under the proposed or final regulations. The employees in that case were technicians employed by the Navy at the GS–11 grade level who performed "technical tasks relating to the proper design, repair, testing and overhaul of naval ship systems and equipment, as well as the vessels themselves." *Id.* at 668. The court described the employees as "primarily responsible for preparing drawings and schematics used in installing and reconfiguring equipment on navy vessels," but these tasks were "accomplished by consulting standard texts, guides and established formulas." *Id.* The work was "practical rather than theoretical," with the more complex tasks performed by professional engineers. *Id.* at 668–69. The only educational requirement for the positions was a high school diploma, and the skills needed to perform the work were "obtained through on the job training." *Id.* The work did "not require an advanced course of academic study." *Id.* Such technicians would be entitled to overtime pay under the final regulations, because the standard prerequisite for entry into such jobs is only a high school education, not advanced specialized academic training. In addition, the technicians would be entitled to overtime pay under the final regulations because they did not perform the same work as the professional engineers. In contrast, the employee in *Leslie* v. *Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578 (S.D. Miss. 1995), who had completed three years of engineering study at a university and had many years of experience in the field of engineering, would continue to be properly classified as an exempt learned professional.

The Department also received substantial comments on the proposal to eliminate the existing "short" test requirement that an exempt professional employee "consistently exercise * * * discretion and judgment." Many commenters such as the U.S. Chamber of Commerce (Chamber), the HR Policy Association, the Public Sector FLSA Coalition, the National Restaurant Association, and the National Association of Chain Drug Stores support this change. The Chamber, for example, notes that the "discretion and judgment" requirement is inconsistent with modern workforce practices, citing the case of *Hashop* v. *Rockwell Space Operations Co.*, 867 F. Supp. 1287, 1297 (S.D. Tex. 1994) (employees with degrees in electronic engineering and mathematics who trained Space Shuttle ground control personnel held not exempt). Difficulties in articulating and defining this requirement, the HR Policy Association states, have resulted in confusion in its application and have spawned numerous lawsuits. The HR Policy Association notes that professional employees are increasingly guided by operational parameters or standards because of the increased acceptance of international standards, especially in fields like engineering and science. According to the commenter, this evolution in work performed by professional employees has accelerated confusion with, and litigation over, the current professional exemption. The HR Policy Association also cites the *Rockwell Space Operations* case to illustrate that the current test can lead to illogical results.

Other commenters, such as the AFL–CIO, the American Federation of State, County and Municipal Employees, the National Treasury Employees Union, the American Federation of Government Employees and the International Federation of Professional and Technical Engineers, urge the Department to restore "discretion and judgment" as a requirement for the professional exemption. Such commenters argue that the exercise of discretion and judgment demonstrates the independence and authority that is an inherent part of professional work. Similarly, the National Employment Law Project contends that the "discretion and judgment" requirement "is a key limiting factor of the exemption and is intended to weed out those workers who are not bona fide exempt employees." Some of these commenters also believe that the proposal eliminated the "long" duties test requirement that exempt professionals perform work "predominantly intellectual and varied in character." Such commenters object to the perceived deletion of the "predominantly intellectual" requirement as further weakening the requirements for exemption.

The Department continues to believe that having a primary duty of "performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" includes, by its very nature, exercising discretion and independent judgment. Indeed, existing section 541.305 defines "discretion and judgment" under the professional exemption by stating only that: "A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional." *See also* 1940 Stein Report at 37 ("A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment."). The Department has been unable to identify any occupation that would meet the primary duty test for the professional exemption, but not require the consistent exercise of discretion and judgment.

The Department observes that only a few courts have discussed the definition of the phrase "includes work requiring the consistent exercise of discretion and judgment" in the existing "short" professional duties test, and how this standard differs from the phrase "includes work requiring the exercise of discretion and *independent* judgment" in the existing "short" administrative duties test. *See, e.g., Piscione* v. *Ernst & Young, L.L.P.*, 171 F.3d 527, 536 (7th Cir. 1999); *Hashop*, 867 F. Supp. at 1298 n.6. The Department also notes that the "consistent exercise of discretion and judgment" standard under the learned professional exemption is less stringent than the "includes work requiring the exercise of discretion and *independent* judgment" standard of the administrative exemption. *See De Jesus Rentas* v. *Baxter Pharmacy Services Corp.*, 286 F. Supp. 2d 235, 241 (D.P.R. 2003) (noting that the discretion required for the professional exemption is "a lesser standard" than the discretion required under the administrative exemption).

The Department continues to agree that a "prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment," 29 CFR 541.305(b), and did not intend to delete this concept entirely from the professional duties test. Thus, consistent with existing section 541.305(b), the Department has included the "consistent exercise of discretion and judgment" in final subsection 541.301(b) as part of the definition of "work requiring advanced knowledge," one of three essential elements of the learned professional primary duty tests:

> The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

This language, consistent with existing section 541.305, acknowledges that the exercise of "discretion and judgment" is a prime characteristic of professional work, while also providing a more substantive definition of "advanced knowledge" than the definition in existing section 541.301(b), which merely defines advanced knowledge as "knowledge which cannot be attained at a high school level." These clarifications in the final rule are based on current law, should make the professional duties test easier to apply, and will not cause currently nonexempt employees to be classified as exempt learned professionals. At the same time, the final rule recognizes that some learned professionals in the modern workplace are required to comply with national or international standards or guidelines. Certified Public Accountants have not under current law, and will not under the final rule, lose the learned professional exemption because they follow the Generally Accepted Accounting Principles (GAAP). Similarly, a lawyer who follows Security and Exchange Commission rules to prepare corporate filings should still qualify for exemption even though such rules today allow for little variation. In such cases, the exempt professional employee applies advanced knowledge to identify and interpret varying facts and circumstances. As noted by several commenters, the decision in *Hashop* v. *Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994), demonstrates the absurd result from too literally applying the current "discretion and judgment" requirement to a 21st century job. While this case has not been followed by any court in the decade since it was decided, the *Rockwell Space Operations* decision has caused confusion for employers attempting to determine the exempt status of employees. The plaintiffs in the *Rockwell Space Operations* case were instructors who trained "Space Shuttle ground control personnel during simulated missions." *Id.* at 1291. The plaintiffs provided "instruction on all communications, data, tracking, and telemetry information that ordinarily flows between the Space Shuttle and the Johnson Space Center Mission Control Center." *Id.* The plaintiffs were responsible for assisting in development of the script for the simulated missions, running the simulation, and debriefing Mission Control on whether the trainees handled simulated anomalies correctly. *Id.* at 1291–92. The plaintiffs also wrote workbooks and technical guides. *Id.* The plaintiffs had college degrees in electrical engineering, mathematics or physics. *Id.* at 1296. Nonetheless, the court found the plaintiffs did not "consistently exercise discretion and judgment," and thus were entitled to overtime pay, because the appropriate responses to simulated Space Shuttle malfunctions were contained in a manual. *Id.* at 1297–98. In the Department's view, the reliance by an engineer or physicist on a manual outlining appropriate responses to a Space Shuttle emergency (or a problem in a nuclear reactor, as another example) should not transform an otherwise learned professional scientist into a nonexempt technician. The clarifications to the professional duties test are designed to prevent such an absurd result.

The definition of "advanced knowledge" also retains the "predominantly intellectual" concept from the existing "long" duties test. The Department notes that the proposal did not eliminate the requirement that exempt professional work must be predominantly intellectual. We agree with the commenters stating that professional work, by its very nature, must be intellectual. Thus, proposed section 541.301(a) defined learned professions to include those "occupations that have a recognized professional status based on the acquirement of advanced knowledge and performance of work that is *predominantly intellectual in character* as opposed to routine mental, manual, mechanical or physical work." Nonetheless, the comments demonstrate that the proposal did not sufficiently stress this concept, and may have been unclear as to how the "predominantly intellectual" requirement fits into the primary duty test. Moving the "predominantly intellectual" language to final section 541.301(b) should address the commenter concerns discussed above.

A number of commenters ask the Department to declare various occupations as qualifying for the learned professional exemption, but these commenters did not provide sufficient information regarding the educational requirements of the occupations necessary for us to make that determination. For example, the Newspaper Association of America (NAA) suggests that the Department consider including a specific discussion on the applicability of the learned professional exemption to journalists, particularly given the guidance in the existing regulations that the learned professional exemption does not apply to "quasi-professions" such as journalism. The NAA cites a 1996 survey of daily newspaper editors conducted at the Ohio State Newspaper finding that 86 percent of daily newspaper entry-level hires just out of college had journalism and mass communication degrees. The Department, however, has no further supporting information about the requirements for the profession and, as such, declines to include journalists in the learned professional exemption at this time. Further discussion regarding journalists is retained as in the existing regulations under the creative professional exemption.

The record evidence is sufficient for the Department to provide additional guidance regarding the following occupations, some of which are covered by the current regulations but repeated here:

*Nurses.* The proposal retained the Department's existing interpretation regarding the exempt status of registered nurses (RNs). Simply stated, nurses who are *registered* by an appropriate state licensing board satisfy the duties requirements for exemption as learned professional employees. This well-established regulatory exemption for registered nurses has appeared in the existing interpretative guidelines for more than 32 years:

> Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.

29 CFR 541.301(e)(1) (36 FR 22978, December 2, 1971). Final rule section 541.301(e)(2) continues to provide that RNs satisfy the duties test for the professional exemption, and clarifies that other nurses, such as licensed practical nurses (LPNs), would not be exempt from eligibility for overtime.

The AFL–CIO, the American Federation of Teachers (AFT), the American Nurses Association, the Maine State Nurses Association, the Minnesota Nurses Association, the Service Employees International Union (SEIU) and United Food and Commercial Workers International Union (UFCW), as well as many individual nurses, express reservations about the knowledge equivalency language of the proposal. They state that the proposed formulation of the professional standard duty test would exempt additional classes of healthcare workers, such as LPNs. For example, AFT and SEIU note that LPNs have some level of formal education but do

not possess the same level to be considered degreed exempt employees, as are RNs. SEIU also argues that the proposal ignored the differences in the permitted scope of practice between RNs and LPNs. The UFCW argues that the difference between RNs and LPNs is that the former typically enter the nursing profession by attending a specialized school and obtaining a specialized nursing degree while the latter do not. The UFCW criticizes the proposal as eliminating this distinction between RNs and LPNs, and for eliminating overtime for LPNs and other technical workers who have experience or training but do not have an advanced degree in a recognized field of science or learning. In describing the work and qualifications of LPNs, or a licensed vocational nurse (LVNs) in the state of California, UFCW comments that they perform patient care tasks pursuant to the direct and close supervision of RNs or physicians. LPNs and LVNs are not required to have an advanced degree or undergo a prolonged course of study in a recognized field of science or learning. "Typically, all that is required is a high school education and a year's training in a vocational school." As for their job duties, UFCW states that LPNs and LVNs have limited discretion and little supervisory or administrative duties; rather, they perform tasks such as "routine bedside care, including bathing, dressing, personal hygiene, feeding, and tending to patients' comfort and emotional needs." Since such nurses are nonexempt under the current regulatory framework, UFCW calls on the Department to expressly affirm that such nurses remain nonexempt under the final regulations. The Minnesota Nurses Association states that the proposal would detrimentally affect the nursing profession. Other organizations, such as the National Organization for Women and Women Employed Institute, also express similar concerns that nurses could be classified as exempt and no longer entitled to overtime.

Some of these same commenters view the proposal as classifying RNs as bona fide professionals and thereby exempting them from overtime for the first time. For example, the American Nurses Association states that the proposal would add RNs as exempt from overtime. Also, the Maine State Nurses Association argues that RNs should be treated as eligible for overtime.

As noted above, the existing regulations have treated RNs as performing exempt learned professional duties since 1971. The Department's long-standing position is that RNs satisfy the duties test for exempt learned professionals, but LPNs do not. *See* Wage and Hour Opinion Letters dated April 1, 1999, June 23, 1983, May 16, 1983 and November 16, 1976. As re-emphasized by the Administrator in an October 19, 1999 Opinion Letter, "in virtually every case, licensed practical nurses cannot be considered exempt, bona fide, professionals." Similarly, the scant case law in this area is consistent. For example, in *Fazekas* v. *Cleveland Clinic Foundation Health Care Ventures, Inc.*, 204 F.3d 673 (6th Cir. 2000), the parties did not dispute that the plaintiff RNs who made home health care visits possessed the requisite knowledge of an advanced type in a field of science to satisfy the duties test for the professional exemption. There, as in most reported cases involving claims by nurses for overtime pay, the issue was whether the nurses were paid on a fee basis that would meet the salary or fee basis test. *See also Elwell* v. *University Hospitals Home Care Services*, 276 F.3d 832, 835–36 (6th Cir. 2002) (dispute regarding whether home health care nurse providing "skilled nursing services" was paid on a salary or fee basis, but no dispute that nurse met the duties test); *Klem* v. *County of Santa Clara, California*, 208 F.3d 1085, 1088–90 (9th Cir. 2000) (dispute on whether RN was paid on a salary basis, but no dispute that registered nurse met the duties test for the learned professional exemption).

The Department did not and does not have any intention of changing the current law regarding RNs, LPNs or other similar health care employees, and no language in the proposed regulations suggested otherwise. Consequently, the final rule reiterates the long-standing position that RNs satisfy the duties test for bona fide learned professional employees. The Department further clarifies that LPNs and other similar health care employees generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

*Physician Assistants.* Proposed section 541.301(e)(4) included an enforcement policy articulated in section 22d23 of the Wage and Hour Division Field Operations Handbook (FOH) that physician assistants who complete three years of pre-professional study (or 2,000 hours of patient care experience) and not less than one year of professional course work in a medical school or hospital generally meet the duties requirements for the learned professional exemption. Although a few commenters object to this section, the final rule retains this long-standing recognition of physician assistants as exempt learned professionals. However, the Department has modified the educational and certification requirements in final section 541.301(e)(4) in response to a comment filed by the American Academy of Physician Assistants (AAPA).

According to the AAPA, the standard prerequisite for practice as a physician assistant is graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant and certification by the National Commission on Certification of Physician Assistants (NCCPA). The AAPA states that the proposal, and thus section 22d23 of the FOH, describes the educational background or experience typical of an individual who is admitted into an accredited physician assistant program and includes an abbreviated version of the physician assistant educational curriculum—not the standard an individual must satisfy to practice as a physician assistant. For entry into an accredited physician assistant educational program, an individual should have a Bachelor's degree and 45 months of health care experience, according to the AAPA. Physician assistant programs are located at schools of medicine or health sciences, universities and teaching hospitals and typically consist of 111 weeks of instruction: 400 classroom and laboratory hours in the basic sciences with at least 70 hours in pharmacology, more than 149 hours in behavioral sciences and more than 535 hours in clinical medicine. In the second year of the program, 2,000 hours are spent in clinical rotations divided between primary care medicine and various specialties. To practice as a physician assistant, an individual must pass a national certifying examination jointly developed by the National Board of Medical Examiners and NCCPA. Physician assistants also must take continuing medical education credits and a recertification to maintain certification.

The Department recognizes that the FOH section has not been updated in many years and thus may be out of date. The information provided by the AAPA reveals a more lengthy and involved required course of study than is currently set forth in the FOH. The national testing and certification requirement also is consistent with exempt learned professional status. Thus, the Department concludes that physician assistants who have graduated from a program accredited by

the Accreditation Review Commission on Education for the Physician Assistant and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption. Final section 541.301(e)(4) has been modified accordingly.

*Chefs.* Section 541.301(e)(6) of the proposal provided that chefs, such as executive chefs and sous chefs, "who have attained a college degree in a culinary arts program, meet the primary duty requirement for the learned professional exemption." The Department received few comments addressing this section. The National Restaurant Association confirms that a four-year college degree in culinary arts is the standard prerequisite in the industry for executive chefs. The National Restaurant Association argues, however, that the Department should more explicitly allow work experience to substitute for a college degree. In contrast, the AFL–CIO expresses concern that the proposed language unjustly would expand the "learned professional" exemption to cover employees properly considered nonexempt cooks.

The Department agrees that the proposed language should be clarified to better distinguish between exempt professional chefs with four-year culinary arts degrees and nonexempt ordinary cooks who perform predominantly routine mental, manual, mechanical or physical work. The Department has no intention of departing from current law that ordinary cooks are not exempt professionals. *See, e.g.*, Wage and Hour Opinion Letter of February 18, 1983 ("Cooks and bakers are not considered to be executive, administrative, or professional employees within the meaning of the regulations regardless of how highly skilled or paid such employees may be"). *See also Cobb* v. *Finest Foods, Inc.*, 755 F.2d 1148, 1150 (5th Cir. 1985) (employee who directed the work of two or more employees and whose primary duty was management of hot food section of cafeteria was exempt executive); *Noble* v. *93 University Place Corp.*, 2003 WL 22722958, at *10 (S.D.N.Y. 2003) (summary judgment denied because of factual dispute over whether employee was head chef and kitchen manager with numerous managerial and supervisory responsibilities or "simply a chef who spent 75 to 100 percent of his time cooking").

Accordingly, to avoid any misinterpretations, the final rule replaces the proposed language "a college degree" with "a four-year specialized academic degree" and states that cooks are not exempt professionals. The final subsection 541.301(e)(6) thus provides: "Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work." This language is consistent with industry standard educational prerequisites as represented by the National Restaurant Association and distinguishes the exempt learned professional chef from the nonexempt cook. The Department rejects the National Restaurant Association's suggestion that the regulations should broadly allow work experience to substitute for a four-year college degree in the culinary arts because it would inappropriately expand the scope of the learned professional exemption.

The National Restaurant Association also argues that certain chefs qualify as creative professionals. The Department agrees that certain forms of culinary arts have risen to a recognized field of artistic or creative endeavor requiring "invention, imagination, originality or talent." The National Restaurant Association points to the Department's Occupational Outlook Handbook, 2002–2003, stating at page 306 that "[d]ue to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame* * *." The National Restaurant Association also references various publications emphasizing the creative nature of certain culinary innovation, including the specialization of creating distinctive, unique dishes. Another commenter, a wage and hour consultant, also suggests that the Department consider the creative professional exemption for such chefs, noting the "national acclaim" and "reputation and power in the industry" enjoyed by certain chefs.

Accordingly, after careful consideration of this issue, the Department concludes that to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional. Recognizing that some chefs may qualify as exempt creative professionals is consistent with the Department's long-standing enforcement policy regarding floral designers and other federal case law. *See* Wage and Hour Opinion Letter of September 4, 1970, 1970 WL 26442 ("The requirement that work must be original and creative in character would be, generally speaking, met by a flower designer who is given a subject matter, theme or occasion for which a floral design or arrangement is needed and creates the floral design or floral means of communicating an idea for the occasion. Work of this type is original and creative and depends primarily on the invention, imagination and talent of the employee"). *See also Freeman* v. *National Broadcasting Co.*, 80 F.3d 78, 82 (2nd Cir. 1996) (employees "talented" because they have a "native and superior ability in their fields"); *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 700 (3rd Cir. 1994) ("developing an entirely fresh angle on a complicated topic"); *Shaw* v. *Prentice Hall, Inc.*, 977 F. Supp. 909, 914 (S.D. Ind. 1997) ("employees who have been found to meet the artistic professional exemption performed work that was much more inventive and 'artistic'"). However, there is a wide variation in duties of chefs, and the creative professional exemption must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue. The Department intends that the creative professional exemption extend only to truly "original" chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires "invention, imagination, originality, or talent."

*Paralegals.* The Department received a number of comments from paralegals and legal assistants expressing concern that they would be classified as exempt under the proposed regulations. Other commenters urge the Department to declare that paralegals are exempt learned professionals. However, none of these commenters provided any information to demonstrate that the educational requirement for paralegals is greater than a two-year associate degree from a community college or equivalent institution. Although many paralegals possess a Bachelor's degree, there is no evidence in the record that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation. Because comments revealed some confusion regarding paralegals, the final rule contains new language in section 541.301(e)(7) providing that paralegals generally do not qualify as exempt learned professionals. The final rule, however, also states that the learned professional exemption is available for paralegals

who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

*Athletic Trainers.* The Department requested and received a number of comments on athletic trainers. Commenters describe an athletic trainer's duties as evaluation of injuries and illnesses of athletes; designing and administering care, treatment and rehabilitation; keeping and maintaining records of injuries and progress; directly supervising student athletic trainers and student team managers; and maintaining current catalogues and files on research and information related to sports medicine. Athletic trainers are on call 24 hours a day to assist coaches and teams with athletic injuries, according to the commenters, and often travel to away competitions with teams.

In the past, the Department has taken the position that athletic trainers are not exempt learned professionals. However, the court in *Owsley* v. *San Antonio Independent School District*, 187 F.3d 521 (5th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000), rejected this position and held that athletic trainers certified by the State of Texas qualified for the learned professional exemption based upon their possession of a specialized advanced degree.

Further, the information submitted by commenters indicates that athletic trainers are nationally certified and that a specialized academic degree is a standard prerequisite for entry into the field. Athletic trainers are nationally certified by the Board of Certification of the National Athletic Trainers Association (NATA) Inc. In order to qualify for such certification, a candidate must meet NATA's basic requirements that include a Bachelor's degree in a curriculum accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP). The CAAHEP-accredited curriculums are in specialized fields such as athletic training, health, physical education or exercise training, and require study in six particular courses—Human Anatomy, Human Physiology, Biometrics, Exercise Physiology, Athletic Training and Health/Nutrition. Candidates are strongly encouraged to take additional courses in the areas of Physics, Pharmacology, Recognition of Medical Conditions, Pathology of Illness and Injury, and Chemistry. Finally, a candidate must participate in extensive clinicals under the supervision of NATA licensed trainers. At least 25 percent of these clinical hours must be obtained on location, at the practice or game, in one of many eligible sports such as football, soccer, wrestling, basketball or gymnastics.

In light of the *Owsley* decision and the comments evidencing the specialized academic training required for certification, the Department concludes that athletic trainers certified by NATA, or under an equivalent state certification procedure, would qualify as exempt learned professionals. We have modified the regulation accordingly by adding a section on athletic trainers at final section 541.301(e)(8).

*Funeral Directors.* Comments from the National Funeral Directors Association (NFDA) include detailed information on the educational and licensure requirements in each state for licensed funeral directors and embalmers. The NFDA comments indicate that the licensing requirements for funeral directors or embalmers in 16 states require at least two years of college plus graduation from an accredited college of mortuary science, which requires two years of study. According to NFDA, the American Board of Funeral Service Education (ABFSE) is the sole national academic accreditation agency for college and university programs in funeral service and mortuary science education, and the ABFSE is recognized by the U.S. Department of Education and Council on Higher Education Accreditation. The ABFSE-recommended curriculum is used in all accredited mortuary colleges in the United States. The ABFSE stipulates that the minimum educational standard for the funeral service profession consists of 60 semester hours (equivalent to two years of college-level credits) in public health and technical studies, such as chemistry, anatomy and pathology; business management, such as funeral home management and merchandising and funeral directing; social sciences, such as grief dynamics and counseling; legal, ethical and regulatory subjects, such as mortuary law; and electives in general education or non-technical courses. Thus, licensed funeral directors or embalmers in 16 states must complete at least the equivalent of four years of post-secondary education which is sufficient, NFDA argues, to meet the educational requirements for the learned professional exemption. The NFDA comments also reveal that one state, Colorado, has no educational or licensing requirements for funeral directors or embalmers, and five states require funeral directors or embalmers to have only a high school education. The other states fall somewhere in between: some requiring high school and mortuary college, and some requiring one year of post-secondary education plus completion of the mortuary college program. Twelve states also require passage of a state or national exam for licensure.

Other commenters oppose recognizing licensed funeral directors or embalmers as learned professionals. For example, the International Brotherhood of Teamsters (Teamsters) contend that the proposed rule would improperly exempt most licensed funeral directors and embalmers. The Teamsters argue that the specialized intellectual instruction and apprenticeship that a licensed funeral director or embalmer attains does not constitute the requisite knowledge of an exempt professional. The Teamsters state that a four-year course of study is not a prerequisite to licensure, and cites a November 23, 1999, Wage and Hour Opinion letter in support of its position. In this opinion letter, the Wage and Hour Division wrote that "[a] prolonged course of specialized instruction and study generally has been interpreted to require at least a baccalaureate degree or its equivalent which includes an intellectual discipline in a particular course of study as opposed to a general academic course otherwise required for a baccalaureate degree." 1999 WL 33210905. The Teamsters also express concern that, under the proposal, more licensed funeral directors and embalmers could be classified as exempt professional employees because they could obtain the requisite knowledge through a combination of educational requirements, apprenticeships and on-the-job training.

The issue of the exempt status of funeral directors and embalmers presents precisely the situation long contemplated by the existing regulations at section 541.301(e)(2) that the "areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests." *See also* discussion of final section 541.301(f), *infra*. In the past, the Department has taken the position that licensed funeral directors and embalmers are not exempt learned professionals. The Department took this position as *amicus curiae* in support of a funeral director's argument that he was not an exempt learned professional in the case of *Rutlin* v. *Prime Succession, Inc.*, 220 F.3d 737 (6th Cir.

2000). However, the court in *Rutlin* did not agree with the Department's position and held that funeral directors certified by the State of Michigan qualified for the learned professional exemption. In *Rutlin*, the district court found that the plaintiff funeral director's work "required knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study * * *." 220 F.3d at 742. Quoting from the lower court's decision, the appellate court agreed:

> As a funeral director and embalmer, plaintiff had to be licensed by the state. In order to become licensed, plaintiff had to complete a year of mortuary science school and two years of college, including classes such as chemistry and psychology, take national board tests covering embalming, pathology, anatomy, and cosmetology, practice as an apprentice for one year, and pass an examination given by the state.

*Id.* The appellate court characterized plaintiff's educational requirement as "a specialized course of instruction directly relating to his primary duty of embalming human remains," notwithstanding the fact that plaintiff "was not required to obtain a bachelor's degree." *Id.* The court noted that "[t]he FLSA regulations do not require that an exempt professional hold a bachelor's degree; rather, the regulations require that the duties of a professional entail advanced, specialized knowledge" and concluded "that a licensed funeral director and embalmer must have advanced, specialized knowledge in order to perform his duties." *Id. See also Szarnych* v. *Theis-Gorski Funeral Home Inc.*, 1998 WL 382891 (7th Cir. 1998) (licensed funeral director/embalmer in Illinois was exempt learned professional).

After carefully weighing the comments and case law, the Department concludes that some licensed funeral directors and embalmers may meet the duties requirements for the learned professional exemption. The Teamsters state that a four-year course of study is not a prerequisite for licensure as a funeral director or embalmer. However, the detailed, state-by-state analysis submitted by NFDA evidences that four years of post-secondary education, including two years of specialized intellectual instruction in an accredited mortuary college, is a prerequisite for licensure in many states. In such states, a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the profession. *See, e.g., Reich* v. *State of Wyoming*, 993 F.2d 739, 742 (10th Cir. 1993) (the Department's argument that game wardens were not exempt professionals because "there is a lack of uniformity among states as to the requirement and duties of game wardens" was rejected by the court, which stated that "Wyoming may rightfully require more duties of its game wardens than other states"). Further, the only federal appellate courts to address this issue—the Sixth Circuit in *Rutlin* and the Seventh Circuit in *Szarnych*—have held the licensed funeral directors and embalmers are exempt learned professionals. Indeed, the educational and licensing requirements for funeral directors or embalmers in the 16 states that require two years of post-secondary education and completion of a two-year program at an accredited mortuary college are comparable to the educational requirements for certified medical technologists, who have long been recognized in the existing regulations as exempt professionals. Accordingly, consistent with the case law and the existing rule on medical technologists, a new subsection 541.301(e)(9) in the final rule provides:

> Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

The Department recognizes, however, that some employees with the job title of "funeral director" or "embalmer" have not completed the four years of post-secondary education required in final subsection 541.301(d)(9). In fact, the NFDA comments reveal that the state of Colorado has no educational requirements for funeral directors and embalmers, and five other states require only a high school education. Such employees, of course, cannot qualify as exempt learned professionals.

*Pilots.* Most pilots are exempt from the FLSA overtime requirements under section 13(b)(3) of the Act, which exempts "any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act." Thus, pilots who are employed by commercial airlines are exempt from overtime under section 13(b)(3). However, the exempt status of other pilots, such as pilots of corporate jets, is determined under section 13(a)(1), and has been the subject of recent litigation.

The Department has taken the position that pilots are not exempt professionals. We have maintained that aviation is not a "field of science or learning," and that the knowledge required to be a pilot is not "customarily acquired by a prolonged course of specialized intellectual instruction." *See* Wage and Hour Opinion Letter dated January 20, 1975; In re *U.S. Postal Service ANET and WNET Contracts*, 2000 WL 1100166, at *7 (DOL Admin. Rev. Bd.).

A contrary result was reached in *Paul* v. *Petroleum Equipment Tools Co.*, 708 F.2d 168 (5th Cir. 1983). In *Paul*, the Fifth Circuit allowed the learned professional exemption for a company airline pilot who held an airline transport pilot (ATP) certificate, a flight instructor certificate, a commercial pilot certificate, an instrument flight rules (IFR) rating, and was authorized to fly both single and multiengine airplanes. The court examined the Federal Aviation Authority regulations setting forth the requirements for the licenses and ratings, finding the combination of instruction and flight tests sufficient to satisfy the requirement of a prolonged course of specialized instruction, "despite its distance from campus." *Id.* at 173.

Despite *Paul*, the Department continued to assert that pilots are not exempt in *Kitty Hawk Air Cargo, Inc.* v. *Chao*, 2004 WL 305603 (N.D. Tex. 2004) (Service Contract Act case), supported by the decision in *Ragnone* v. *Belo Corp.*, 131 F. Supp. 2d 1189, 1193–94 (D. Ore. 2001), holding that a helicopter pilot was not exempt under section 13(a)(1).

However, the district court in *Kitty Hawk*, relying on *Paul*, ruled on January 26, 2004, that the pilots at issue did in fact meet the requirements of the professional exemption. In addition, a number of commenters argue that the Department should reconsider its position on pilots. Such commenters note that aviation degrees are now available from a few institutions of higher education. Further, pilots must complete classroom training, hours of flying with an instructor, pass tests and meet other requirements to obtain FAA licenses. Because of the conflict in the courts, and the insufficient record evidence on the standard educational requirements for the various pilot licenses, the Department has decided not to modify its position on pilots at this time.

*Other Professions.* The final rule adopts without change subsection 541.301(e)(1) on medical technologists, subsection 541.301(e)(3) on dental hygienists and subsection 541.301(e)(5) on accountants. These subsections are consistent with the existing regulations and long-standing policies of the Wage and Hour Division. None of the

comments received provided information justifying departure from the current law.

Finally, consistent with the existing regulations and the proposal, final section 541.301(f) recognizes that the areas in which the professional exemption may be available are expanding. Final section 541.301(f) also now provides:

> Accrediting and certifying organizations similar to those listed in subsections (e)(1), (3), (4), (8) and (9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

This new language is adopted to ensure that final subsections 541.301(e)(1), (3), (4), (8) and (9) do not become outdated if the accrediting and certifying organizations change or if new organizations are created. Accredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative, if certification does not involve a prolonged course of specialized intellectual instruction. For example, certified physician assistants meet the duties requirements for the learned professional exemption because certification requires four years of specialized post-secondary school instruction; employees with cosmetology licenses are not exempt because the licenses do not require a prolonged course of specialized intellectual instruction.

Section 541.302 Creative Professionals

Proposed section 541.302 provided further guidance on the primary duties test for creative professionals. In the proposal, subsection (a) set forth the general rule that creative professionals must have "a primary duty of performing office or non-manual work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual ability and training." Proposed subsection (b) set forth some general examples of fields of "artistic or creative endeavor." Proposed subsection (c) set forth more specific examples of creative professionals, and proposed subsection (d) provided guidance on journalists.

The final rule deletes the "office or non-manual work" language in subsection 541.302(a) for the reasons discussed above under section 541.300. In addition, the words "or intellectual" have been reinserted from the existing regulations into subsection (a) because its deletion in the proposal was unintentional. To add further clarity to the requirement of "invention, imagination, originality or talent," final subsection (c) adds: "The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis." As described in more detail below, the final rule also makes substantial changes to subsection (d) regarding journalists.

Because the proposal adopted the primary duty test of the existing regulations with few changes, the Department received few substantive comments on this section except for comments regarding journalists. The American Federation of Television and Radio Artists expresses concern that the proposed regulations would lead to an across-the-board exemption of all journalists, including employees of smaller news organizations, whom the organization believes should not be exempt. In an opposing view, the Newspaper Association of America and the National Newspaper Association, an organization of smaller newspapers,[10] support the proposed regulations relating to journalists and would seek to have all reporters of community newspapers classified as exempt.

Proposed subsection (d) was intended to reflect current federal case law regarding the status of journalists as creative professionals. *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 689 (3rd Cir. 1994), for example, involved the exempt status of reporters who worked for weekly newspapers either rewriting press releases under various topics such as "what's happening," "church news," "school lunch menus," and "military news," or writing standard recounts of public information by gathering facts on routine community events. In affirming the lower court's decision that the plaintiffs were not exempt, the appellate court evaluated the duties of reporters in light of the Department's interpretive guidelines, current section 541.302(d), which states: "The majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on 'invention, imaging [sic], or talent.'" The court concluded that the duties of the weekly newspaper reporters did not require invention, imagination, or talent:

> This work does not require any special imagination or skill at making a complicated thing seem simple, or at developing an entirely fresh angle on a complicated topic. Nor does it require invention or even some unique talent in finding informants or sources that may give access to difficult-to-obtain information.

13 F.3d at 700. However, the appellate court did recognize that not all fact-gathering duties are necessarily nonexempt work. While some fact-gathering would entail the skill or expertise of an investigative reporter or bureau chief, the court found that the fact gathering performed by the reporters in the *Gateway* case did not rise to such level.

The First Circuit reached a similar conclusion in *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995). In *Newspapers of New England*, the reporters had duties similar to those in the *Gateway* case. In finding such reporters nonexempt, the court observed that "the day-to-day duties of these three reporters consisted primarily of 'general assignment' work," and the reporters "[r]arely" were "asked to editorialize about or interpret the events they covered." Rather, the focus of their writing was "to tell someone who wanted to know what happened * * * in a quick and informative and understandable way." *Id.* at 1075. Like the Third Circuit in *Gateway*, the First Circuit concluded that the reporters "were not performing duties which would place them in that minority of reporters 'whose work depends primarily on invention, imaging [sic], or talent.'" *Id.* (citation omitted). *See also Bohn* v. *Park City Group Inc.*, 94 F.3d 1457 (10th Cir. 1996) (employee employed as a technical writer or documenter in software and training departments did not perform work requiring artistic invention, imagination, or talent to qualify as an exempt artistic professional); *Shaw* v. *Prentice Hall, Inc.*, 977 F. Supp. 909, 914 (S.D. Ind. 1997), *aff'd*, 151 F.3d 640 (7th Cir. 1998) (district court found that production editor in book publishing industry did not qualify as exempt

[10] Employees of small newspapers and small radio and television stations are statutorily exempt from the overtime pay requirement under sections 13(a)(8) and 13(b)(9) of the Act, respectively. 29 U.S.C. 213(a)(8); 29 U.S.C. 213(b)(9).

creative professional because the "duty * * * to manage a book project through the editing and publishing process" did not entail "invention, imagination, or talent in an artistic field of endeavor.").

In addition to examining the nature of the journalists' duties to determine exempt creative professional status, courts have looked to whether an employee's work is subject to substantial control from management. For example, in *Dalheim* v. *KDFW–TV*, 918 F. 2d 1220, 1229 (5th Cir. 1990), the court found that while general-assignment reporters could be exempt creative professionals, the reporters in this case were nonexempt because "their day-to-day work is in large part dictated by management." In addition, the court held that news producers were not exempt creative professionals because they performed work pursuant to "a well-defined framework of management policies and editorial convention."

In contrast, other courts have recognized that some journalists perform work requiring invention, imagination and talent, and thus qualify as exempt creative professionals. For example, in *Freeman* v. *National Broadcasting Co.*, 80 F.3d 78 (2nd Cir. 1996), the appellate court found that the duties of a domestic news writer, domestic producer, and field producer for television news shows involved a sufficient amount of creativity to qualify them as exempt "employees whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor." *Id.* at 82. The court noted that technological changes and the more sophisticated demands of the current news consumer have caused changes in the news industry, and stated that the lower court erred in finding the plaintiffs were nonexempt because it relied on a nonbinding, outdated, and inapplicable interpretation by the U.S. Department of Labor of the artistic professional exemption, section 541.302(a). One of the reasons the appellate court gave scant weight to the Department's interpretation was the Department's failure to reflect the vast changes in the industry. The court described the transition that modern news organizations had experienced as follows:

> Dizzying technological advances and the sophisticated demands of the news consumer have resulted in changes in the news industry over the past half-century. This is particularly true of television news where the same news may be communicated by a variety of combined audio and visual presentations in which creativity is at a premium. Yet, over this period, the DOL has failed to update the journalism interpretations.

*Id.* at 85. Citing *Sherwood* v. *Washington Post*, 871 F. Supp. 1471, 1482 (D.D.C. 1994), the *NBC* court acknowledged that there is a fundamental difference between a journalist working for a major news organization and a journalist working as a small press reporter. It would be "anachronistic, even irrational," the court wrote, "to continue to impose these guidelines on many journalists in major news organizations." 80 F.3d at 85. The court in *Truex* v. *Hearst Communications, Inc.*, 96 F. Supp. 2d 652, 661 (S.D. Tex. 2000), denying the employer's summary judgment motion regarding a sportswriter, also acknowledged the continuum that, on one end, consists of nonexempt reporters who gather and "regurgitate" facts and, on the other end, consists of exempt creative professionals who generate and develop ideas for stories in print or broadcast, with little editorial input.

In proposed subsection (d), the Department intended to modify the existing regulations to reflect this federal case law. The Department did not intend to create an across the board exemption for journalists. As stated in the case law, the duties of employees referred to as journalists vary along a spectrum from the exempt to the nonexempt, regardless of the size of the news organization by which they are employed. The less creativity and originality involved in their efforts, and the more control exercised by the employer, the less likely are employees classified as journalists to qualify as exempt. The determination of whether a journalist is exempt must be made on a case-by-case basis. The majority of journalists, who simply collect and organize information that is already public, or do not contribute a unique or creative interpretation or analysis to a news product, are not likely to be exempt.

In order to reflect this case law more accurately, the Department has modified section 541.302(d) to state as follows:

> Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

Section 541.303 Teachers

The Department received few comments on this provision and does not believe any substantive changes to this section are necessary in light of those comments.

Section 541.304 Practice of Law or Medicine

The Department received few comments on this provision and does not believe any substantive changes to this section are necessary in light of those comments.

*Subpart E, Computer Employees*

Sections 541.400–402

The proposed regulations consolidated all of the regulatory guidance on the computer occupations exemption into a new regulatory Subpart E, by combining provisions of the current regulations found at sections 541.3(a)(4), 541.205(c)(7), and 541.303. Proposed Subpart E collected into one place the substance of the original 1990 statutory enactment, the 1992 final regulations, and the 1996 statutory enactment (section 13(a)(17) of the FLSA). Because the key regulatory language that resulted from the 1990 enactment is now substantially codified in section 13(a)(17) of the FLSA, no substantive changes were proposed to that language comprising the primary duty test for the computer exemption. However, the proposal removed the additional regulatory requirement, not contained in section 13(a)(17) of the FLSA, that an exempt computer employee must consistently exercise discretion and judgment. Because of the tremendously rapid pace of significant changes occurring in the information technology industry, the proposal did not cite specific job titles as examples of exempt computer employees, as job titles tend to quickly become outdated.

Based on the comments received and for reasons discussed below, several changes have been made in the final rule to further align the regulatory text with the specific standards adopted by the Congress for the computer employee

exemption in section 13(a)(17) of the FLSA. Section 541.401 of the proposed rule, which discussed the high level of skill and expertise in "theoretical and practical application" of specialized computer systems knowledge as a prerequisite for exemption (a carry-over from the rules in effect prior to the 1996 statutory amendment), has been deleted from the final rule, as it goes beyond the scope of the specific standards adopted by Congress in section 13(a)(17).

As described in the preamble to the proposed rule, the exemption for employees in computer occupations has a unique legislative and regulatory history. In November 1990, Congress enacted legislation directing the Department of Labor to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled professional workers to qualify as exempt executive, administrative, or professional employees under FLSA section 13(a)(1). This enactment also extended the exemption to employees in such computer occupations if paid on an hourly basis at a rate at least 6½ times the minimum wage. Final implementing regulations were issued in 1992. *See* 29 CFR 541.3(a)(4), 541.303; 57 FR 46744 (Oct. 9, 1992); 57 FR 47163 (Oct. 14, 1992). However, when Congress increased the minimum wage in 1996, Congress enacted, almost verbatim, *most*—but not *all*—of the Department's regulatory language comprising the computer employee "primary duty test" as a separate statutory exemption, under a new FLSA section 13(a)(17). Section 13(a)(17) exempts "any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is (A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (B) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (C) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of [the aforementioned duties], the performance of which requires the same level of skills * * *." The 1996 enactment also froze the hourly compensation test at $27.63 (which equaled 6½ times the former $4.25 minimum wage). The 1996 enactment included no delegation of rulemaking authority to the Department of Labor to further interpret or define the scope of the exemption; however, the original 1990 statute was not repealed by the 1996 amendment.

A number of employers and business groups commenting on the proposal believe that the Department should update the computer exemption regulations to reflect the status of the many new job classifications that have arisen since the computer exemption regulations were first promulgated in the early 1990s. They suggest that the Department expand the computer employee exemption beyond the specific terms used in section 13(a)(17), to include additional job titles like network managers, LAN/WAN administrators, database administrators, web site design and maintenance specialists, and systems support specialists performing similar duties with hardware, software and communications networks.

The Wisconsin Department of Employment Relations notes that most computer professionals now work within a personal computer, network-based environment and recommends adding language to the duties test that addresses hardware, software, and network-based duties, to make the test more relevant and applicable to current computer environments. The HR Policy Association comments that the computer professionals exemption was written 11 years ago, and considerable confusion exists over which jobs are covered. The commenter suggests that the Department provide additional guidance in the preamble through illustrative examples analyzing exempt computer jobs. The HR Policy Association also recommends clarifying the duties for computer employees who do not program yet have highly sophisticated roles in maintaining computer software and systems, such as network managers, systems integration professionals, programmers, certain help desk professionals, and those who provide end-user support. The U.S. Chamber of Commerce asks the Department to recognize that the computer exemption applies not only to analysts, programmers, and engineers, but also to those with similar skills, and suggested amendments to the regulations to include network, LAN, and database analysts and developers, Internet administrators, individuals responsible for troubleshooting, those who train new employees, and those who install hardware and software. The Financial Services Roundtable comments that the specialized education necessary to acquire the complex knowledge associated with software languages, relational database applications, and/or communication or operating system software should correlate with the exemption for computer employees. The Information Technology Industry Council and Organization Resources Counselors suggest the Department clarify that computer networks and the Internet are included in the phrase "computer systems," and that high-level work on a computer's database or on the Internet is covered by the reference to programming or analysis.

The Workplace Practices Group notes that past distinctions between software and hardware positions have long converged. Today, according to this commenter, enterprise applications run on sophisticated networks administered by highly skilled and highly compensated LAN/WAN professionals who typically understand both networking and telecommunications theory and practice, some of whom are required to have a college degree in computer science, management information systems, or the equivalent, often with an additional preference that the individual have server or system-level engineer certification.

The National Association of Computer Consultant Businesses (NACCB) notes that the computer employee exemption is unique in that it has a dual statutory basis—section 13(a)(1) (from the 1990 law) and section 13(a)(17) (from 1996). NACCB urges that the Department explore how the exemption applies under the 1990 law to workers beyond those covered by section 13(a)(17) in 1996, and address what other duties, apart from those listed in the proposed regulations, should be included in the computer employee exemption in accordance with the 1990 enactment. This commenter suggests an illustrative list of "similarly skilled workers" covered by the exemption, to include database administrators, network or system administrators, computer support specialists including help desk technicians, and technical writers. This commenter also suggests definitions for "system functional specifications," "computer systems," and "machine operating systems."

Other commenters, in contrast, question the Department's authority to expand the computer employee exemption beyond the express terms used by the Congress in 1996 under section 13(a)(17). The McInroy & Rigby law firm states that the Department should not expand the computer exemption, and that there is no justification for any such expansion. The Fisher & Phillips law firm states

that, unlike in section 13(a)(1), in section 13(a)(17) Congress granted no authority to the Secretary of Labor to define or delimit the computer employee exemption. This commenter suggests that the final regulations clarify that references to section 13(a)(17) are illustrative only and are not to be taken as affecting the scope or application of that exemption in any respect.

The Workplace Practices Group also traces the evolution of the statutory exemption for computer employees noting that, while the Department has authority to define and delimit the section 13(a)(1) exemptions by regulation, the Department has no such authority under the computer exemption in section 13(a)(17). If additional positions are to be found exempt under the computer exemption, that status must be found clearly within the provisions specified by Congress under section 13(a)(17), according to this commenter.

While the Department recognizes that the computer employee exemption has been particularly confusing given its history, and that comments were invited on whether any further clarifications were possible under the terms of the statute, the Department believes that creating two different definitions for computer employees exempt under sections 13(a)(1) and 13(a)(17) of the FLSA would be inappropriate given that Congress recently spoke directly on this issue in 1996 under section 13(a)(17). Moreover, adopting such inconsistent definitions would be confusing and unwieldy for the regulated community.

Section 13(a)(17) exempts computer positions that are "similarly skilled" to a systems analyst, programmer, or software engineer, but only *if* the primary duty of the position in question includes the specified "systems analysis techniques * * * to determine hardware, software, or system functional specifications" or a combination of duties prescribed in section 13(a)(17), "the performance of which requires the same level of skills." Depending on the particular facts, some of the computer occupations mentioned in the comments could in fact meet this statutory primary duty test for the computer exemption without having to specifically cite job titles in the regulations to qualify for exemption. Where the prescribed duties tests are met, the exemption may be applied regardless of the job title given to the particular position. Since an employee's job *duties*, not job *title*, determine whether the exemption applies, we do not believe it is appropriate, given the history of the computer employee exemption, to cite additional job titles as exempt beyond those cited in the primary duty test of the statute itself. In each instance, regardless of the job title involved, the exempt status of any employee under the computer exemption must be determined from an examination of the actual job duties performed under the criteria in section 13(a)(17) of the Act. In addition, the Department notes that certain jobs cited in the comments could in fact meet the duties test for the *administrative* employee exemption and be exempt on that basis where all those tests are met, as the proposed regulations pointed out (see proposed section 541.403) and some commenters observe.

Several commenters question whether it was an oversight for the Department not to include the computer employee exemption within the proposed special exemption for highly compensated employees. As originally proposed in section 541.601, an employee performing office or non-manual work who is guaranteed total annual compensation of at least $65,000 and who performs any *one* or more of the exempt duties or responsibilities of an executive, administrative, or professional employee could be found exempt. Because Congress included a detailed primary duty test in the computer exemption, the Department did not apply the highly compensated exemption to computer employees. We continue to believe that decision was sound, and follows the statutory primary duty standards adopted by the Congress in section 13(a)(17) of the Act. It should also be noted that, for the same reason, the Department in its proposal removed the limitation contained in section 541.303 of the current rule (adopted prior to 1996) that limited the exemption to employees who work in *software* functions, as no such limitation exists in the statutory exemption enacted in 1996. Similarly, the Department rejects, as inconsistent with the 1996 enactment, comments suggesting that we reinsert the requirement that an exempt computer employee must "consistently exercise discretion and judgment." Minor editorial revisions have been made to further conform the regulatory language to the statute, but no other suggested revisions have been adopted.

*Subpart F, Outside Sales Employees*

Section 541.500 General Rule for Outside Sales Employees

Section 13(a)(1) of the FLSA contains a separate exemption for any employee employed "in the capacity of outside salesman." Proposed section 541.500 set forth the general rule for exemption of such "outside sales" employees.[11] Under proposed subsection 541.500(a), the outside sales exemption applied to any employee "with a primary duty of (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." In addition, to qualify for exemption the outside sales employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." Finally, proposed subsection 541.500(b) stated that in determining the primary duty of an outside sales employee, "work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work." Under this subsection, other work that furthers the employee's sales effort, including "writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences," is also considered exempt work.

The Department has retained this general rule as proposed.

The only modification intended in the proposed regulations was removing the restriction that exempt outside sales employees could not perform work unrelated to outside sales for more than 20-percent of the hours worked in a workweek by nonexempt employees of the employer. This revision was proposed for consistency with the "primary duty" approach adopted for the other section 13(a)(1) exemptions. In addition, the current outside sales 20-percent restriction is particularly complicated and confusing since it relies on the work hours of nonexempt employees and requires tracking the time of employees who, by definition, spend much of their time away from the employer's place of business.

A large majority of the comments that address the outside sales exemption express support for the adoption of the "primary duty" test in lieu of the 20-percent rule. For example, the Society for Human Resource Management (SHRM) and Grocery Manufacturers of America (GMA) state that this revision would provide a more practical method for employers to determine whether an employee qualifies as an exempt outside sales employee. According to SHRM, in

[11] Although the statute refers to "salesman," the final rule, without objection from commenters, replaces this gender-specific term with "outside sales employees."

order to keep an account of the percentage of time that outside sales employees spend on exempt versus nonexempt tasks, as required under the 20-percent rule, employers essentially have to track the hours of their outside sales employees. SHRM notes that it is very difficult for employers to meet this responsibility given that outside sales employees spend large amounts of time away from their employers' regular places of business. GMA shares these concerns, stating that keeping track of an outside sales employee's individual activities to determine whether they are exempt, nonexempt or incidental to exempt sales activity is administratively difficult, if not impossible. The National Small Business Association comments that moving away from a percentage basis to the new definition of "primary duty" will alleviate much of the administrative burden on small business owners.

Two law firms commenting on the outside sales exemption (Goldstein Demchak Baller Borgen & Dardarian and McInroy & Rigby) ask the Department to retain the current 20-percent limit on nonexempt work. Both firms express concern that the outside sales exemption would be subject to abuse by employers without a "bright-line" 20-percent test. In other words, employers might misclassify sales personnel as exempt under the outside sales exemption by merely requiring that they perform only minor amounts of outside sales work. A few commenters, such as the AFL-CIO, generally oppose removing the 20-percent limitation on nonexempt work for the same reasons discussed above in connection with the executive, administrative and professional exemptions.

After review of the relevant comments, the Department continues to believe that the application of the primary duty test to the outside sales exemption is preferable to the 20-percent tolerance test. As noted in several comments, the primary duty test is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule. *Cf. Ackerman* v. *Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1267 (10th Cir. 1999) (citing existing § 541.505(a) to the effect that "'[a] determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole' and that "the time devoted to the various duties is an important, but not necessarily controlling, element' "), *cert. denied*, 528 U.S. 1145 (2000). It also avoids the necessity that employers track the hours of its outside sales employees, which is consistent with the underlying rationale for exempting outside salespersons. Utilization of the primary duty concept also provides a consistent approach between the outside sales exemption and the exemptions for executive, administrative and professional employees. Finally, the Department is of the view that concerns relating to potential abuse under the new rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700.

Section 541.501 Making Sales or Obtaining Orders

Proposed section 541.501 defined the term "sales" consistent with section 3(k) of the FLSA, to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Proposed subsection (b) also stated that "sales" includes the transfer of title to tangible property and transfer of tangible and valuable evidences of intangible property. Proposed subsections (c) and (d) defined the phrase "obtaining orders or contracts for services or for the use of facilities" to include such activities as selling of time on radio or television; soliciting of advertising for newspapers and other periodicals; soliciting of freight for railroads and other transportation agencies; and taking orders for a service which may be performed for the customer by someone other than the person taking the order.

The Department's proposal removed outdated examples and unnecessary language from current section 541.501, but did not intend any substantive changes. The Department has retained the proposed changes to section 541.501 in the final rule.

The Department received few comments on this section. However, one commenter expresses concern regarding the Department's decision to remove current section 541.501(e), which states that the outside sales exemption does not apply to "servicemen even though they may sell the service which they themselves perform." The commenter claims that, because of the removal of subsection (e), service technicians would be classified as exempt outside sales employees. The Department believes that subsection (e) is an unnecessary example, and its removal is not a substantive change. The Department agrees with the commenter that an employee whose primary duty is to repair or service products (*e.g.*, refrigerator repair) does not qualify as an exempt outside sales employee. However, we continue to believe that this conclusion is obvious from the regulations and this example is unnecessary.

Section 541.502 Away From Employer's Place of Business

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." This phrase was defined in proposed section 541.502, which began in subsection (a) by stating: "The Administrator does not have authority to define this exemption for 'outside' sales under section 13(a)(1) of the Act as including inside sales work. Section 13(a)(1) does not exempt inside sales and other inside work (except work performed incidental to and in conjunction with outside sales and solicitations). However, section 7(i) of the Act exempts commissioned inside sales employees of qualifying retail or service establishments if those employees meet the compensation requirements of section 7(i)." The actual definition of "away from the employer's place of business" was contained in proposed subsection (b) which requires that an exempt outside sales employee make sales "at the customer's place of business or, if selling door-to-door, at the customer's home." Proposed subsection (b) also stated that: "Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property."

Numerous commenters request that the Department delete the language in proposed section 541.502(a) regarding the Administrator's lack of authority to expand the outside sales exemption to include inside sales work. For example, the U.S. Chamber of Commerce urges the Department not to use expansive language that could be read to render all inside sales employees nonexempt, even if they meet the requirements of the executive, administrative or professional exemptions.

The Department has decided to make the changes requested by these commenters, not due to any inaccuracy in the sentence, but because we agree that this language might imply that sales employees, inside or outside, can only have exempt status by meeting the requirements for the section 13(a)(1) "outside sales" exemption. Thus, the final rule eliminates most of the regulatory text in proposed section 541.502(a), including the language

regarding the Administrator's lack of authority to define the "outside" sales exemption to include "inside" sales work and the language regarding the section 7(i) exemption. The Department is deleting this language to avoid any misunderstanding that the outside sales exemption is the only exemption available for sales employees. Other exemptions in the statute, including the section 7(i) exemption for commissioned employees of retail and service establishments, and the executive, administrative and professional exemptions, are also available for sales employees who can meet all the requirements for any of those exemptions.

The Department emphasizes, however, that notwithstanding these deletions to the proposed language of section 541.502(a), the Administrator does not have statutory authority to exempt inside sales employees from the FLSA minimum wage and overtime requirements under the outside sales exemption. Those comments that ask the Department to revise the regulatory definition of an outside sales employee to include inside sales employees, on the basis that they perform much the same functions as outside sales employees, must be rejected as beyond the statutory authority of the Administrator. For example, the National Association of Manufacturers (NAM) states that, because of technological advances, inside sales employees perform the same functions as outside sales employees, with the only distinction being an on-site visit by the outside sales employee. According to NAM, fax machines, voice-mail, teleconferencing, cellular phones, computers, and videoconferencing all enable office-based sales personnel to emulate the customer contact formerly within the exclusive province of outside salespersons.

Finally, the National Automobile Dealers Association asks that the definition of "away from the employer's place of business" be expanded to encompass trade shows. The Department believes that, if sales occur, trade shows are similar to the "hotel sample room" example in the current and proposed regulations. In trade shows, as in the hotel sample room, a sales employee displays the employer's product over a short time period and for the purpose of promoting or making sales in a room not owned by the employer. Accordingly, we have added language to clarify that an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's places of business.

Section 541.503 Promotion Work

Under proposed section 541.503, "promotional work" is exempt outside sales work if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." However, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." Proposed subsections 541.503(b) and 541.503(c) include examples to illustrate when promotional activities are exempt versus nonexempt work. To address commenter concerns discussed below, the Department has made minor changes to section 541.503(c).

Several commenters, including the Grocery Manufacturers Association (GMA), ask the Department to eliminate the emphasis upon an employee's "own" sales in the proposed regulations. According to GMA, because of team selling, customer control of order processing, and increasing computerization of sales and purchasing activities, many of its members do not analyze performance of their salespersons by looking at their "own" sales. In other words, they do not evaluate their sales personnel based on their "sales numbers," but rather their "sales efforts." GMA urges the Department to modify the outside sales regulations to exempt promotion work when it is performed incidental to and in connection with an employee's "sales efforts" and to delete the requirement that such work be incidental to the employee's "own" sales. GMA states this change is necessary to maintain the exemption where customers enter orders into a computer system, rather than by submitting a paper order to the outside sales employee whose promotional efforts helped facilitate the sale.

The U.S. Chamber of Commerce (Chamber) expresses similar concerns, stating that due to advances in computerized tracking of inventory and product shipment, the sales of manufactured goods are increasingly driven by computerized recognition of decreases in customer's inventory, rather than specific face-to-face solicitations by outside sales employees. The Chamber states that, under these circumstances, the role of the outside sales employee has, in many instances, changed to one of facilitation of sales. The Chamber maintains that promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process.

The National Association of Manufacturers (NAM) also expresses concern that the proposal does not take into account the extent to which modern technology affects the outside sales exemption. NAM states, for example, that outside sales employees might lose their exempt status where products stored in centralized warehouses are ordered through the customer's internal computerized purchasing system. In other words, such employees might not be viewed as having "consummated the sale" or "directed efforts toward the consummation of the sale." NAM comments that employees who have long functioned as outside sales employees may no longer be exempt under the proposed regulations because they no longer execute contracts or write orders due to technological advances in the retail business.

After reviewing the comments and current case law, the Department has made minor changes to section 541.503(c) to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales. As indicated in the proposal, the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test. *See* 1940 Stein Report at 46 (outside sales exemption does not extend to employees "engaged in paving the way for salesmen, assisting retailers, and establishing sales displays, and so forth").

Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. *See* 1949 Weiss Report at 83 ("In borderline cases

the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt"). *See also Ackerman* v. *Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1266–67 (10th Cir. 1999) (substantial merchandising responsibilities, including restocking of store shelves and setting up product displays, did not defeat outside sales exemption for soft drink advance sales reps and account managers where such responsibilities were "incidental to and in conjunction with" sales they consummated at stores they visited), *cert. denied*, 528 U.S. 1145 (2000); *Wirtz* v. *Keystone Readers Service, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) ("student salesmen" not exempt where engaged in promotional activities incidental to sales thereafter made by others).

Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result. Finally, the Department notes that outside sales employees may also qualify as exempt executive, administrative or professional employees if they meet the requirements for those exemptions. For example, an employee whose primary duty is promotion work such as advertising or marketing—not selling—may not meet the requirements for the "outside sales" exemption, but could be an exempt administrative employee.

Section 541.504 Drivers Who Sell

Under proposed section 541.504(a), drivers "who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales." Proposed subsection (b) provided factors that should be considered when determining whether the driver's primary duty is making sales: "A comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales."

The Department has made no substantive changes to proposed section 541.504, although editorial changes have been made to final subsections 541.504(a) and 541.504(c)(4) as described below.

The Grocery Manufacturers Association (GMA) has several concerns regarding proposed section 541.504. In its comments, for example, GMA sees a possible inconsistency between the language of proposed section 541.500(b) and proposed section 541.504(a). Proposed section 541.500(b) states that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with an employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work." Proposed section 541.504(a) states with respect to drivers who sell that "[i]f the employee has a primary duty of making sales, all work performed incidental to and in conjunction with the employee's own sales efforts * * * is exempt work." GMA believes that it is inconsistent with section 541.500(b) to make the inclusion of driver/salesperson's incidental work within the outside sales exemption conditional upon the employee having a primary duty of making sales. GMA therefore urges the Department to delete the conditional phrase "[i]f the employee has a primary duty," from the second sentence of proposed section 541.504(a).

The Department had no intention of creating a different standard regarding incidental work for drivers who sell as opposed to other outside sales employees. The two subsections at issue used different language to describe the same concept, which could lead to confusion. Accordingly, we have modified final section 541.504(a) to track the language from section 541.500(b).

GMA also requests that the Department clarify section 541.504(c)(1), to the extent it describes a driver who may qualify for the outside sales exemption as one "who receives compensation commensurate with the volume of products sold." GMA does not believe that commissions alone should be used to determine exempt status. GMA therefore suggests that this regulation be broadened to recognize compensation systems which, while not commission-based, provide "compensation at least partially based on the volume of products sold," such as bonuses or other forms of recognition based on individual, group or corporate goals and volumes.

The Department believes that the phrase in question, "[a] driver * * * who receives compensation commensurate with the volume of products sold," helps provide an accurate example of an employee who has a primary duty of making sales. This phrase generally describes an employee paid on a commission basis, which is a commonly and frequently utilized method for compensating sales personnel. Since section 541.504(c)(1) is intended to provide guidance by presenting an example of a driver who may qualify as an exempt outside sales employee and, as such, does not foreclose the exemption for employees who receive other types of compensation, we have not made the requested change.

GMA also suggests that the Department delete the phrase "and carrying an assortment of the employer's products" from proposed section 541.504(c)(4), because it should not matter whether the driver/salesperson is carrying one product or an assortment of them. The Department agrees with the comment that it is not necessary for a driver to carry "an assortment" of products in order to qualify as exempt under the outside sales exemption. The availability of this exemption does not depend on either the volume or variety of products carried by the driver/salesperson in question. Accordingly, we have made the suggested change.

Another commenter asks that the Department clarify that "Professional Drivers" are nonexempt. This exemption covers drivers who have a primary duty of making sales. The primary duty test offers an alternative to job titles that may not accurately reflect job duties and actual performance. Therefore, the Department believes that a blanket statement that "Professional Drivers" are not exempt employees would not serve the interest of a more accurate rule.

Finally, a commenter asks for more examples of outside sales employees, including drivers who sell. Proposed subsection 541.504(c) and 541.504(d) already contain a number of examples of drivers who would or would not qualify as exempt employees. The Department does not believe that there will be any value added to the regulation through additional examples.

*Subpart G, Salary Requirements*

Section 541.600 Amount of Salary Required

Salary level tests have been included as part of the exemption criteria since

the original regulations of 1938. With a few exceptions, executive, administrative and professional employees must earn a minimum salary level to qualify for the exemption.[12] Employees paid below the minimum salary level are not exempt, irrespective of their job duties and responsibilities. Employees paid a salary at or above the minimum level in the regulations are only exempt if they also meet the salary basis and job duties tests. To qualify for exemption under the existing regulations, an employee must earn a minimum salary of $155 per week ($8,060/year) for the executive and administrative exemptions, and $170 per week ($8,840/year) for the professional exemption. Employees paid above these minimum salary levels must meet a "long" duties test to qualify for the exemption. The existing regulations also provide, under special provisions for "high salaried" employees (*see* 29 CFR 541.119, 541.214 and 541.315), that employees paid above a higher salary rate of $250 per week ($13,000/year) are exempt if they meet a "short" duties test. As the name implies, the short tests contain fewer duties requirements. Because the salary levels have not been increased since 1975, the existing salary levels are outdated and no longer useful in distinguishing between exempt and nonexempt employees. A full-time minimum wage worker, in comparison, earns $206 per week ($5.15/hour × 40 hours)—an amount above the existing "long" test levels and closely approaching the existing "short" test level. As a result, under the existing regulations, most employees are now tested for exemption under the "short" duties tests.

The Department proposed that the minimum salary level required for exemption as an executive, administrative, or professional employee be increased from $155 per week ($8,060/year) to $425 per week ($22,100/year). Thus, under proposed section 541.600(a), all employees earning less than $425 per week, either on an hourly or salary basis, would be guaranteed overtime protection, irrespective of their job duties and responsibilities. Employees earning $425 or more on a salary basis would only qualify for exemption if they met a new "standard" test of duties.

The final rule adopts the new structure of the proposal to include a "standard" test of duties tied to a minimum salary level. However, the proposed rule used the Bureau of Labor Statistics' (BLS) year 2000 Current Population Survey Outgoing Rotation Group data set, the most recent data available from BLS when the Preliminary Regulatory Impact Analysis was completed. When the Regulatory Impact Analysis for this final rule was completed, the most recent data available was the 2002 CPS data set. Based on the more recent data, and taking into account numerous comments about the salary levels in the proposal, the Department has raised the minimum weekly salary level required for exemption in the final rule from $425 per week to $455 per week, an increase of $30 from the proposed regulations and an increase of $300 per week from the existing minimum salary level. As a result of this increase, 6.7 million salaried workers who earn between $155 and $455 per week will be guaranteed overtime protection, regardless of their duties.

The remaining subsections of 541.600 retained, without substantive change from the existing regulations, certain special provisions regarding the salary requirements: Subsection (b) set forth the minimum salary levels required if the employee is paid on a biweekly, semimonthly or monthly basis; subsection (c) discussed the salary required for academic administrative employees; subsection (d) set forth the salary required for computer employees; and subsection (e) provided that the salary requirements do not apply to teachers, lawyers and doctors. The Department did not receive significant comments on these subsections, and thus no other changes have been made to section 541.600.

Most commenters agree that the minimum salary level needed to be increased, but disagreed sharply regarding the size of the increase. Some commenters state that the proposed $425 minimum salary level is too high, other commenters say it is too low, and some say it is just right.

Some employer commenters, such as the U.S. Small Business Administration's Office of Advocacy, the American Health Care Association, and the Securities Industry Association's Human Resources Management Committee, strongly oppose the $425 per week minimum salary as too high. The Associated Builders and Contractors state that $425 per week "may be particularly high for rural areas of the country." Similarly, the National Grocers Association (NGA) comments that the $425 level "could prove problematic for some retail grocers operating in differing geographic regions, such as rural areas and the South where economic conditions vary and pay scales are less." Based on their 2003 compensation survey, NGA suggests that the Department lower the minimum salary level to $400 per week. Some owners of small retail and restaurant businesses also filed comments asserting that $425 per week is too high. An owner of four Dairy Queen stores in Austin, Texas, for example, asks the Department to lower the minimum salary level to $400 per week because supervisor salaries in the area start at $21,000 per year. A comment from Wesfam Restaurants requests that the Department lower the minimum salary level to $350 per week because the Department's proposed $425 level will cost the company at least $100,000 each year.

Other organizations representing employer interests generally support the $425 salary level, but object to any further increase in this proposed minimum. For example, the U.S. Chamber of Commerce (Chamber) does not oppose the minimum salary level, but states that a significant minority of its members oppose the proposed compensation level as too high. Nevertheless, the Chamber opposes an increase to $425 per week if "unaccompanied by significant changes in the duties and salary basis tests," and would oppose any compensation level higher than $425. The FLSA Reform Coalition, the Public Sector FLSA Coalition, the American Corporate Counsel Association and the HR Policy Association believe that the $425 per week minimum is reasonable. The National Restaurant Association recognizes that the salary levels have not been changed for many years, but states: "Under no circumstance should the threshold be increased to a higher salary level [than $425 per week]. In fact, the Association urges DOL to review the methodology used to establish the proposed minimum salary threshold of $425/wk. and reevaluate the impact of this threshold on specific industry sectors, including restaurants and retail establishments. Strong consideration should be given to adjusting the threshold downward to reflect the realities of variations in industry and regional compensation levels." Similarly, the National Council of Chain Restaurants asks the Department to "resist any pressure to raise the salary threshold to an even

[12] For many years, the regulations have contained no salary level test for outside sales employees and some professional employees (teachers, doctors, lawyers). Such employees are exempt regardless of their salary. The final rule makes no changes in this area. Also, in 1990, Congress amended the FLSA to exempt certain hourly-paid computer professionals paid at least 6½ times the minimum wage (which then totaled $27.63 per hour; $57,470 per year, assuming 40 hours per week). Congress froze this compensation test at $27.63 per hour in 1996.

higher level, which would wreak havoc on the chain restaurant industry, and retailers generally." The Food Marketing Institute also opposes increasing the minimum salary level above $425, noting that this salary level will already particularly affect independent, family-owned grocery stores.

On the other hand, organizations representing employee interests oppose the standard salary level as being too low. Such organizations advocate salary levels ranging from $530 per week to $1,000 per week. The AFL–CIO and the International Association of Machinists and Aerospace Workers, for example, purporting to apply the approach set forth in the 1958 Kantor Report to the current "long" and "short" duties test structure, suggest salary levels of at least $610 per week for the long test and $980 for the short test. The United Food and Commercial Workers International Union would adjust the current salary levels for inflation using the Consumer Price Index (CPI), resulting in a "minimum of $530/week for the first level ($580 for professionals), and $855 for the second level." The American Federation of State, County and Municipal Employees similarly comments that adjusting the current salary levels to reflect changes in the CPI would increase the salary level under the "long" test for executive and administrative employees to $530 per week ($580 for professional employees) and to $855 per week for the "short" test.

The Department has long recognized that the salary paid to an employee is the "best single test" of exempt status (1940 Stein Report at 19), which has "simplified enforcement by providing a ready method of screening out the obviously nonexempt employees" and furnished a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment." As the Department stated in 1949:

> [T]he salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them. In the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.
>
> * * * * *
>
> Regulations of general applicability such as these must be drawn in general terms to apply to many thousands of different situations throughout the country. In view of the wide variation in their applicability the regulations cannot have the precision of a mathematical formula. The addition to the regulations of a salary requirement furnishes a completely objective and precise measure which is not subject to differences of opinion or variations in judgment. The usefulness of such a precise measure as an aid in drawing the line between exempt and nonexempt employees, particularly in borderline cases, seems to me to be established beyond doubt.

1949 Weiss Report at 8–9. *See also* 1940 Stein Report at 42 ("salary paid the employee is the best single test"); 1958 Kantor Report at 2–3 (salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees").

While the purpose of the FLSA is to provide for the establishment of fair labor standards, the law does not give the Department authority to set minimum wages for executive, administrative and professional employees. These employees are exempt from any minimum wage requirements. The salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these exempt categories. Any increase in the salary levels from those contained in the existing regulation, therefore, has to have as its primary objective the drawing of a line separating exempt from nonexempt employees. Moreover, it has long been recognized that "such a dividing line cannot be drawn with great precision but can at best be only approximate." 1949 Weiss Report at 11.

Some of the comments opposed to the proposed $425 minimum salary level question the Department's methodology for setting the appropriate salary levels. The Department determined the appropriate methodology for adjusting the salary levels after a thorough review of the regulatory history of previous increases. The initial minimum salary level requirement for exemption, adopted in the 1938 regulations, was $30 a week for executive and administrative employees. The 1938 regulations did not include a salary requirement for professional employees, or a "short test" salary level. We could find no regulatory history from 1938 regarding the rationale for setting the salary level at $30 a week. *But see* 1940 Stein Report at 20–21 ($30 salary level adopted from the National Industrial Recovery Act and State law). Since 1938, and as shown in Table 1, the Department has increased the salary levels on six occasions—in 1940, 1949, 1958, 1963, 1970 and 1975. Until 1975, the Department increased salary levels every five to nine years, and the largest increase was only $50 per week.

TABLE 1.—WEEKLY SALARY LEVELS FOR EXEMPTION

| | Executive | Administrative | Professional | Short test |
|---|---|---|---|---|
| 1938 | $30 | $30 | None | None |
| 1940 | 30 | 50 | 50 | None |
| 1949 | 55 | 75 | 75 | $100 |
| 1958 | 80 | 95 | 95 | 125 |
| 1963 | 100 | 100 | 115 | 150 |
| 1970 | 125 | 125 | 140 | 200 |
| 1975 | 155 | 155 | 170 | 250 |

The regulatory history of these six increases reveals that, in determining appropriate salary levels, the Department has examined data on actual salaries and wages paid to exempt and nonexempt employees. In 1940, the Department considered salary surveys by government agencies, experience under the National Industrial Recovery Act, and federal government salaries. 1940 Stein Report at 9, 20, 31–32. The Department then

used these salary data to determine the average salary that was the "dividing line" between exempt and nonexempt employees, and to find the percentage of employees earning below various salary levels. The Department set the minimum required salary at levels below the average salary dividing exempt from nonexempt employees: "Furthermore, these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude." 1940 Stein Report at 32.

In 1949, the Department looked at salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The Department considered wages in small towns and low-wage industries, wages of federal employees, average weekly earnings for exempt employees and starting salaries for college graduates. 1949 Weiss Report at 10, 14–17, 19. The Department compared weekly earnings in 1940 with weekly earnings in 1949 to determine the average percentage increase in earnings. As in 1940, the Department then set a salary level at a "figure slightly lower than might be indicated by the data" because of concerns regarding the impact of the salary level increases on small businesses: "The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption." 1949 Weiss Report at 15.

In 1958, the Department considered data collected during 1955 Wage and Hour Division investigations on "the actual salaries paid" to employees who "qualified for exemption" (*i.e.*, met the applicable salary and duties tests), grouped by geographic region, broad industry groups, number of employees and size of city. 1958 Kantor Report at 6. The Department then set the salary tests for exempt employees "at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." 1958 Kantor Report at 6–7.

The Department followed this same methodology when determining the appropriate salary level increase in 1963. The Department examined data on salaries paid to exempt workers collected in a special survey conducted by the Wage and Hour Division in 1961. 28 FR 7002 (July 9, 1963). The salary level for executive and administrative employees was increased to $100 per week, for example, when the 1961 survey data showed that 13 percent of establishments paid one or more exempt executives less than $100 per week; and 4 percent of establishments paid one or more exempt administrative employees less than $100 a week. 28 FR 7004 (July 9, 1963). The professional salary level was increased to $115 per week, when the 1961 survey data showed that 12 percent of establishments surveyed paid one or more professional employees less than $115 per week. 28 FR 7004. The Department noted that these salary levels approximated the same percentages used in 1958:

> Salary tests set at this level would bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958, on the occasion of the last previous adjustment, bore to the minimum salaries reflected in a comparable survey, adjusted by trend data to early 1958. At that time, 10 percent of the establishments employing executive employees paid one or more executive employees less than the minimum salary adopted for executive employees and 15 percent of the establishments employing administrative or professional employees paid one or more employees employed in such capacities less than the minimum salary adopted for administrative and professional employees. (28 FR 7004).

The Department continued to use this methodology when adopting salary level increases in 1970. In 1970, the Department examined data from 1968 Wage and Hour Division investigations and 1969 BLS wage data. The Department increased the salary level for executive employees to $140 per week when the salary data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than $130 a week. 35 FR 884 (January 22, 1970).

The last increase to the salary levels was in 1975. Instead of following the prior approaches, in 1975 the Department set the salary levels based on increases in the Consumer Price Index, although it adjusted the salary level downward to eliminate any potential inflationary impact. 40 FR 7091 (February 19, 1975) ("However, in order to eliminate any inflationary impact, the interim rates hereinafter specified are set at a level slightly below the rates based on the CPI"). More to the point, the salary levels adopted were intended as *interim* levels "pending the completion and analysis of a study by the Bureau of Labor Statistics covering a six month period in 1975." *Id.* Thus, the Department again intended to increase the salary levels based on actual salaries paid to employees. However, the intended process was never completed, and the so-called "interim" salary levels have remained untouched for 29 years.

In summary, the regulatory history reveals a common methodology used, with some variations, to determine appropriate salary levels. In almost every case, the Department examined data on actual wages paid to employees and then set the salary level at an amount slightly lower than might be indicated by the data. In 1940 and 1949, the Department looked to the average salary paid to the lowest level of exempt employee. Beginning in 1958, however, the Department set salary levels to exclude approximately the lowest-paid 10 percent of exempt salaried employees. Perhaps the best summary of this methodology appears in the 1958 Kantor Report at pages 5–7:

> The salary tests have thus been set for the country as a whole * * * with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the "bona fide" executive, administrative and professional employees without disqualifying any substantial number of such employees.
>
> * * * * *
>
> It is my conclusion, from all the evidence, that the lower portion of the range of prevailing salaries will be most nearly approximated if the tests are set at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests. Although this may result in loss of exemption for a few employees who might otherwise qualify for exemption * * * in the light of the objectives discussed above, this is a reasonable exercise of the Administrator's authority to "delimit" as well as define.

Using this regulatory history as guidance, the Department reached the proposed minimum salary level of $425 per week after considering available data on actual salary levels currently being paid in the economy, broken out by broad industry categories and geographic areas. We reviewed a preliminary report on actual salary levels based on the BLS year 2000 Current Population Survey (CPS) Outgoing Rotations Group data set. These data included all full-time (defined as 35 hours or more per week),

salaried workers aged 16 and above, but excluded the self-employed, agricultural workers, volunteers and federal employees (who are all not subject to the salary level tests in the Part 541 regulations). We considered the data in Table 2 below showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of all salaried employees, and salaried employees in the lower-wage South and retail sectors:

TABLE 2.—WAGES OF FULL-TIME SALARIED EMPLOYEES (2000 CPS)

| | All | South | Retail |
|---|---|---|---|
| 10% | $18,195 | $15,955 | $15,600 |
| 15% | 21,050 | 19,950 | 19,400 |
| 20% | 24,455 | 22,200 | 21,800 |

As in the 1958 Kantor Report analysis, the Department's proposal looked to "points near the lower end of the current range of salaries" to determine an appropriate salary level for the standard test—although we relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, because of the proposed change from the "short" and "long" test structure and because the data included nonexempt salaried employees. Applying this analysis, the Department proposed a standard salary level of $425 per week, an increase of $270 per week over the existing rule's salary level of $155 per week.[13] Using this level, approximately the bottom 20 percent of all salaried employees covered by the FLSA would fall below the minimum salary requirement and be automatically entitled to overtime.

Many commenters find this methodology appropriate and reasonable. Comments filed by the U.S. House of Representatives Committee on Education and the Workforce, for example, "commend the Department for its thoughtful analysis of the prior revisions to the salary level test," and "endorse the Department's review of and adherence to regulatory precedent."

However, some commenters who oppose the proposed $425 minimum salary level as too low argue that the Department should adjust the existing salary levels for inflation by applying the Consumer Price Index. This methodology would result in salary levels of $530 per week ($580 for professionals) for the "long" duties test and $855 per week for the "short" duties tests, according to the commenters.

[13] The Department's proposal to eliminate the different salary level associated with the professional "long" duties test is adopted in the final regulations as most commenters supported this as simplifying the existing regulations.

Other commenters, including the AFL–CIO, agree with the Department that the 1958 Kantor Report methodology of looking to the "range of salaries actually paid" to employees is the "most accurate approach to set the salary levels," but assert that the Department "misrepresented and misused the Kantor Report." Thus, comments filed by the AFL–CIO, and adopted by many of their affiliated unions, state:

> The Department has taken several approaches in the past to decide how to increase the salary levels used in the regulations. The most accurate approach to set salary levels for exempt executive, administrative, and professional employees is first to determine the range of salaries actually paid to employees who qualify for the exemption in each of the three categories. The Department took this approach when it set new salary levels effective in 1959, based on the Kantor Report. The Kantor Report also noted, as the Department mentions in its preamble, that: "the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the bona fide executive, administrative, and professional employees without disqualifying any substantial number of such employees." 68 Fed. Reg. at 15570, quoting Kantor Report at 5. The Department's present proposal purports to use the approach of the Kantor Report. However * * * the Department has completely misrepresented and misused the Kantor Report. *The actual methodology used in the Kantor Report would result today not in a "standard salary" of $425 as proposed by the Department, but instead in a "long test" salary of $610 per week and a "short test" salary of $980 per week. (Emphasis in comment.)*

The AFL–CIO claims that the Department "misused" the Kantor methodology by relying on year 2000 BLS data regarding salary levels of *all* salaried employees: "Kantor's salary survey was limited to those executive, administrative and professional employees who were found to be exempt—that is, employees who were paid on a salary basis, and met the applicable salary and duties tests. * * * Instead, the DOL survey encompasses the broadest possible group—*all* salaried employees in every occupation, even those who could not be regarded by any stretch of the imagination as executive, administrative, or professional employees." The AFL–CIO thus suggests that the Department use more current salary data and look only at salaries of *exempt* employees.

The National Association of Convenience Stores (NACS) also believes the Department misapplied the Kantor methodology, but resulting in a salary level that is too *high*, rather than too *low* as the AFL–CIO contends: "Instead of setting the threshold at the lowest 10% of the salaries reviewed as was done in 1958, the proposed cutoff has been set at 20%. * * * NACS submits that, to remain faithful to the wise principles of the Kantor Report, the Labor Department should use the 10% guideline and should apply it to the salaries in the lowest geographical or industry sector (whichever of the two data sets is lower), rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors."

The Department recognizes the strong views in this area, and has carefully considered the comments addressing the amount of the proposed minimum salary level. The Department continues to believe that its methodology is consistent with the regulatory history and, most importantly, is a reasonable approach to updating the salary level tests. For example, instead of investigating the lowest 10% of *exempt* salaried employees, an approach that depends on uncertain assumptions regarding which employees are actually exempt, the Department decided to set the minimum salary level based on the lowest 20% of *all* salaried employees. The Department felt this adjustment achieved much the same purpose as restricting the analysis to a lower percentage of exempt employees. Assuming that employees earning a lower salary are more likely non-exempt, both approaches are capable of reaching exactly the same endpoint, as discussed more fully below. The Department, in order to address the many comments regarding this assumption, decided for this final rule to directly test whether our method for setting the salary threshold was robust to different analytical approaches. In fact, the Department found that our proposed approach to setting salary levels was very consistent with past approaches. Therefore we disagree with the AFL–CIO's contention that the proposed analysis was flawed and not consistent with the Kantor approach.

The final rule reflects the Department's long-standing tradition of avoiding the use of inflation indicators for automatic adjustments to these salary requirements. The 1949 Weiss Report, for example, considered and rejected proposals to increase salary levels based upon the change in the cost of living from the 1940 levels:

> Actual data showing the increases in the prevailing minimum salary levels of bona fide executive, administrative and professional employees since October 1940 would be the best evidence of the appropriate

salary increases for the revised regulations. * * * The change in the cost of living which was urged by several witnesses as a basis for determining the appropriate levels is, in my opinion, not a measure of the rise in prevailing minimum salary levels.

1949 Weiss Report at 12. The Department continues to believe that such a mechanical adjustment for inflation could have an inflationary impact or cause job losses. We are particularly concerned about, and required to consider, the impact that an inflation adjustment could have on lower-wage sectors such as businesses in rural areas, businesses in the retail and restaurant industry, and small businesses.

Thus, as in the proposal, the Department determined the minimum salary level in the final rule by examining available data on actual salary levels currently being paid in the economy as suggested by the 1958 Kantor Report. In the proposed rule, we relied on year 2000 salary data because it was the most current data available at that time. However, the Department should rely on the most current salary data available. Thus, for the final rule, we carefully reviewed a report on actual salary levels based on the 2002 Current Population Survey (CPS) Outgoing Rotation public use data set, the most current data available at the time the analysis was conducted.[14] As explained in more detail under section VI of this preamble, the CPS data is the best available data source because of its size (more than 474,000 observations) and its breadth of detail (*e.g.*, occupation classifications, salary, hours worked and industry). Consistent with the proposal, the Department examined a subset of the 2002 CPS data, broken out by broad industry categories and geographic areas, that included full-time (working 35 or more hours per week) employed workers age 16 years and older who are both covered by the Fair Labor Standards Act and subject to the Part 541 salary tests. Thus, the Department relied on a data set that excluded: (1) The self-employed, unpaid volunteers and religious workers who are not covered by the FLSA; (2) agricultural workers, certain transportation workers, and certain automobile dealerships employees who are exempt from overtime under other provisions of the Act; (3) teachers, academic administrative personnel, certain medical professionals, outside sales employees, lawyers and judges who are not subject to the Part 541 salary tests; and (4) federal employees who are not subject to the Part 541 regulations.

Using this subset of the 2002 CPS data, the final rule again follows the 1958 Kantor Report analysis and looks to "points near the lower end of the current range of salaries" to determine an appropriate salary level. The Department acknowledges that the 1958 Kantor Report used data regarding the wages of *exempt* employees, and set the salary level so that "no more than about 10 percent" of such exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." 1958 Kantor Report at pages 5–7. The Department's proposal used a different data set—all salaried employees covered by the FLSA, rather than just exempt employees. However, the proposal accounted for these differences in data by setting a salary level excluding from the exemptions approximately the lowest *20 percent* of all salaried employees, rather than the Kantor Report's *10 percent* of exempt employees.

In developing the salary level for the final rule, the Department first looked at the proposed salary level of $425 per week to determine what percentage of salaried employees would fail to meet the test. As shown in Table 3, approximately 18 percent of full-time salaried employees in the South region and in the retail industry would fail to meet the $425 salary level. Because the Department was concerned by this drop from the 20 percent level used in the proposal, we assessed the salary level that would be necessary in order to exclude 20 percent of all salaried employees in the South region and in the retail industry.

As shown in Table 3, applying the 2002 CPS data, the lowest 20 percent of full-time salaried employees in the South region earn approximately $450 per week. The lowest 20 percent of full-time salaried employees in the retail industry earn approximately $455 per week. The lowest 20 percent of all salaried employees earn somewhere between $475 and $500 per week.

The Department maintains that this slight departure from the Kantor Report analysis was appropriate and within its discretion. As the AFL–CIO itself noted, the "Department has taken several approaches in the past to decide how to increase the salary levels used in the regulations." The regulatory history described above reveals that these various approaches have three things in common: (1) Relying on actual wages earned by employees; (2) setting the salary level slightly lower than indicated by the data because of the impact on lower-wage industries and regions; and (3) rejecting suggestions to mechanically adjust the salary levels based on an inflationary measure. Historically, however, the Department has looked at different wage surveys in an effort to find the best data available.

Nonetheless, to address concerns of the AFL–CIO, the National Association of Convenience Stores and other commenters regarding the Department's methodology, we also examined salary ranges for employees in the subset of 2002 CPS data who, applying a methodology modified from the GAO Report,[15] likely qualify as exempt employees under Section 13(a)(1) of the FLSA and the existing Part 541 regulations. Section VI of this preamble includes a detailed description of the Department's methodology for estimating the number and salary levels of exempt employees. The result of this analysis is Table 4, showing salary ranges for likely exempt workers. As shown in Table 4, the lowest 10 percent of all likely exempt salaried employees earn approximately $500 per week. The lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week. The lowest 10 percent of likely exempt salaried employees in the retail industry earn approximately $450 per week.

[14] The 2003 CPS data was made available after much of the economic analysis was completed. The Department reviewed the 2003 data in order to ensure that it had considered the most current salary information available. As explained in detail in Appendix B, an analysis of the 2003 data demonstrates that using this data would not alter the determination of the minimum salary level because the results are consistent under both data sets.

[15] *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place*, GAO/HEHS–99–164, September 30, 1999.

TABLE 3.—FULL-TIME SALARIED EMPLOYEES

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| $155 | $8,060 | 1.6 | 1.6 | 1.8 |
| 255 | 13,260 | 4.6 | 5.3 | 5.4 |
| 355 | 18,460 | 10.0 | 11.8 | 12.0 |
| 380 | 19,760 | 11.1 | 13.3 | 13.3 |
| 405 | 21,060 | 14.1 | 16.9 | 17.1 |
| 425 | 22,100 | 15.2 | 18.3 | 18.1 |
| 450 | 23,400 | 16.7 | 20.2 | 19.9 |
| 455 | 23,660 | 16.8 | 20.2 | 20.0 |
| 460 | 23,920 | 16.9 | 20.4 | 20.1 |
| 465 | 24,180 | 18.3 | 21.9 | 21.9 |
| 470 | 24,440 | 18.4 | 21.9 | 21.9 |
| 475 | 24,700 | 18.7 | 22.3 | 22.3 |
| 500 | 26,000 | 22.7 | 26.9 | 27.4 |
| 550 | 28,600 | 25.8 | 30.6 | 30.7 |
| 600 | 31,200 | 32.4 | 37.9 | 38.3 |
| 650 | 33,800 | 36.0 | 41.7 | 42.5 |
| 700 | 36,400 | 41.9 | 47.9 | 49.6 |
| 750 | 39,000 | 45.8 | 51.6 | 53.6 |
| 800 | 41,600 | 50.8 | 56.8 | 58.9 |
| 850 | 44,200 | 54.2 | 59.9 | 61.8 |
| 900 | 46,800 | 57.9 | 63.6 | 64.9 |
| 950 | 49,400 | 60.7 | 66.6 | 67.9 |
| 1,000 | 52,000 | 66.6 | 72.1 | 73.5 |
| 1,100 | 57,200 | 70.8 | 75.9 | 76.9 |
| 1,200 | 62,400 | 76.0 | 80.8 | 80.8 |
| 1,300 | 67,600 | 79.2 | 83.5 | 83.3 |
| 1,400 | 72,800 | 82.8 | 86.6 | 85.9 |
| 1,500 | 78,000 | 85.8 | 89.2 | 88.7 |
| 1,600 | 83,200 | 88.0 | 90.9 | 90.3 |
| 1,700 | 88,400 | 89.6 | 92.2 | 91.4 |
| 1,800 | 93,600 | 91.1 | 93.3 | 93.0 |
| 1,900 | 98,800 | 92.0 | 94.0 | 93.7 |
| 1,925 | 100,100 | 93.7 | 95.3 | 95.1 |
| 1,950 | 101,400 | 93.7 | 95.4 | 95.1 |
| 1,975 | 102,700 | 93.9 | 95.5 | 95.2 |
| 2,000 | 104,000 | 94.2 | 95.6 | 95.4 |
| 2,100 | 109,200 | 94.6 | 96.1 | 95.9 |
| 2,200 | 114,400 | 95.2 | 96.5 | 96.2 |
| 2,300 | 119,600 | 95.4 | 96.6 | 96.5 |
| 2,400 | 124,800 | 96.2 | 97.1 | 97.1 |
| 2,500 | 130,000 | 97.0 | 97.6 | 97.8 |

TABLE 4.—LIKELY EXEMPT EMPLOYEES

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| $155 | $8,060 | 0.0 | 0.0 | 0.0 |
| 255 | 13,260 | 1.3 | 1.6 | 1.6 |
| 355 | 18,460 | 3.6 | 4.2 | 5.3 |
| 380 | 19,760 | 4.0 | 4.9 | 6.2 |
| 405 | 21,060 | 5.4 | 6.5 | 8.4 |
| 425 | 22,100 | 5.9 | 7.2 | 9.0 |
| 450 | 23,400 | 6.6 | 8.1 | 10.2 |
| 455 | 23,660 | 6.7 | 8.2 | 10.2 |
| 460 | 23,920 | 6.7 | 8.2 | 10.3 |
| 465 | 24,180 | 7.7 | 9.2 | 11.7 |
| 470 | 24,440 | 7.8 | 9.3 | 11.8 |
| 475 | 24,700 | 7.9 | 9.5 | 12.0 |
| 500 | 26,000 | 10.3 | 12.3 | 15.3 |
| 550 | 28,600 | 12.3 | 14.9 | 18.1 |
| 600 | 31,200 | 17.2 | 20.5 | 24.6 |
| 650 | 33,800 | 20.0 | 23.9 | 29.3 |
| 700 | 36,400 | 25.2 | 29.9 | 36.3 |
| 750 | 39,000 | 28.9 | 33.7 | 40.7 |
| 800 | 41,600 | 33.7 | 39.0 | 46.0 |
| 850 | 44,200 | 37.3 | 42.4 | 49.4 |
| 900 | 46,800 | 41.2 | 46.7 | 53.0 |
| 950 | 49,400 | 44.5 | 50.4 | 56.9 |

TABLE 4.—LIKELY EXEMPT EMPLOYEES—Continued

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| 1,000 | 52,000 | 51.3 | 57.2 | 63.5 |
| 1,100 | 57,200 | 56.7 | 62.2 | 67.6 |
| 1,200 | 62,400 | 63.5 | 69.3 | 72.9 |
| 1,300 | 67,600 | 67.9 | 73.3 | 76.4 |
| 1,400 | 72,800 | 73.1 | 77.9 | 80.4 |
| 1,500 | 78,000 | 77.5 | 81.9 | 83.7 |
| 1,600 | 83,200 | 80.8 | 84.7 | 85.9 |
| 1,700 | 88,400 | 83.3 | 86.8 | 87.7 |
| 1,800 | 93,600 | 85.7 | 88.6 | 90.0 |
| 1,900 | 98,800 | 87.2 | 89.8 | 90.8 |
| 1,925 | 100,100 | 89.8 | 92.0 | 92.7 |
| 1,950 | 101,400 | 89.9 | 92.1 | 92.8 |
| 1,975 | 102,700 | 90.1 | 92.3 | 92.9 |
| 2,000 | 104,000 | 90.6 | 92.6 | 93.1 |
| 2,100 | 109,200 | 91.3 | 93.3 | 93.6 |
| 2,200 | 114,400 | 92.2 | 93.9 | 94.1 |
| 2,300 | 119,600 | 92.6 | 94.2 | 94.4 |
| 2,400 | 124,800 | 93.9 | 95.0 | 95.4 |
| 2,500 | 130,000 | 95.2 | 95.9 | 96.4 |

TABLE 5.—FULL-TIME HOURLY WORKERS

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| $155 | $8,060 | 1.2 | 1.3 | 2.0 |
| 255 | 13,260 | 7.6 | 9.5 | 13.7 |
| 355 | 18,460 | 25.8 | 30.4 | 41.4 |
| 380 | 19,760 | 31.4 | 36.6 | 47.9 |
| 405 | 21,060 | 38.5 | 44.4 | 55.9 |
| 425 | 22,100 | 41.3 | 47.5 | 59.1 |
| 450 | 23,400 | 46.1 | 52.4 | 64.1 |
| 455 | 23,660 | 46.4 | 52.8 | 64.5 |
| 460 | 23,920 | 47.3 | 53.6 | 65.4 |
| 465 | 24,180 | 47.9 | 54.3 | 65.9 |
| 470 | 24,440 | 48.3 | 54.8 | 66.4 |
| 475 | 24,700 | 48.7 | 55.2 | 66.9 |
| 500 | 26,000 | 54.8 | 61.5 | 71.9 |
| 550 | 28,600 | 60.6 | 67.0 | 76.7 |
| 600 | 31,200 | 68.2 | 73.9 | 82.6 |
| 650 | 33,800 | 72.2 | 77.5 | 85.8 |
| 700 | 36,400 | 76.3 | 81.1 | 88.7 |
| 750 | 39,000 | 79.6 | 83.9 | 90.9 |
| 800 | 41,600 | 83.6 | 87.1 | 93.2 |
| 850 | 44,200 | 85.9 | 88.9 | 94.1 |
| 900 | 46,800 | 88.0 | 90.7 | 95.1 |
| 950 | 49,400 | 89.6 | 92.0 | 95.7 |
| 1,000 | 52,000 | 91.9 | 93.9 | 96.7 |
| 1,100 | 57,200 | 94.0 | 95.5 | 97.4 |
| 1,200 | 62,400 | 95.8 | 96.9 | 98.0 |
| 1,300 | 67,600 | 96.7 | 97.6 | 98.3 |
| 1,400 | 72,800 | 97.6 | 98.2 | 98.8 |
| 1,500 | 78,000 | 98.2 | 98.6 | 99.1 |
| 1,600 | 83,200 | 98.7 | 99.0 | 99.4 |
| 1,700 | 88,400 | 99.0 | 99.2 | 99.5 |
| 1,800 | 93,600 | 99.2 | 99.4 | 99.6 |
| 1,900 | 98,800 | 99.3 | 99.4 | 99.6 |
| 1,925 | 100,100 | 99.4 | 99.5 | 99.7 |
| 1,950 | 101,400 | 99.4 | 99.5 | 99.7 |
| 1,975 | 102,700 | 99.4 | 99.5 | 99.7 |
| 2,000 | 104,000 | 99.5 | 99.6 | 99.7 |
| 2,100 | 109,200 | 99.6 | 99.6 | 99.7 |
| 2,200 | 114,400 | 99.6 | 99.6 | 99.7 |
| 2,300 | 119,600 | 99.7 | 99.7 | 99.8 |
| 2,400 | 124,800 | 99.7 | 99.7 | 99.8 |
| 2,500 | 130,000 | 99.8 | 99.8 | 99.8 |

Under the final rule, the minimum salary level for an employee to be exempt is increased from $155 per week ($8,060/year) to $455 per week ($23,660/year), a large increase by almost any yardstick. The $455 minimum salary level, as shown in Table 6, is an unprecedented increase in both absolute dollar amount and percentage terms. The $455 minimum salary level is a $10.34 annual dollar increase from 1975 to 2004, the highest annual dollar increase in the 65-year history of the FLSA.

TABLE 6.—COMPARISON OF SALARY LEVEL INCREASES

| | Years since last increase | Executive long test salary level | Dollar change | Percent change | Average annual dollar change |
|---|---|---|---|---|---|
| 1949 | | $55 | | | |
| 1958 | 9 | 80 | 25 | 45.5 | 2.78 |
| 1963 | 5 | 100 | 20 | 25.0 | 4.00 |
| 1970 | 7 | 125 | 25 | 25.0 | 3.57 |
| 1975 | 5 | 155 | 30 | 24.0 | 6.00 |
| 2004 | 29 | 455 | 300 | 193.5 | 10.34 |

The Department believes that a $455 minimum salary level for exemption is consistent with the Department's historical practice of looking to "points near the lower end of the current range of salaries" to determine an appropriate salary level. A minimum salary level of $455 per week represents the lowest 10.2 percent of likely exempt employees in the lower-wage retail industry; the lowest 8.2 percent of likely exempt employees in the South; and the lowest 6.7 percent of all likely exempt employees. The $455 level also represents the lowest 20.0 percent of salaried employees in the retail industry; the lowest 20.2 percent of salaried employees in the South; and the lowest 16.8 percent of all salaried employees. As shown in Table 5, the $455 minimum salary level also automatically excludes 46.4 percent of hourly workers from the exemptions. In addition, based on the comments from the business community, the Department believes this increase is clearly at the upper boundary of what is capable of being absorbed by employers without major disruptions to local labor markets. Accordingly, the Department concludes that a minimum salary level of $455 per week "will assist in demarcating the 'bona fide' executive, administrative and professional employees without disqualifying any substantial number of such employees." Kantor Report at 5.

Concerns by employer groups that a $455 per week salary level will disproportionately impact small businesses, businesses in rural areas, and retail businesses are misplaced. The Department examined the 2002 CPS data broken out by industry and geographic area, and as in the Kantor Report, selected a salary level "near the lower end of the current range of salaries" to ensure the minimum salary level is practicable over the broadest possible range of industries, business sizes and geographic regions. Kantor Report at 5.

Similarly, the AFL–CIO's attempt to apply the Kantor Report analysis, yielding a result of $610 per week, is also flawed. Rather than starting with the 2002 CPS data, the AFL–CIO began its analysis by identifying the salary level for the lowest 10 percent of likely exempt employees from the 1998 data in the GAO Report. Then, the AFL–CIO adjusted that salary level for inflation by applying the Employment Cost Index. The problem with this approach is that the GAO Report methodology, as discussed in Section VI, inappropriately excludes from the analysis exempt employees in lower-wage regions and industries. The AFL–CIO then exacerbates the GAO's biased result by using the ECI to adjust the 1998 data, rather than using the available 2002 data. Table 4 contains more accurate data on current salary ranges of likely exempt employees. Applying these data, the AFL–CIO suggestion of a $610 salary level represents approximately the lowest 17 percent of all likely exempt salaried employees, the lowest 21 percent of such employees in the South, and the lowest 25 percent of such employees in retail—not the lowest 10 percent used by Kantor.

Finally, the comments raise a number of additional issues which the Department considered but did not find persuasive. *First*, several commenters urge the Department to adopt different salary levels for different areas of the country (or urban and rural areas) or for different kinds or sizes of businesses. The Department does not believe that this approach is administratively feasible because of the large number of different salary levels this would require. In addition, we believe that the traditional methodology addresses the concerns of such commenters by looking toward the lower end of the salary levels and considering salaries in the South and in the retail industry. We also considered but rejected comments requesting a special rule for part-time employees. The regulations have never included a different salary level for part-time employees, and such a rule appears unnecessary.

*Second*, some commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6½ times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (6½ times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of

concerns regarding the impact on lower-wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.

*Third,* the Puerto Rico Chamber of Commerce recommends a special salary test for Puerto Rico of $360 per week (the same as the proposed salary level test for American Samoa). The Department considered this comment and concluded that such a differential in Puerto Rico would be inconsistent with the FLSA Amendments of 1989 (Pub. L. 101–157), which deleted Puerto Rico and the Virgin Islands from the special industry wage order proceedings under section 6(a)(1) of the FLSA allowing industry minimum wage rates that are lower than the U.S. mainland minimum wage. Before 1989, Puerto Rico, the Virgin Islands, and American Samoa all had minimum wages below the U.S. mainland and consequently lower salary level tests traditionally were established for employees in these jurisdictions. However, since Puerto Rico is now subject to the same minimum wage as the U.S. mainland, there is no longer a basis for a special salary level test. The final rule maintains the special minimum salary level for employees in American Samoa at approximately the same ratio to the mainland test (84 percent) used under the existing rule—which computes to $380 per week.

*Fourth,* the National Association of Chain Drug Stores (NACDS) comments that the exception to a minimum salary test for physicians should apply to pharmacists. The NACDS states that the educational requirements and professional standards for pharmacists have increased substantially since these regulations were last revised. For example, pharmacists graduating today complete a doctoral program before they are licensed to practice. In the Department's view, pharmacists can qualify, along with doctors, teachers, lawyers, *etc.,* as professionals under the FLSA exemption. However, the fact that the standards for the profession are rising does not mean that the minimum salary requirement to be exempt should be removed. The Department also considered but rejected suggestions from commenters that we remove the salary requirements for registered nurses and others. The Department does not think it is appropriate to expand the original, limited number of professions that were not subject to the salary test.

*Fifth,* several commenters favor a final rule that would eliminate the salary tests entirely. These commenters point out that this approach would eliminate concerns about how the salary levels might affect lower wage regions and industries. They argue that the duties tests have been the only active tests for some time, given the erosion of the value of the salary levels in the prior existing rule. Fairfax County states that the salary test should be eliminated because of the wide variation across the country in living costs and labor market viability. The National Automobile Dealers Association and others comment that the salary tests were simply unnecessary. The Central Iowa Society for Human Resource Management comments that job content should be the deciding factor, not salary level. On the other hand, many commenters oppose this approach. The Department has carefully considered the comments in this area and has not adopted this alternative, among other reasons, because this approach would be inconsistent with the Department's long-standing recognition that the amount of salary paid to an employee is the "best single test" of exempt status. 1940 Stein Report at 19. Moreover, this alternative would require a significant restructuring of the regulations and probably the use of more rigid duties tests. Thus, this alternative conflicts with a key purpose of this rulemaking, namely, to simplify and streamline these regulations.

Section 541.601 Highly Compensated Employees

Proposed section 541.601 set forth a new rule for highly compensated employees. Under the proposed rule, an employee who had a guaranteed total annual compensation of at least $65,000 was deemed exempt under section 13(a)(1) of the Act if the employee performed an identifiable executive, administrative or professional function as described in the standard duties tests. Subsection (b) of the proposed rule defined "total annual compensation" to include "base salary, commissions, non-discretionary bonuses and other non-discretionary compensation" as long as that compensation was "paid out to the employee as due on at least a monthly basis." Proposed subsection (b) also provided for prorating the $65,000 annual compensation for employees who work only part of the year, and allowed an employer to make a lump-sum payment sufficient to bring the employee to the $65,000 level by the next pay period after the end of the year. Proposed subsection (c) stated that a "high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties," and provided an example to illustrate the duties requirement applicable to highly compensated employees under this rule: "an employee may qualify as a highly compensated executive employee, for example, if the employee directs the work of two or more other employees, even though the employee does not have authority to hire and fire." Proposed subsection (d) provided that the highly compensated rule applied only to employees performing office or non-manual work, and was not applicable to "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, teamsters and other employees who perform manual work * * * no matter how highly paid they might be."[16]

The final section 541.601 raises the total annual compensation required for exemption as a highly compensated employee to $100,000, an increase of $35,000 from the proposal. The final rule also makes a number of additional changes, including: Requiring that the total annual compensation must include at least $455 per week paid on a salary or fee basis; modifying the definition of "total annual compensation" to include commissions, nondiscretionary bonuses and other nondiscretionary compensation even if they are not paid to the employee on a monthly basis; allowing the make-up payment to be paid within one month after the end of the year and clarifying that such a payment counts toward the prior year's compensation; allowing a similar make-up payment to employees who terminate employment before the end of the year; and deleting the word "guaranteed" to clarify that compliance with this provision does not create an employment contract. In addition, the final rule modifies the duties requirement to provide that the employee must "customarily and regularly" perform one or more exempt duties. Finally, subsection (d) in the final rule has been modified to better reflect the language of new subsection 541.3(a) and now provides:

> This section applies only to employees performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers,

[16] Even if the requirements of section 541.601 are not met, an employee may still be tested for exemption under the standard tests for the executive, administrative or professional exemption.

longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

Comments on proposed section 541.601 disagree sharply. The AFL–CIO and other affiliated unions object entirely to section 541.601, claiming the section is beyond the scope of the Department's authority. The unions characterize this section as a "salary-only" test that will exempt every employee earning above the highly compensated salary level. The unions argue that Congress did not intend to exempt all employees who are paid over a certain level. If Congress intended to exempt employees who are paid over a certain level, the unions argue, it could easily have done so. Comments submitted by unions and other employee advocates also argue that the highly compensated test should be deleted entirely because proposed section 541.601 will allow the exemption for employees traditionally entitled to overtime pay. Such commenters also argue that the proposed $65,000 level is too low and the proposed duties requirements too lax.

In contrast, organizations representing employer interests generally support the new provision, although a number of these commenters ask for technical modifications. However, some employer commenters argue that the total annual compensation requirement of $65,000 per year is too high. In addition, a significant number of employer commenters find a duties requirement in proposed section 541.601 unnecessary, and ask the Department to eliminate it. The Morgan, Lewis & Bockius law firm, for example, argues that the duties test for highly compensated employees can be eliminated because employees paid more than 80 percent of all full-time salaried workers are not the persons Congress sought to protect from exploitation when it passed the FLSA. The U.S. Chamber of Commerce comments that a "bright line" (*i.e.*, salary only) test for highly compensated employees would add significant clarity to the regulations and is consistent with the historical approach of guaranteeing overtime protections to workers earning below the minimum salary level, regardless of duties performed. The Society for Human Resource Management adds that high compensation is indicative of likely exempt status and a bright line rule for highly compensated employees based on earnings alone would eliminate the need for an expensive and potentially confusing legal inquiry into whether the employee's duties truly are exempt.

The Department agrees with the AFL–CIO that the Secretary does not have authority under the FLSA to adopt a "salary only" test for exemption, and rejects suggestions from employer groups to do so. Section 13(a)(1) of the FLSA requires that the Secretary "define and delimit" the terms executive, administrative and professional employee. The Department has always maintained that the use of the phrase "bona fide executive, administrative or professional capacity" in the statute requires the performance of specific duties. For example, the 1940 Stein report stated: "Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act." 1940 Stein Report at 6–7. In fact, as the AFL–CIO and other unions note, Congress rejected several statutory amendments during the FLSA's early history which would have established "salary only" tests. In 1940, for example, Congress rejected an amendment which would have provided the exemption to all employees earning more than $200 per week. H.R. 8624, 76th Cong. (1940). *See also* Deborah Malamud, *Engineering the Middle Class: Class Line-Drawing in New Deal Hours Legislation*, 96 Mich. L. Rev. 2212, 2299–2303 (August 1998) (discussing four separate proposals to exempt all highly paid employees between 1939 and 1940). Finally, as the unions also correctly note, in *Jewell Ridge Coal Corp.* v. *United Mine Workers* of America, Local No. 6167, 325 U.S. 161, 167 (1949), the Supreme Court stated that "employees are not to be deprived of the benefits of the Act simply because they are well paid." *See also Overnite Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 578 (1942) (the primary purposes of the overtime provisions were to "spread employment" and assure workers additional pay "to compensate them for the burden of a workweek beyond the hours fixed in the Act").

However, the Department rejects the view that section 541.601 does not contain a duties test. As noted above, the proposed section did require that an exempt highly compensated employee perform "any one or more exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part." Some commenters find this language insufficient and confusing, arguing that it would allow employees to qualify for exemption under section 541.601 even if they performed only a single exempt duty once a year. The Department never intended to exempt as "highly compensated" employees those who perform exempt duties only on an occasional or sporadic basis. Accordingly, to clarify this duties requirement for highly compensated employees and ensure exempt duties remain a meaningful aspect of this test, the final rule adds to section 541.601(a) that an employee must "customarily and regularly" perform work that satisfies one or more of the elements of the standard duties test for an executive, administrative or professional employee.

The Department has the authority to adopt a more streamlined duties test for employees paid at a higher salary level. Indeed, no commenter challenges this authority. The Part 541 regulations have contained special provisions for "high salaried" employees since 1949. Although commonly referred to as the "short" duties tests today, the existing regulations actually refer to these tests as the "special proviso for high salaried executives" (29 CFR 541.119), the "special proviso for high salaried administrative employees" (29 CFR 541.214), and the "special proviso for high salaried professional employees" (29 CFR 541.315). Perhaps the courts appropriately refer to these special provisions as the "short" tests today because the associated salary level is only $250 per week ($13,000 annually)—hardly "high salaried" in today's economy.

In any case, these special provisions applying more lenient duties standards to employees earning higher salaries have been in the Part 541 regulations for 52 years. The rationale for a highly compensated test was set forth in the 1949 Weiss Report and is still valid today:

> The experience of the Divisions has shown that in the categories of employees under consideration the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed. At the higher salary levels in such classes of employment, the employees have almost invariably been found to meet all the other requirements of the regulations for exemption. In the rare instances when these employees do not meet all the other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the act, The evidence supported the experience of the Divisions, and indicated that a short-cut test of exemption along the lines suggested above would facilitate the administration of the regulations without defeating the purposes of section 13(a)(1). A number of management representatives stated that such a provision

would facilitate the classification of employees and would result in a considerable saving of time for the employer.

The definition of bona fide "executive," "administrative," or "professional" in terms of a high salary alone is not consistent with the intent of Congress as expressed in section 13(a)(1) and would be of doubtful legality since many persons who obviously do not fall into these categories may earn large salaries. The Administrator would undoubtedly be exceeding his authority if he included within the definition of these terms craftsmen, such as mechanics, carpenters, or linotype operators, no matter how highly paid they might be. A special proviso for high salaried employees cannot be based on salary alone but must be drawn in terms which will actually exclude craftsmen while including only bona fide executive, administrative, or professional employees. The evidence indicates that this objective can best be achieved by combining the high salary requirements with certain qualitative requirements relating to the work performed by bona fide executive, administrative or professional employees, as the case may be. Such requirements will exclude craftsmen and others of the type not intended to come within the exemption.

1949 Weiss Report at 22–23.

Section 541.601 is merely a reformulation of such a test. Although final section 541.601 strikes a slightly different balance than the existing regulations " a much higher salary level associated with a more flexible duties standard " that balance, in the experience of the Department, still meets the goals of the 1949 Weiss Report of providing a "short-cut test" that combines "high salary requirements with certain qualitative requirements relating to the work performed by bona fide executive, administrative or professional employees," while excluding "craftsmen and others of the type not intended to come within the exemption." Thus, the final section 541.601 provides that an exempt highly compensated employee must earn $100,000 per year and "customarily and regularly" perform exempt duties, and that "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be."

The Department also received a substantial number of comments on the proposed $65,000 earnings level. Some commenters such as the National Association of Manufacturers, the American Corporate Counsel Association, the Society for Human Resource Management and the FLSA Reform Coalition endorse the proposed $65,000 level as appropriately serving the purposes of the FLSA. However, other employer groups state that the salary level is too high. The U.S. Chamber of Commerce asks the Department to lower the earnings level to $50,000 per year. The National Retail Federation also suggests a $50,000 level, arguing that the $65,000 standard is prohibitively high for most retailers. The National Grocers Association and the International Mass Retail Association similarly state that $65,000 is far too high a level, particularly in the retail industry. The National Association of Convenience Stores suggests that the Department should set the salary level for highly compensated employees at $36,000 per year or, in the alternative, at a level related to the minimum salary level for exemption, such as $44,200 per year, twice the proposed minimum.

Other commenters, including labor unions, argue that $65,000 is too low. The National Employment Lawyers Association argues that the $65,000 proposed level is not much higher than the annualized level of $57,470 per year for computer employees exempt under section 13(a)(17) of the FLSA, which retains substantial duties tests. The National Association of Wage Hour Consultants notes that, although the top 20 percent of salaried employees earn $65,000 in base wages, that number does not include other types of compensation (*e.g.*, commissions) that the proposal includes within the definition of "total annual compensation." Accordingly, this commenter argues, the Department either should raise the salary level to $80,000 per year or modify the provision to exclude non-salary compensation. The American Federation of Government Employees suggests that the salary level should be fixed at the rate for a federal GS–15/step 1 employee ($85,140 per year, at the time the comment was submitted, without the locality pay differentials that can raise the total to in excess of $100,000). Two employers suggest that the section 541.601 salary level should conform to the Internal Revenue Service pay threshold for highly compensated employees, which is currently $90,000 per year.

The Department continues to find that employees at higher salary levels are more likely to satisfy the requirements for exemption as an executive, administrative or professional employee. The purpose of section 541.601 is to provide a "short-cut test" for such highly compensated employees who "have almost invariably been found to meet all the other requirements of the regulations for exemption." 1949 Weiss Report at 22. Thus, the highly compensated earnings level should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections.

Accordingly, the Department rejects the comments from employer groups that the highly compensated salary level should be reduced to as low as $36,000 per year, and instead sets the highly compensated test at $100,000 per year. In the Department's experience, employees earning annual salaries of $36,000 often fail the duties tests for exemption, while virtually every salaried "white collar" employee with a total annual compensation of $100,000 per year would satisfy any duties test. Employees earning $100,000 or more per year are at the very top of today's economic ladder, and setting the highly compensated test at this salary level provides the Department with the confidence that, in the words of the Weiss report: "in the rare instances when these employees do not meet all other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act." 1949 Weiss Report at 22–23.

Only roughly 10 percent of likely exempt employees who are subject to the salary tests earn $100,000 or more per year (Table 4). This is broadly symmetrical with the Kantor approach of setting the minimum salary level for exemption at the lowest 10 percent of likely exempt employees. In contrast, approximately 35 percent of likely exempt employees subject to the salary tests exceed the proposed $65,000 salary threshold. In addition, less than 1 percent of full-time hourly workers (0.6 percent) earn $100,000 or more (Table 5). Thus, at the $100,000 or more per year salary level, the highly compensated provision will *not be available* to the vast majority of both salaried and hourly employees. Unlike the $65,000 or more per year salary level, setting the highly compensated test at the $100,000 avoids the potential of unintended exemptions of large numbers of employees who are not bona fide executive, administrative or professional employees. At the same time, because the Department believes that many employees who earn between $65,000 and $100,000 per year also satisfy the standard duties tests, the section 13(a)(1) exemptions will still be available for such employees. The

Department believes this $100,000 level is also necessary to address commenters' concerns regarding the associated duties test, the possibility that workers in high-wage regions and industries could inappropriately lose overtime protection, and the effect of future inflation. The Department recognizes that the duties test for highly compensated employees in final section 541.601 is less stringent than the existing "short" duties tests associated with the existing special provisions for "high salaried" employees (29 CFR 541.119, 541.214, 541.315). But this change is more than sufficiently off-set by the $87,000 per year increase in the highly compensated level. Under the existing regulations, a "high salaried executive" earns only $13,000 annually, which is approximately 60 percent higher than the minimum salary level of $8,060. Under the final rule, a highly compensated employee must earn $100,000 per year, which is more than 400 percent higher than the final minimum salary level of $23,660 annually.[17]

A number of commenters question the definition of "total annual compensation" and the mechanics of applying the highly compensated test. *First*, a number of commenters are concerned that the requirement that an employee must be "guaranteed" the total annual compensation amount would be interpreted as creating an employment contract for an employee who otherwise would be an at-will employee. Because the Department did not intend this result, we have deleted the word "guaranteed."

*Second*, several commenters, including the Morgan, Lewis & Bockius law firm, the Securities Industry Association and the HR Policy Association, suggest that employers should be permitted to prorate the total annual compensation amount if an employee uses leave without pay, such as under the Family and Medical Leave Act. The Department does not believe that such deductions are appropriate. The test for highly compensated employees is intended to provide an alternative, simplified method of testing a select group of employees for exemption. We believe that the test for highly compensated employees should remain straightforward and easy to administer by maintaining a single, overall compensation figure applicable to every employee. Determining the variety of reasons that might qualify for deduction, such as for a medical leave of absence, a military leave of absence, or an educational leave of absence, and establishing rules about the lengths of time such absences must cover before deductions could be made, would unnecessarily complicate this rule.

*Third*, because the final rule increases the compensation level significantly, from $65,000 to $100,000, the Department agrees with comments that the definition of "total annual compensation" should include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, even if such compensation is not "paid out to the employee as due on at least a monthly basis" as proposed in subsection 541.601(b)(1). Numerous commenters state that such payments often are paid on a quarterly or less frequent basis. Accordingly, we have deleted this requirement from the final rule. However, we have not adopted comments suggesting that discretionary bonuses should be included in "total annual compensation" because there is not enough information in the record on the frequency, size and types of such payments. The Department also does not agree with comments that the costs of employee benefits, such as payments for medical insurance and matching 401(k) pension plan payments, should be included in computing total annual compensation. The inclusion of such costs in the calculations for testing highly compensated employees would make the test administratively unwieldy.

*Fourth*, final subsection 541.601(b)(1) contains a new safeguard against possible abuses that are of concern to some commenters, including the AFL–CIO: the "total annual compensation" must include at least $455 per week paid on a salary or fee basis. This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses. As explained below, the salary basis requirement is a valuable and easily applied criterion that is a hallmark of exempt status. Accordingly, the Department has modified the final subsection 541.601(b)(1) to provide:

> "Total annual compensation" must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

*Fifth*, the final rule also continues to permit a catch-up payment at the end of the year. Such a catch-up payment is necessary because, according to some commenters, many highly compensated employees receive commissions, profit sharing and other incentive pay that may not be calculated or paid by the end of the year. However, some commenters state that it would be difficult to compute the amount of any such payment due by the first pay period following the end of the year, as required by proposed section 541.601(b)(2). They emphasize that it takes some time after the close of the year to compute the amounts of any commissions or bonuses that are due, such as those based on total sales or profits. Thus, for example, the Mortgage Bankers Association, the Consumer Bankers Association and the Consumer Mortgage Coalition suggest that employers be allowed one month to make the catch-up payment. The Department recognizes that an employer may need some time after the close of the year to make calculations and determine the amount of any catch-up payment that is due. Accordingly, we have clarified that such a payment may be made during the last pay period of the year or within one month after the close of the year. The final rule also provides that a similar, but prorated, catch-up payment may be made within one month after termination of employment for employees whose employment ends before the end of the 52-week period. Finally, the final rule clarifies that any such payments made after the end of the year may only be counted once, toward the "total annual compensation" for the preceding year. To ensure appropriate evidence is maintained of such catch-up payments, employers may want to document and advise the employee of the purpose of the payment, although this is not a requirement of the final rule.

Finally, some commenters suggest applying the highly compensated test to outside sales and computer employees. Outside sales employees have never been subject to a salary level or a salary

[17] In addition, the final compensation level of $100,000 for highly compensated employees is almost twice the highest salary level that the AFL–CIO advocates as necessary to update the salary level associated with the existing "short" duties tests. The AFL–CIO did not suggest an alternative salary level for section 541.601, likely because of its strong objections to this section as a whole. However, the AFL–CIO suggests that the salary level associated with the existing "short" duties test should be increased either to $855 per week ($44,460 annually) if based on inflation or to $980 per week ($50,960 annually) if based on the Kantor Report.

basis test as a requirement for exemption, and the Department did not propose to add these requirements. Since outside sales employees are not subject to the standard salary level test, it would not be appropriate to apply the highly compensated test to these employees. We have not applied the highly compensated test to computer employees because, as explained under subpart E, Congress has already created special compensation provisions for this industry in section 13(a)(17) of the Act.

Section 541.602 Salary Basis

In its proposal, the Department retained the requirement that, to qualify for the executive, administrative or professional exemption, an employee must be paid on a "salary basis." Proposed section 541.602(a) set forth the general rules for determining whether an employee is paid on a salary basis, which were retained virtually unchanged from the existing regulation. Under this subsection (a), an employee must regularly receive a "predetermined amount" of salary, on a weekly or less frequent basis, that is "not subject to reduction because of variations in the quality or quantity of the work performed." With a few identified exceptions, the employee "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." Subsection (a) also provides that an "employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." Exempt employees, however, "need not be paid for any workweek in which they perform no work."

Proposed subsection (b) included several exceptions to the salary basis rules that are in the existing regulations. An employer may make deductions from the guaranteed pay: when the employee is "absent from work for a full day for personal reasons, other than sickness or disability"; for absences of a full day or more due to sickness or disability, if taken in accordance with a bona fide plan, policy or practice providing wage replacement benefits; for any hours not worked in the initial and final weeks of employment; for hours taken as unpaid FMLA leave; as offsets for amounts received by an employee for jury or witness fees or military pay; or for penalties imposed in good faith for "infractions of safety rules of major significance." The proposed subsection (b) also added a new exception to the salary basis rule for deductions for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules," such as rules prohibiting sexual harassment or workplace violence. Such suspensions must be imposed "pursuant to a written policy applied uniformly to all workers."

The Department's final rule retains both the requirement that an exempt employee must be paid on a "salary basis" and the exceptions to this rule specified in the proposal, with only a few minor modifications. We have changed the phrase "a full day or more" to read "one or more full days" throughout section 541.602 to clarify that certain deductions can only be made for full day increments. In addition, the final rule modifies the text of the new disciplinary deduction exception to indicate more clearly that the disciplinary policy must be applicable to all employees.

A number of commenters, such as the Fisher & Phillips law firm, the National Association of Convenience Stores and the American Bakers Association, urge the Department to abandon the salary basis test entirely, arguing that this requirement serves as a barrier to the appropriate classification of exempt employees. These comments note that the explanation in the proposal that payment on a salary basis is the *quid pro quo* for an exempt employee not receiving overtime pay reflects an inappropriate regulation of the compensation of an otherwise exempt employee.

In contrast, commenters such as the AFL–CIO and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm view the salary basis requirement as a hallmark of exempt status. In fact, many commenters such as the New York State Public Employees Federation, the National Employment Lawyers Association, and the National Employment Law Project, request that the salary basis test be tightened.

After considering the salary basis test in light of its historical context and judicial acceptance, the Department has decided that it should be retained. As early as 1940, the Department noted that there was "surprisingly wide agreement" among employers and employees "that a salary qualification in the definition of the term 'executive' is a valuable and easily applied index to the 'bona fide' character of the employment. * * *" 1940 Stein Report at 19. The basis of that agreement was that "[t]he term 'executive' implies a certain prestige, status, and importance" that is captured by a salary test. *Id.* Also, because "executive" employees are denied the protection of the Act, "[i]t must be assumed that they enjoy compensatory privileges," including a salary "substantially higher" than the minimum wages guaranteed under the Act. *Id.* The 1940 Stein Report recommended a salary test for executives that would be satisfied if the "employee is guaranteed a net compensation of not less than $30 a week '*free and clear.*'" *Id.* at 23 (emphasis added). The Report concluded that the inclusion of a salary test was vital in defining administrative and professional employees as well. *Id.* at 26 ("[A] salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity"); *id.* at 36 ([I]n order to avoid disputes, to assist in the effective enforcement of the act and to prevent abuse, it appears essential * * * to include a salary test in the definition [of professional]").

Based on the 1940 Stein Report's recommendation, the Department promulgated regulations providing that an exempt executive must be "compensated for his services *on a salary basis* at not less than $30 per week." 29 CFR 541(e) (1940 Supp.). The regulations required that exempt administrative and professional employees (except physicians and attorneys) must be paid "*on a salary or fee basis* at a rate of not less than $200 per month." 29 CFR 541.2(a) (administrative), 541.3(b) (professional) (emphasis added).

In 1944, the Wage and Hour Division issued Release No. A–9, which addressed the meaning of "salary basis." The Release stated that an employee will be considered to be paid on a salary basis if "under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semi-monthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period." Release No. A–9 (Aug. 24, 1944), *reprinted in* Wage & Hour Manual (BNA) 719 (cum. ed. 1944–1945). The Release further explained that because "bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work," such employees should

generally be free to go home early or occasionally take a day off without reduction in pay. *Id.*

After hearings conducted in 1947, the Wage and Hour Division recommended retention of the salary basis test in the 1949 Weiss Report, stating:

> The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment.

1949 Weiss Report at 24. Based on the Weiss Report recommendations, the Department issued revised Part 541 regulations in 1949 that retained the salary basis test. 29 CFR 541.1(f), 541.2(e), 541.3(e) (1949 Supp.). Shortly thereafter, the Department published the first version of 29 CFR 541.118 (1949 Supp.) in a new Subpart B, entitled "Interpretations." Section 541.118(a) provided as follows:

> An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

In 1954, the Administrator issued a revised section 541.118(a) that retained the salary basis test, but added a number of exceptions to the rule. In 1958, the Wage and Hour Division again conducted hearings for the purpose of determining whether the salary levels should be changed. Although the resulting 1958 Kantor Report related primarily to the salary levels, it reiterated that salary is a "mark of [the] status" of an exempt employee, and reaffirmed the criterion's importance as an enforcement tool, noting that the Department had "found no satisfactory substitute for the salary tests." 1958 Kantor Report at 2–3. Since 1954, the salary basis test has remained unchanged.

The Department thus has determined over the course of many years that executive, administrative and professional employees are nearly universally paid on a salary basis. This practice reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time. Such employees are not paid by the hour or task, but for the general value of services performed. *See Kinney* v. *District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Brock* v. *Claridge Hotel & Casino*, 846 F.2d 180, 184 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988). There is nothing in this rulemaking record that contradicts the Department's long-standing view. The comments accusing the Department of improperly regulating the wages of exempt employees miss the mark. The *quid pro quo* referenced in the proposal was simply a way to explain that payment on a salary basis reflects an employee's discretion to manage his or her time and to receive compensatory privileges commensurate with exempt status.

Many commenters, including the FLSA Reform Coalition, the Fisher & Phillips law firm, the U.S. Chamber of Commerce, the HR Policy Association and the Oklahoma Office of Personnel Management, support the proposed new exception to the salary basis rule for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules." These commenters note that this additional exception will permit employers to apply the same progressive disciplinary rules to both exempt and nonexempt employees, and is needed in light of federal and state laws requiring employers to take appropriate remedial action to address employee misconduct. A number of commenters ask the Department to construe the term "workplace misconduct" more broadly to include off-site, off-duty conduct. The National Association of Manufacturers suggests that the term should be clarified, at a minimum, to refer to the standards of conduct imposed by state and federal anti-discrimination laws.

In contrast, commenters such as the AFL–CIO, the Communications Workers of America, the New York State Public Employees Federation and the National Employment Law Project oppose the new exception, arguing that the current rule properly recognizes that receiving a salary includes not being subject to disciplinary deductions of less than a week. These commenters argue that employers have other ways to discipline exempt employees without violating the salary basis test.

The final rule includes the exception to the salary basis requirement for deductions from pay due to suspensions for infractions of workplace conduct rules. The Department believes that this is a common-sense change that will permit employers to hold exempt employees to the same standards of conduct as that required of their nonexempt workforce. At the same time, as one commenter notes, it will avoid harsh treatment of exempt employees—in the form of a full-week suspension—when a shorter suspension would be appropriate. It also takes into account, as the comments of Representative Norwood, Representative Ballenger and the American Bakers Association recognize, that a growing number of laws governing the workplace have placed increased responsibility and risk of liability on employers for their exempt employees' conduct. *See Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) (liability for sexual harassment by supervisory employees may be imputed to the employer where employer fails to take prompt and effective remedial action). At the same time, the Department does not intend that the term "workplace conduct" be construed expansively. As the term indicates, it refers to conduct, not performance or attendance, issues. Moreover, consistent with the examples included in the regulatory provision, it refers to serious workplace misconduct like sexual harassment, violence, drug or alcohol violations, or violations of state or federal laws. Although we believe that this additional exception to the general no-deduction rule is warranted (as was the exception added in 1954 for infractions of safety rules of major significance), it should be construed narrowly so as not to undermine the essential guarantees of the salary basis test. *See Mueller* v. *Reich*, 54 F.3d 438 (7th Cir. 1995). However, the fact that the employee misconduct occurred off the employer's property should not preclude an employer from imposing a disciplinary suspension, as long as the employer has a *bona fide* workplace conduct rule that covers such off-site conduct.

Commenters such as the FLSA Reform Coalition, the Fisher & Phillips law firm and the National Association of Chain Drug Stores urge the Department to delete the proposed requirement that any pay deductions for workplace conduct violations must be imposed pursuant to a "written policy applied uniformly to all workers." These commenters question the need for the policy to be in writing, and are concerned that the uniform application requirement would breed litigation and diminish employer flexibility to take individual circumstances into account. The American Corporate Counsel

Association notes that it "would not object if the present draft were further modified to condition full-day docking on the employer either adopting a written policy notifying employees of the potential for a suspension without pay as a disciplinary measure or providing the employee with written notice of a finding of job-related misconduct." The Department has decided to retain the requirement that the policy be in writing, on the assumption that most employers would put (or already have) significant conduct rules in writing, and to deter misuse of this exception. This provision is a new exception to the salary basis test, and the Department does not believe restricting this new exception to written disciplinary policies will lead to changes in current employer practices regarding such policies. However, the written policy need not include an exhaustive list of specific violations that could result in a suspension, or a definitive declaration of when a suspension will be imposed. The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension. We have clarified the regulatory language to provide that the written policy must be "applicable to all employees," which should not preclude an employer from making case-by-case disciplinary determinations. Thus, for example, the "written policy" requirement for this exception would be satisfied by a sexual harassment policy, distributed generally to employees, that warns employees that violations of the policy will result in disciplinary action up to and including suspension or termination.

Commenters raise a number of other issues related to deductions from salary. *First*, in response to comments from the National Association of Convenience Stores and the Fisher & Phillips law firm, we have changed the phrase "of a full day or more" to "one or more full days" in sections 541.602(b)(1), (2) and (5), to clarify that a deduction of one and one-half days, for example, is impermissible.

*Second*, commenters, such as the National Association of Chain Drug Stores, the U.S. Chamber of Commerce, the HR Policy Association and the National Retail Federation, suggest that partial day deductions be permitted for any leave requested by an employee, including for sickness or rehabilitation, or for disciplinary suspensions. We believe that partial day deductions generally are inconsistent with the salary basis requirement, and should continue to be permitted only for infractions of safety rules of major significance, for leave under the Family and Medical Leave Act, or in the first and last weeks of employment.

*Third*, several commenters, such as the Morgan, Lewis & Bockius law firm, suggest an additional exception to the general no-docking rule: payments in the nature of restitution, fines, settlements or judgments an employer must make based on the misconduct of an employee. Such an additional exception, in our view, would be inappropriate and unwarranted because it would grant employers unfettered discretion to dock large amounts from the salaries of exempt employees in questionable circumstances (judgments against employers because of discriminatory employment actions taken by an exempt employee, for example). The new disciplinary deduction exception only allows deductions for unpaid suspensions of one or more days—not fines, settlements or judgments which could arguably be blamed on an exempt employee.

*Fourth*, the U.S. Chamber of Commerce and a few other commenters request that the Department expand proposed section 541.602 (b)(7) to include employee absences under an employer's family or medical leave policy. Subsection (b)(7) provides an exception from the no-deduction rule for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA). This exception was mandated by Congress when it passed the FMLA in 1993. 29 U.S.C. 2612(c) ("Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938, * * * the compliance of an employer with this title by providing unpaid leave shall not affect the exempt status of the employee. * * *"). There is no basis to enlarge the statutory exception. We also would note that deductions may be made for absences of one or more full days occasioned by sickness under section 541.602(b)(2).

*Fifth*, several commenters, including the National Association of Manufacturers and the American Corporate Counsel Association, urge the Department expressly to recognize that compensation shortages resulting from payroll system errors may not constitute impermissible "dockings." We do not believe it is appropriate to provide such a general rule in the context of this rulemaking. Whether payroll system errors constitute impermissible "dockings" depends on the facts of the particular case, including the frequency of the errors, whether the errors are caused by employee data entry or the computer system, whether the employer promptly corrects the errors, and the feasibility of correcting the payroll system programming to eliminate the errors.

*Sixth*, a few commenters, such as the National Association of Chain Drug Stores and the National Council of Chain Restaurants, suggest that employers should be able to recover leave and salary advances from an employee's final pay. Recovery of salary advances would not affect an employee's exempt status, because it is not a deduction based on variations in the quality or quantity of the work performed. Recovery of partial-day leave advances, however, essentially are deductions for personal absences and would constitute an impermissible deduction. Whether recovery for a full-day leave is permissible depends on whether such a leave is covered by one of the section 541.602(b) exceptions.

*Seventh*, the New York State Public Employees Federation requests that if the Department retains the disciplinary deduction provision, it should eliminate the current pay-docking rule applicable to public employers. The public accountability rationale for the public employer pay-docking rule (section 541.709) continues to be valid, however, and is not affected by the new exception for disciplinary suspensions.

*Finally*, a number of commenters, including the Society for Human Resource Management, the National Association of Chain Drug Stores, the National Council of Chain Restaurants and the National Retail Federation, ask the Department to confirm that certain payroll and record keeping practices continue to be permissible under the new rules. We agree that employers, without affecting their employees' exempt status, may take deductions from accrued leave accounts; may require exempt employees to record and track hours; may require exempt employees to work a specified schedule; and may implement across-the-board changes in schedule under certain circumstances. *See, e.g., Webster* v. *Public School Employees of Washington, Inc.*, 247 F.3d 910 (9th Cir. 2001) (accrued leave accounts); *Douglas* v. *Argo-Tech Corp.*, 113 F.3d 67 (6th Cir. 1997) (record and track hours); *Aaron* v. *City of Wichita, Kansas*, 54 F.3d 652 (10th Cir.) (accrued leave accounts, record and track hours), *cert. denied*, 516 U.S. 965 (1995); *Graziano* v. *The Society of the New York Hospital*, 1997 WL 639026 (S.D.N.Y. 1997) (accrued leave accounts); Wage and Hour Opinion Letter of 2/23/98, 1998 WL 852696 (across-the-board changes in schedule); Wage and Hour Opinion

Letter of 4/15/95 (accrued leave accounts); Wage and Hour Opinion Letter of 3/30/94, 1994 WL 1004763 (accrued leave accounts); and Wage and Hour Opinion Letter of 4/14/92, 1992 WL 845095 (accrued leave accounts).

Section 541.603 Effect of Improper Deductions From Salary

Proposed section 541.603 discussed the effect of improper deductions from salary and established a new "safe harbor" rule. Subsection (a) of the proposal set forth the general rule that: "An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a pattern and practice of not paying employees on a salary basis. A pattern and practice of making improper deductions demonstrates that the employer did not intend to pay employees in the job classification on a salary basis." Factors for determining whether an employer had such a "pattern and practice" listed in this subsection included: The "number of improper deductions; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; the size of the employer; whether the employer has a written policy prohibiting improper deductions; and whether the employer corrected the improper pay deductions." Proposed subsection (a) also provided that "isolated or inadvertent" deductions would not result in loss of the exemption. Proposed section 541.603(b) further provided: "If the facts demonstrate that the employer has a policy of not paying on a salary basis, the exemption is lost during the time period in which improper deductions were made for employees in the same job classification working for the same managers responsible for the improper deductions. Employees in different job classifications who work for different managers do not lose their status as exempt employees." Finally, proposed section 541.603(c) included a new "safe harbor" provision: "If an employer has a written policy prohibiting improper pay deductions as provided in § 541.602, notifies employees of that policy and reimburses employees for any improper deductions, such employer would not lose the exemption for any employees unless the employer repeatedly and willfully violates that policy or continues to make improper deductions after receiving employee complaints."

The final rule makes a number of substantive changes to the proposed section 541.603. We have modified the first two sentences of subsection (a) to better clarify that the effect of improper deductions depends upon whether the facts demonstrate that the employer intended to pay employees on a salary basis, and to substitute the phrase "actual practice" of making improper deductions for the "pattern and practice" language in proposed subsection (a). The final subsection (a) makes four changes in the factors to consider when determining whether an employer has an actual practice of making improper deductions: (1) Adding consideration of "the number of employee infractions warranting discipline" as compared to the number of deductions made; (2) modifying the written policy factor to state, "whether the employer has a clearly communicated policy *permitting or* prohibiting improper deductions" (3) deleting the "size of employer" factor; and (4) deleting the "whether the employer corrected the improper deductions" factor. The final rule moves the language regarding isolated or inadvertent improper deductions to subsection (c), and inserts language, developed from the existing regulations, requiring an employer to reimburse employees for isolated or inadvertent improper deductions. The "safe harbor" provision, found in final section 541.603(d), substitutes "clearly communicated policy" for the proposed "written policy"; adds that the policy must include a complaint mechanism; deletes the term "repeatedly"; clarifies that the safe harbor is not available if the employer "willfully violates the policy by continuing to make improper deductions after receiving employee complaints"; and clarifies that if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same manager responsible for the actual improper deductions.

Proposed subsection 541.603(a) contained the general rule regarding the effect of improper deductions from salary on the exempt status of employees: "An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a pattern and practice of not paying employees on a salary basis." Many commenters, including the FLSA Reform Coalition, the National Association of Manufacturers, the U.S. Chamber of Commerce and the AFL–CIO, express concern that the phrase "pattern and practice of not paying employees on a salary basis" in proposed subsection 541.603(a) was ambiguous and would engender litigation and perhaps result in unintended consequences. The final rule clarifies that the central inquiry to determine whether an employer who makes improper deductions will lose the exemption is whether "the facts demonstrate that the employer did not intend to pay employees on a salary basis." The final subsection (a) replaces the proposed "pattern and practice" language with the phrase "actual practice," and also states that an "actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." The phrase "pattern and practice" is a legal term of art in other employment law contexts which we had no intent to incorporate into these regulations. These changes should provide better guidance to the regulated community.

Most commenters support the listed factors in subsection (a) for determining when an employer has an actual practice of making improper deductions. Responding to comments submitted by the Fisher & Phillips law firm and the National Association of Convenience Stores, the final rule states that the number of improper deductions should be considered "particularly as compared to the number of employee infractions warranting discipline." The Second Circuit in *Yourman* v. *Giuliani,* 229 F.3d 124, 130 (2nd Cir. 2000), *cert. denied,* 532 U.S. 923 (2001), provided the following useful comparison: an employer that regularly docks the pay of managers who come to work five hours late has more of an "actual practice" of improper deduction than does an employer that only sporadically docks the pay of managers who come to work five minutes late, even though the penalties imposed by this second employer could far outnumber the penalties imposed by the first. Thus, it is the *ratio* of deductions to infractions that is most informative, rather than simply the number of deductions, because the total number of deductions is significantly influenced by the size of the employer. In light of this change, we have also deleted the size of the employer as a relevant factor in final subsection (a), as we did not intend that this section be applied differently depending on the size of the employer, and have deleted "whether the employer

has corrected the improper pay deductions" as a relevant factor in determining whether an employer has an actual practice of improper pay deductions. We have modified the written policy factor to state: "Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions" because, as discussed below under subsection 541.603(d), the U.S. Small Business Administration Office of Advocacy and other commenters state that the written policy factor may be prejudicial to small businesses.

Final subsection 541.603(b), as in the proposal, addresses which employees will lose the exemption, and for what time period, if an employer has an actual practice of making improper deductions. The proposal provided that the exemption would be lost "during the time period in which improper deductions were made for employees in the same job classification working for the same managers responsible for the improper deductions." The comments express strongly contrasting views on whether proposed section 541.603(b) should be retained or modified either to mitigate the impact on employers or to expand the circumstances in which employees would lose their exempt status. Commenters such as the Federal Wage Hour Consultants, the Society for Human Resource Management and the National Association of Chain Drug Stores support the proposal as resolving many of the misunderstandings that exist under the existing regulations and current case law. Other commenters, however, including the FLSA Reform Coalition, the U.S. Chamber of Commerce, the National Council of Chain Restaurants, the National Retail Federation, the HR Policy Association, and the County of Culpeper, Virginia, suggest that improper deductions should affect only the exempt status of the individual employees actually subjected to the impermissible pay deductions. These commenters argue that the possibility that employees who have never experienced a salary reduction could also lose their exempt status was first raised by the decision in *Abshire* v. *County of Kern, California,* 908 F.2d 483 (9th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991), and has led to extensive litigation thereafter. The HR Policy Association states that the Supreme Court in *Auer* v. *Robbins,* 519 U.S. 452 (1997), "did not rectify the central flaw in the current interpretation: that a few deductions made against a couple of employees arguably converts whole classes of employees to nonexempt."

In contrast, commenters such as the AFL–CIO, the McInroy & Rigby law firm, the National Employment Law Project, the Goldstein, Demchak, Baller, Borgen & Dardarian law firm and the National Employment Lawyers Association urge the Department to modify the proposed provision to state that employees will lose their exempt status if they are subject to an employment policy permitting impermissible deductions, even absent any actual deductions. These comments note that the Supreme Court in *Auer* deferred to the Department's view, as expressed in its legal briefs to the Court, that employees should lose their exempt status if there is either an actual practice of making impermissible deductions or an employment policy that creates a significant likelihood of such deductions.

After giving this complex issue careful consideration, the Department has decided to retain in final subsection 541.603(b) the proposed approach that an employer who has an actual practice of making improper deductions will lose the exemption during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The final regulation also retains the language that employees in different job classifications or who work for different managers do not lose their status as exempt employees. Any other approach, on the one hand, would provide a windfall to employees who have not even arguably been harmed by a "policy" that a manager has never applied and may never intend to apply, but on the other hand, would fail to recognize that some employees may reasonably believe that they would be subject to the same types of impermissible deductions made from the pay of similarly situated employees.

The final rule represents a departure from the Department's position in *Auer* v. *Robbins,* 519 U.S. 452 (1997). In *Auer,* the Supreme Court, deferring to arguments made in an *amicus* brief filed by the Department, found that the existing salary basis test operated to deny exempt status when "there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." *Id.* at 461. In deferring to the Department, the Supreme Court stated:

> Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "plainly erroneous or inconsistent with the regulation."
>
> * * * * *
>
> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference.

*Id.* at 461–62 (citations omitted). Thus, in *Auer,* the Supreme Court relied on arguments made in the Department's *amicus* brief interpreting ambiguous regulations existing at the time of the decision. The "significant likelihood" test is not found in the FLSA itself or anywhere in the existing Part 541 regulations. Moreover, nothing in *Auer* prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking. *See Keys* v. *Barnhart,* 347 F.3d 990, 993 (7th Cir. 2003).

We are concerned with those employees who actually suffer harm as a result of salary basis violations and want to ensure that those employees receive sufficient back pay awards and other appropriate relief. We disagree, however, with those comments arguing that only employees who suffered an actual deduction should lose their exempt status. An exempt employee who has not suffered an actual deduction nonetheless may be harmed by an employer docking the pay of a similarly situated co-worker. An exempt employee in the same job classification working for the same manager responsible for making improper deductions, for example, may choose not to leave work early for a parent-teacher conference for fear that her pay will be reduced, and thus is also suffering harm as a result of the manager's improper practices. Because exempt employees in the same job classification working for the same managers responsible for the actual improper deductions may reasonably believe that their salary will also be docked, such employees have also suffered harm and therefore should also lose their exempt status. The Department's construction best furthers the purposes of the section 13(a)(1) exemptions because it realistically assesses whether an employer intends to pay employees on a salary basis. For the same reasons, final subsection (a) provides that "whether the employer has a clearly communicated policy permitting or prohibiting improper deductions" is one factor to consider when determining whether the employer has an actual practice of not paying employees on a salary basis.

A number of commenters, such as the FLSA Reform Coalition, the U.S. Chamber of Commerce and the National

Employment Lawyers Association, ask the Department to clarify how section 541.603(b) would apply if deductions result from a corporate-wide policy or the advice a manager receives from the human resources department. We believe that final section 541.603 calls for a case-by-case factual inquiry. Thus, for example, under final subsection 541.603(a), a corporate-wide policy permitting improper deductions is some evidence that an employer has an actual practice of not paying employees on a salary basis, but not sufficient evidence by itself to cause the exemption to be lost if a manager has never used that policy to make any actual deductions from the pay of other employees. Moreover, in such a circumstance, the existence of a clearly communicated policy prohibiting such improper deductions would weigh against the conclusion that an actual practice exists.

Final subsection (c) contains language taken from proposed subsection 541.603(a) and the existing "window of correction" in current subsection 541.118(a)(6) regarding the effect of "isolated" or "inadvertent" improper deductions. Some commenters request additional clarification regarding the meaning of these terms. Inadvertent deductions are those taken unintentionally, for example, as a result of a clerical or time-keeping error. *See, e.g., Jones* v. *Northwest Telemarketing, Inc.*, 2000 WL 568352, at *3 (D. Or. 2000); *Reeves* v. *Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242, 251 (D.R.I. 1999). *See also Furlong* v. *Johnson Controls World Services, Inc.*, 97 F. Supp. 2d 1312, 1317 (S.D. Fla. 2000) (partial day deductions, made pursuant to the employer's mistaken belief that the employee's absences were covered by the Family and Medical Leave Act's statutory exemption to the salary basis test due to the employee's representations and actions, are considered inadvertent). Whether deductions are "isolated" is determined by reference to the factors set forth in final subsection 541.603(a). Other commenters object to the proposed "isolated or inadvertent" language because the proposal did not require employees to be reimbursed for the improper deductions that are isolated or inadvertent.

The AFL–CIO, for example, states that the "underlying purpose of the window of correction is *not* simply to ensure that an employer does not lose the FLSA exemption because of inadvertent or isolated incidents of improper pay deductions, but rather to provide a means for an employer who has demonstrated an objective intention to pay its employees on a salary basis to remedy improper deductions and avoid further liability." We agree with commenters who state that employees whose salary has been improperly docked should be reimbursed, even if the improper deductions were isolated or inadvertent. Thus, final subsection (c) provides: "Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions." The Department continues to adhere to current law that reimbursement does not have to be made immediately upon the discovery that an improper deduction was made. *See, e.g., Moore* v. *Hannon Food Service,* Inc., 317 F.3d 489, 498 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003) (reimbursement made five days before trial held sufficient because reimbursement "may be made at any time").

The existing "window of correction" is not a model of clarity. It has been difficult for the Department to administer, been the source of considerable litigation, and produced divergent interpretations in the courts of appeals. Most notably, federal courts have reached different conclusions regarding the interpretation and application of existing section 541.118(a)(6), "or is made for reasons other than lack of work." *Compare Moore* v. *Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003), with *Takacs* v. *Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir.), *cert. denied,* 534 U.S. 889 (2001), *Whetsel* v. *Network Property Services, L.L.C.*, 246 F.3d 897 (7th Cir. 2001), *Yourman* v. *Giuliani,* 229 F.3d 124 (2nd Cir. 2000), *cert. denied,* 532 U.S. 923 (2001), and *Klem* v. *County of Santa Clara,* 208 F.3d 1085 (9th Cir. 2000).

There is no need to resolve the conflict between these cases for purposes of the final rule because of the changes made in this subsection (c) and the new safe harbor provision in final subsection (d). Under final subsection (c), isolated and inadvertent improper deductions do not result in loss of the exemption if the employer reimburses the employee for such improper deductions. Further, as discussed below, for other actual improper deductions, employers can preserve the exemption by taking advantage of the safe harbor provision. The safe harbor provision applies regardless of the reason for the improper deduction—whether improper deductions were made for lack of work or for reasons other than lack of work. For the reasons discussed below, the Department believes that the new "safe harbor" is the best approach going forward. However, we recognize that some cases, based on events arising before the effective date of these revisions, will be governed by the prior version of the "window of correction." This final rule is not intended to govern those cases in any way, or to express a view regarding the correct interpretation of the prior version of the "window of correction." Instead, we intend only to adopt a different approach going forward for the reasons stated herein.

Many commenters, including the National Association of Manufacturers, the Society for Human Resource Management, the Federal Wage Hour Consultants, the American Health Care Association and the American Bakers Association, generally support the proposed safe harbor provision, moved to subsection (d) in the final rule. These commenters state that the proposal was an "excellent common sense approach" that promoted proactive steps by employers to protect employees without risking liability and resolved a conflict in the case law. Other commenters, however, while supporting the goal of the proposed safe harbor, believe it to be confusing and suggest modifications. The American Corporate Counsel Association, for example, notes that the interplay between sections 541.603(a), (b) and (c) "is not immediately obvious to trained professionals responsible for securing compliance." The U.S. Chamber of Commerce (Chamber) comments that the phrase "repeatedly and willfully" in the proposed provision was vague, and the Chamber supports the construction of the "window of correction" in *Moore* v. *Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003). The Chamber also argues that the proposal only provides an incentive for employers to adopt policies prohibiting improper deductions, but not to take corrective action; believes that the requirement for a written policy was impractical; and suggests eliminating the provision denying use of the safe harbor to employers that make improper deductions after receiving employee complaints. The U.S. Small Business Administration Office of Advocacy also objects to the written policy requirement as excluding some small businesses. The National Association of Manufacturers objects to the elimination of the phrase "for reasons other than lack of work" in the existing regulations.

Commenters such as the AFL–CIO, the National Employment Lawyers Association, the National Employment Law Project and the Public Justice

Center oppose the proposed safe harbor provision, arguing that it eviscerated the salary basis requirement by permitting an employer to avoid overtime liability even after making numerous impermissible deductions.

After careful consideration of the comments and case law, the Department continues to believe that the proposed safe harbor provision is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole. Thus, the final rule retains the proposed language with several changes. In our view, this provision achieves the goals, supported by many comments, of both encouraging employers to adopt "proactive management practices" that demonstrate the employers' intent to pay on a salary basis, and correcting violative payroll practices. *Cf. Kolstad* v. *American Dental Ass'n,* 527 U.S. 526, 545 (1999) (Title VII of the Civil Rights Act is intended to promote prevention and remediation). In addition, employees will benefit from this additional notification of their rights under the FLSA and the complaint procedures. We intend this safe harbor provision to apply, for example, where an employer has a clearly communicated policy prohibiting improper deductions, but a manager engages in an actual practice (neither isolated nor inadvertent) of making improper deductions. In this situation, regardless of the reasons for the deductions, the exemption would not be lost for any employees if, after receiving and investigating an employee complaint, the employer reimburses the employees for the improper deductions and makes a good faith commitment to comply in the future. We believe it furthers the purposes of the FLSA to permit the employer who has a clearly communicated policy prohibiting improper pay deductions and a mechanism for employee complaints, to reimburse the affected employees for the impermissible deductions and take good faith measures to prevent improper deductions in the future. This is generally consistent with trends in employment law. An employer, for example, that has promulgated a policy against sexual harassment and takes corrective action upon receipt of a complaint of harassment may avoid liability. *See Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742 (1998). Consistent with final subsection 541.603(b), final subsection (c) also provides that, if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, "the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions."

The comments raise several additional issues. *First,* as previously noted, some commenters object to the requirement that an employer have a written policy in order to utilize the safe harbor. The U.S. Small Business Administration Office of Advocacy, for example, notes that small business representatives express concern that the safe harbor's requirement for a pre-existing written policy "may exclude some small businesses which do not produce written compliance materials in the ordinary course of business." The U.S. Chamber of Commerce similarly heard concerns from its small business members that the requirement for a written policy would be impractical. It suggests that "[w]hile employers seek to comply with the law, the safe harbor seems geared to those already sufficiently versed in the law and is likely to be of little effect to less sophisticated employers." Other commenters, such as the American Health Care Association, the American Corporate Counsel Association, and the National Association of Manufacturers, believe that adopting a written policy is an essential part of the employer's responsibility. We intend the safe harbor to be available to employers of all sizes. Thus, although a written policy is the best evidence of the employer's good faith efforts to comply with the Part 541 regulations, we have concluded, consistent with an employer's obligation under *Farragher* and *Ellerth,* that a written policy is not essential. However, the policy must have been communicated to employees prior to the actual impermissible deduction. Thus, final subsection (d) provides that the safe harbor is available to employers with a "clearly communicated policy" prohibiting improper pay deductions. To protect against possible abuses, final subsection (d) adds the requirement that the clearly communicated policy must include a "complaint mechanism." Final subsection (d) also states that the "clearly communicated" standard may be met, for example, by "providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet." For small businesses, the "clearly communicated policy" could be a statement to employees that the employer intends to pay the employees on a salary basis and will not make deductions from salary that are prohibited under the Fair Labor Standards Act; such a statement would also need to include information regarding how the employees could complain about improper deductions, such as reporting the improper deduction to a manager or to an employee responsible for payroll. To further assist small businesses, the Department intends to publish a model safe harbor policy that would comply with final subsection 541.603(d).

*Second,* some commenters, such as the HR Policy Association and the National Employment Lawyers Association, support a requirement in the subsection (d) safe harbor provision that the employer must "promise to comply" in the future. Although other commenters oppose such a requirement, we believe that this promise is inherent in adopting the required employment policy and the duty to cease making improper deductions after receiving employee complaints. Thus, the Department has included as an explicit requirement for the safe harbor rule in final subsection (d) that the employer make a good faith commitment to comply in the future. There may be many ways that an employer could make and evidence its "good faith commitment" to comply in the future including, but not limited to: adopting or re-publishing to employees its policy prohibiting improper pay deductions; posting a notice including such a commitment on an employee bulletin board or employer Intranet; providing training to managers and supervisors; reprimanding or training the manager who has taken the improper deduction; or establishing a telephone number for employee complaints.

*Third,* to avoid confusion that some commenters noted with the "actual practice" determination under final subsection (a), we have changed the phrase "repeatedly and willfully" to "willfully," and defined "willfully" as continuing to make improper deductions after receiving employee complaints. This definition of "willfully" is consistent with *McLaughlin* v. *Richland Shoe,* 486 U.S. 128, 133–35 (1988) ("willfulness" means that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"). Thus, as stated above, an employer with a clearly

communicated policy that prohibits improper pay deductions and includes a complaint mechanism will not lose the exemption for any employee if the employer reimburses employees for the improper deductions after receiving employee complaints and makes a good faith commitment to comply in the future. This rule applies, moreover, regardless of the reasons for the improper pay deductions. The safe harbor is available both for improper deductions made because there is no work available and for improper deductions made for reasons other than lack of work. If the employer fails to reimburse the employees for improper deductions or continues to make improper deductions after receiving employee complaints, final subsection (d) clarifies that "the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions."

*Fourth*, the HR Policy Association, the U.S. Chamber of Commerce, the National Association of Chain Drug Stores and others ask the Department to allow employers a reasonable amount of time to investigate after receiving an employee complaint to determine whether the deductions were improper, to take action to halt any improper deductions, and to correct any improper deductions. We have not changed the text of the regulation in response to this suggestion because the Department views it as self-evident that, before reimbursing the employee or taking other corrective action, an employer will need a reasonable amount of time to investigate an employee's complaint that an improper deduction was made. The amount of time it will take to complete the investigation will depend upon the particular circumstances, but employers should begin such investigations promptly. The mere fact that other employee complaints are received by the employer before timely completion of the investigation should not, by itself, defeat the safe harbor.

Finally, a number of commenters, such as the Food Marketing Institute, ask the Department to clarify the burdens of proof. We do not intend to modify the burdens that courts currently apply. *See Schaefer* v. *Indiana Michigan Power Co.*, 358 F.3d 394 (6th Cir. 2004) (employer has the burden to show employee was paid on a salary basis); *Yourman* v. *Giuliani*, 229 F.3d 124 (2nd Cir. 2000) (employee has the burden to show actual practice of impermissible deductions), *cert. denied*, 532 U.S. 923 (2001).

Section 541.604 Minimum Guarantee Plus Extras

Under proposed section 541.604, an exempt employee may receive additional compensation beyond the minimum amount that is paid as a guaranteed salary. For example, an employee may receive, in addition to the guaranteed minimum paid on a salary basis, extra compensation from commissions on sales or a percentage of the profits. An exempt employee may also receive additional compensation for extra hours worked beyond the regular workweek, such as half-time pay, straight time pay, or a flat sum. Proposed section 541.604(b) provided that an exempt employee's salary may be computed on an hourly, daily or shift basis, if the employee is given a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and "a reasonable relationship exists between the guaranteed amount and the amount actually earned." The reasonable relationship requirement is satisfied where the weekly guarantee is "roughly equivalent" to the employee's actual usual earnings. Thus, for example, the proposal stated that where an employee is guaranteed at least $500 per week, and the employee normally works four or five shifts per week and is paid $150 per shift, the reasonable relationship requirement is satisfied.

The final rule does not make any substantive changes to the proposed rule, but does make a number of clarifying changes. The reasonable relationship requirement incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation, which is set forth in the agency's Field Operations Handbook and in opinion letters. The courts also have upheld the reasonable relationship requirement. *See, e.g., Brock* v. *Claridge Hotel & Casino*, 846 F.2d 180, 182–83 (3rd Cir.) (salary basis requirement not met where employees are paid by the hour and the guarantee is "nothing more than an illusion"), *cert. denied*, 488 U.S. 925 (1988). Some commenters, although not a significant number, object to the reasonable relationship requirement or question the clarity of the regulatory text, while others ask for additional specificity about the various types of additional compensation that may be paid above and beyond the guaranteed salary. The Department has made minor wording changes in response to the comments to clarify this provision.

The National Association of Manufacturers (NAM) suggests that the Department list the range of compensation options, such as cash overtime in any increment, compensatory time off, and shift or holiday differentials, that employers may provide in addition to the guaranteed salary without violating the salary basis requirement. NAM gave the specific example of an employer who allows an exempt worker to take a day off as a reward for hours worked on a weekend outside the employee's normal schedule. The proposed regulation provided some examples and stated that additional compensation "may be paid on any basis." We agree that the examples described above would not violate the salary basis test. However, we have not and could not include in the regulations every method employers might use to provide employees with extra compensation for work beyond their regular workweek. Thus, we have added only one of the examples NAM suggests regarding compensatory time off.

The National Technical Services Association states that it was unclear whether the reasonable relationship requirement applies in all cases to employees who receive a salary and additional compensation. We have clarified that this requirement applies only when an employee's actual pay is computed on an hourly, daily or shift basis. Thus, for example, if an employee receives a guaranteed salary plus a commission on each sale or a percentage of the employer's profits, the reasonable relationship requirement does not apply. Such an employee's pay will understandably vary widely from one week to the next, and the employee's actual compensation is not computed based upon the employee's hours, days or shifts of work.

A few commenters, including the National Association of Convenience Stores, the Fisher & Phillips law firm and the American Council of Engineering Companies, advocate the elimination of the reasonable relationship test. They question whether it was appropriate for the Department to require a reasonable relationship between the guaranteed salary and the employee's actual usual compensation when the payments are based on the employee's quantity of work, when the Department does not have such a requirement for salaries plus commissions or other similar compensation. They state that, so long as the employee also is guaranteed compensation of not less than the minimum required amount, it ought to be irrelevant how an employee's pay is computed. Moreover, they state that the terms "reasonable relationship" and

"roughly equivalent" are uncertain and will be subject to litigation. Fisher & Phillips also states that the first sentence of proposed section 541.604(a) is ambiguous because it suggests that the extra compensation must somehow be paid consistent with the salary basis requirements. The Department does not agree with the comments suggesting the elimination of the reasonable relationship requirement. If it were eliminated, an employer could establish a pay system that calculated exempt employees' pay based directly upon the number of hours they work multiplied by a set hourly rate of pay; employees could routinely receive weekly pay of $1,500 or more and yet be guaranteed only the minimum required $455 (thus effectively allowing the employer to dock the employees for partial day absences). Such a pay system would be inconsistent with the salary basis concept and the salary guarantee would be nothing more than an illusion. We believe that the proposed regulation provided clear guidance about the reasonable relationship requirement. The Department has never suggested a particular percentage requirement in prior opinion letters, and this issue has rarely arisen in litigation over the years. The proposed rule clarified these terms by stating that an employee who is guaranteed compensation of "at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift consistent with the salary basis requirement." Therefore, we have not made any changes to the proposal in this regard. However, we have modified the introductory sentence to clarify that the extra compensation does not have to be paid on a salary basis.

One commenter states that the "minimum guarantee plus extras" concept allows too much flexibility and essentially allows an employer to circumvent the prohibition against docking for absences due to a lack of work. The commenter gives the example of registered nurses whose average pay is $30 per hour, who would earn the guaranteed minimum in two shifts. The commenter believes that the entire balance of the workweek could be compensated as "extra compensation." Thus, the commenter expresses concern that a nurse could be paid for all additional shifts on a straight time basis, with no overtime, and if the hospital had a lack of work, the nurse might not receive more than the two shifts required to earn the minimum guarantee. This commenter views such a system as effectively converting a nurse into an hourly employee not paid overtime, or a salaried employee whose pay was reduced due to variations in the quantity of work performed. However, under the final rule, if an employee is compensated on an hourly basis, or on a shift basis, there must be a reasonable relationship between the amount guaranteed per week and the amount the employee typically earns per week. Thus, if a nurse whose actual compensation is determined on a shift or hourly basis usually earns $1,200 per week, the amount guaranteed must be roughly equivalent to $1,200; the employer could not guarantee such an employee only the minimum salary required by the regulation.

Another commenter states that allowing an exempt employee to be paid based on an hourly computation is inconsistent with the general requirement that exempt employees must be paid on a salary basis. This comment does not take account of the fact that the employees affected by the reasonable relationship requirement must receive a salary guarantee that applies in any week in which they perform any work. The tolerance for computing their actual pay on an hourly, shift or daily basis is for computation purposes only; it does not negate the fact that such employees must receive a salary guarantee that will be in effect any time the employer does not provide sufficient hours or shifts for them to reach the guarantee. We believe that the reasonable relationship requirement, which has been a Wage and Hour Division policy for at least 30 years (see FOH § 22b03), ensures that the salary guarantee for such employees is a meaningful guarantee rather than a mere illusion.

Section 541.605 Fee Basis

Proposed section 541.605 simplified the fee basis provision in the current rule, but made no substantive change. Thus, the proposed rule provided that administrative and professional employees may be paid on a fee basis, rather than a salary basis: "An employee may be paid on a 'fee basis' within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion." Generally, a "fee" is paid for a unique job. "Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis."

The final rule does not make any changes to the proposed rule. Very few comments were submitted on this provision. The Fisher & Phillips law firm notes that the Sixth Circuit in *Elwell* v. *University Hospitals Home Care Services,* 276 F.3d 832 (6th Cir. 2002), held that a compensation plan that combines fee payments and hourly pay does not qualify as a fee basis because it ties compensation, at least in part, to the number of hours or days worked and not on the accomplishment of a given single task. It asks the Department to amend the rule to permit combining the payment of a fee with additional, non-fee-based compensation. The Department has decided not to change the long-standing fee basis rule because the only appellate decision that addresses this issue accepted the "fee-only" requirement, and Fisher & Phillips conceded that this is an "arcane and rarely-used" provision. We continue to believe that payment of a fee is best understood to preclude payment of additional sums based on the number of days or hours worked. Another commenter asks the Department to revise the rule to eliminate the necessity for "employers to track hours on a project or assignment in order to determine the exempt status of employees." However, as in the current rule, the final rule reasonably prescribes that in determining the adequacy of a fee payment, reference should be made to a standard workweek of 40 hours. Thus, "[t]o determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours."

Section 541.606 Board, Lodging or Other Facilities

Proposed section 541.606 defined the terms, "board, lodging or other facilities." The Department did not receive substantive comments on this section, and has made no changes in the final rule.

*Subpart H, Definitions and Miscellaneous Provisions*

Section 541.700 Primary Duty

Proposed section 541.700 defined the term "primary duty" as "the principal, main, major or most important duty that the employee performs." The proposed rule stated that a determination of an employee's primary duty "must be based on all the facts in a particular case," and set forth four nonexclusive factors to consider: "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct

supervision; and the relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work." The proposed rule also provided that exempt employees are not required to spend over 50 percent of their time performing exempt work. However, because the amount of time spent performing exempt work "can be a useful guide," employees who spend over 50 percent of their time performing exempt work "will be considered to have a primary duty of performing exempt work." The section contained an example illustrating the circumstances in which employees spending less than 50 percent of their time performing exempt work can meet the primary duty test, and stated that the fact an employer has "well-defined operating policies or procedures should not by itself defeat an employee's exempt status."

Section 541.700 of the final rule retains essentially the same principles as the proposed rule, but has been reorganized and supplemented with additional language and a second example to clarify the "primary duty" concept. Section 541.700(a) now sets forth the general principles regarding the "primary duty" requirement. The basic definition of "primary duty," as the "principal, main, major or most important duty that the employee performs," is unchanged. However, the final rule reinserts language from existing section 541.304 that the words "primary duty" places the "major emphasis on the character of the employee's job as a whole." The final section 541.700(b) discusses in more detail the factor of the amount of time an employee spends performing exempt work. With only minor changes from the proposed rule, subsection (b) states that the "amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." In addition, subsection (b) now includes language reinserted from existing section 541.103 with some editorial changes that: "Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." The final section 541.700(c) contains two examples applying the factors listed in subsection (a). The first example is modified from the proposed rule by deleting the proposed language "handling customer complaints" and substituting the phrase "managing the budget." As explained elsewhere in this preamble, handling customer complaints may be exempt or nonexempt work depending on the facts of a particular case. Thus, "managing the budget" is used as a better example of clearly exempt work. The second, new example states: "However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement." Finally, the sentence in the proposed rule regarding operating policies or procedures has been deleted here because it seems relevant only to the administrative exemption and is addressed in that subpart of the final regulations.

Most of the commenters support the clarifying changes to the definition of "primary duty" in section 541.700. For example, the HR Policy Association, the U.S. Chamber of Commerce, the National Restaurant Association, and the National Association of Manufacturers welcome clarification of the primary duty concept, particularly with respect to the amount of time spent performing exempt work, and found section 541.700 simpler to apply and more reflective of the current workplace. The National Association of Federal Wage Hour Consultants states that: "'Primary Duty' is currently one of the most misunderstood sections of the regulations. Too often enforcement personnel, the business community and its representatives confuse 'primary' with a 'mechanical' percentage test, *i.e.*, 50-plus percent."

Some commenters object to the definition of "primary duty" in section 541.700 as the "principal, main, major or most important duty that the employee performs." Commenters such as the National Employment Lawyers Association, for example, argue that terms such as "most important" are vague, expand the primary duty analysis "far beyond its current bounds," and would lead to increased litigation.

This language is the first time the Department has attempted to include a short, general statement defining the term "primary" in the regulations, but it is not a change in current law. Numerous federal courts, relying primarily on dictionary definitions, have defined the term "primary" to mean "most important," "principal" or "chief." *See, e.g., Mellas* v. *City of Puyallup,* 1999 WL 841240, at *2 (9th Cir. 1999) ("most important" duty); *Dalheim* v. *KDFW–TV,* 918 F.2d 1220, 1227 (5th Cir. 1990) ("[T]he essence of the test is to determine the employee's chief or principal duty * * * [T]he employee's primary duty will usually be what she does that is of principal value to the employer"); *Donovan* v. *Burger King Corp.*, 675 F.2d 516, 521 (2nd Cir. 1982) (primary duty defined as the employee's "principal responsibilities" that are "most important or critical to the success" of the employer); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (primary duty defined as the "principal" or "chief" duty, rather than "over one-half") (internal quotation marks omitted). Because the Department relied on these cases, the existing regulations, and dictionary definitions to formulate the general definition of "primary," the commenters' concerns are without merit.

The major comments expressing opposition to proposed section 541.700 view the primary duty definition to be a major departure from a purported existing "bright-line" test in the current regulations requiring exempt employees to spend more than 50 percent of their time performing exempt work. The American Federation of Government Employees (AFGE), for example, states that proposed section 541.700 was "essentially, the destruction of the most crucial test in the entire FLSA exemption area." The AFGE, like other commenters objecting to this section, believes that the current primary duty test "provides an absolutely essential 'bright line' for exemption analysis: 50% of an employee's actual job performance must be engaged in exempt activities." Abandonment of this "bright-line test," such commenters assert, will result in increased confusion and litigation. The National Employment Lawyers Association similarly states: "If the definition of 'primary duty' is to have meaning as a limit on the exemptions, it must contain a time component that has more effect than being one of five enumerated factors to consider."

After careful consideration, the Department must reject these objections. These comments fail to take account of the existing regulations and federal case law. Comments objecting to section 541.700 are simply wrong in asserting that the current law defines "primary duty" by a bright-line 50 percent test. The existing section 541.103 has for decades provided that "it may be taken *as a good rule of thumb* that primary duty means the major part, or over 50 percent, of the employee's time" but that "[t]ime alone, however, is not the sole test." Thus, section 22c02 of the

Wage and Hour Field Operations Handbook states that "the 50% test is not a hard-and-fast rule but rather a flexible rule of thumb. In many cases, an exempt employee may spend less than 50% of his time in managerial duties but still have management as his primary duty." Federal courts also recognize that the current regulations establish a 50 percent "rule of thumb"—not a "bright-line" test. Federal courts have found many employees exempt who spent less than 50 percent of their time performing exempt work. *See, e.g., Jones* v. *Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (management found to be the "primary duty" of employee who spent 75 to 80 percent of her time on basic line-worker tasks); *Murray* v. *Stuckey's, Inc.*, 939 F.2d 614, 618–20 (8th Cir. 1991) (manager met the "primary duty" test despite spending 65 to 90 percent of his time in non-management duties), *cert. denied*, 502 U.S. 1073 (1992); *Glefke* v. *K.F.C. Take Home Food Co.*, 1993 WL 521993, at *4–5 (E.D. Mich. 1993) (employee found exempt despite assertion that she spent less than 20 percent of time on managerial duties because "the percentage of time is not determinative of the primary duty question, rather, it is the collective weight of the four factors"); *Stein* v. *J.C. Penney Co.*, 557 F. Supp. 398, 404–05 (W.D. Tenn. 1983) (employee spending 70 to 80 percent of his time on non-managerial work held exempt because the "overall nature of the job" is determinative, not "the precise percentage of time involved in a particular type of work").

Adopting a strict 50-percent rule for the first time would not be appropriate, as evidenced by the comments discussed in the *Structure and Organization* section above, because of the difficulties of tracking the amount of time spent on exempt tasks. An inflexible 50-percent rule has the same flaws as an inflexible 20-percent rule. Such a rule would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens).

Other commenters objecting to section 541.700, such as the International Federation of Professional & Technical Engineers, assert that section 541.700 adopts an "Alice in Wonderland" approach. They assert that this section creates an "outcome-oriented double standard" because it provides that employees who spend more than 50 percent of their time performing exempt work generally satisfy the primary duty test, while employees spending less than 50 percent do not necessarily fail the test.

But what the commenters call an "Alice in Wonderland" double standard actually appears in the current Part 541 regulations. For decades, current section 541.103 has created a presumption of exempt status for employees crossing the 50-percent threshold while recognizing no presumption of nonexempt status for those who do not cross the threshold. The existing section 541.103 states:

> Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion.

*See also Auer* v. *Robbins*, 65 F.3d 702, 712 (8th Cir. 1995) ("if an employee spends less than 50% of his time on managerial duties, he is not presumed to have a primary duty of nonmanagement"), *aff'd on another issue*, 519 U.S. 452 (1997). The final rule retains this current language with only minor editorial changes.

The final rule lists the same four non-exclusive factors as the proposal for determining the primary duty of an employee: (1) The relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work. The time spent performing exempt work has always been, and will continue to be, just one factor for determining primary duty. Spending more than 50 percent of the time performing exempt work has been, and will continue to be, indicative of exempt status. Spending less than 50 percent of the time performing exempt work has never been, and will not be, dispositive of nonexempt status.

Several commenters request clarification as to whether the determination of an employee's primary duty is made by looking to a single duty or many duties. The Morgan, Lewis & Bockius law firm, for example, suggests that the Department change "primary duty" to "primary duties," in order to reduce the perception that any single task, rather than the aggregate of job tasks, defines an employee's primary duty. In contrast, the AFL–CIO asserts that the term is properly considered in the singular.

The current law is actually somewhere in the middle of these two viewpoints. Although "primary duty" is generally singular, an employee's primary duty can encompass multiple tasks. Thus, for example, an employee would have "management" as his primary duty if he performed tasks such as preparing budgets, negotiating contracts, planning the work, and reporting on performance. As stated in the 1949 Weiss Report at 61, the search for an employee's primary duty is a search for the "character of the employee's job as a whole." Thus, both the current and final regulations "call for a holistic approach to determining an employee's primary duty," not "day-by-day scrutiny of the tasks of managerial or administrative employees." *Counts* v. *South Carolina Electric & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003) ("Nothing in the FLSA compels any particular time frame for determining an employee's primary duty"). To clarify this "holistic approach," the Department has reinserted in subsection (a) the language from current 541.304 that the determination of an employee's primary duty must be based on all the facts in a particular case "*with the major emphasis on the character of the employee's job as a whole.*"

The Department considered but has not incorporated in the final rule other various proposals to add, delete or modify section 541.700. For example, because the Department does not intend to eliminate the amount of time spent on exempt tasks as a factor for determining primary duty, we reject the suggestion of the Morgan, Lewis & Bockius law firm and others to remove the language stating that time is a "useful guide." The Smith Currie law firm proposes adding "in the discretion of the employer" to the definition of primary duty. However, the primary duty determination is based on all the facts and circumstances of each case, not upon the "discretion" of the employer. Similarly, the National Association of Chain Drug Stores (NACDS) proposes allowing employers the opportunity, as they have under the Americans with Disabilities Act, to create a "rebuttable presumption" regarding an employee's primary duty by identifying the principal duties of the employee in a job description. NACDS suggests adding "as determined or expressed by the employer in any agreement, job status form, job offer, job description or other document created by the employer in good faith and acknowledged by the employee verbally

or in writing." The Department recognizes that such documents or agreements may be of some evidentiary value. However, the work actually performed by an employee—not any description or agreement—controls the determination of the employee's primary duty. *See* 1949 Weiss Report at 86 (rejecting proposal to permit employer and employee to reach agreement as to whether exemptions apply); 1940 Stein Report at 25 ("a title alone is of little or no assistance in determining the true importance of an employee to the employer. Titles can be had cheaply and are of no determinative value"). The Food Marketing Institute comments that the definition should explicitly state that employees, such as managers in retail establishments, "should not be subject to arbitrary calculations of the time they spend performing manual labor. * * *" As set forth in the cases cited above, and in the examples in the final rule, the Department has made clear that managers may perform exempt work less than 50 percent of the time and nevertheless have a primary duty of management, depending upon the collective weight of the factors. Final section 541.106 also provides that an employee's managerial duties can be performed concurrently with nonexempt tasks. No further clarification of this point is necessary. Finally, the Fisher & Phillips law firm seeks modification of the wage comparison factor to reflect that exempt employees are frequently eligible for other forms of compensation not widely available to nonexempt employees. Because final section 541.700(a) already provides that all the facts and circumstances of each case are relevant, such facts may be taken into account in determining primary duty without further changes in this section.

Section 541.701 Customarily and Regularly

Proposed section 541.701 defined the phrase "customarily and regularly" to mean "a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks."

The final section 541.701 retains the proposed language without change.

The Department received a few comments on section 541.701 that the "every workweek" requirement in section 541.701 does not reflect that some exempt tasks may not be performed every week or only once each week. The Grocery Manufacturers of America (GMA), for example, states that this language is ambiguous and does not take into account that certain activities, such as lengthy preparation and presentation time that often goes into significant sales efforts, may not take place "recurrently" within a given week. GMA proposes that the term "customarily and regularly" should mean "duties performed at least once in each workweek." Similarly, the McInroy & Rigby law firm and the Miller Canfield law firm seek clarification of the "workweek-by-workweek" timeframe and its application in determining exempt activities.

The Department does not believe any changes to section 541.701 are necessary. A similar definition of the term "customarily and regularly" has appeared for decades in section 541.107(b) of the existing regulations, and case law does not indicate significant difficulties with applying the definition. The term "customarily and regularly" requires a case-by-case determination, based on all the facts and circumstances, over a time period of sufficient duration to exclude anomalies. *See, e.g.*, Wage and Hour Opinion of August 20, 1992, 1992 WL 845098 (analysis should be "over a significant time span, especially in smaller organizations * * * to eliminate the possibility of significant cycles in work requirements and to support that there are sufficient exempt duties on a week-in-week-out basis to support the exemption claimed"); Wage and Hour Field Operations Handbook, section 22c00(d) ("The determination as to whether an employee customarily and regularly supervises other employees * * * depends on all the facts and circumstances"). Nothing in this section requires that, to meet the definition of "customarily and regularly," a task be performed more than once a week or that a task be performed each and every workweek.

Section 541.702 Exempt and Nonexempt Work

Proposed section 541.702 stated, "The term 'exempt work' means all work described in §§ 541.100, 541.101, 541.102, 541.200, 541.206, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities directly and closely related to such work. All other work is considered 'nonexempt.'" The final rule deletes the inadvertent reference to a non-existent section 541.206 and the reference to the now-deleted "sole charge" exemption in proposed section 541.102. The Department received no significant comments on this section, and thus has made no other changes.

Section 541.703 Directly and Closely Related

Proposed section 541.703 defined the phrase "directly and closely related" to mean "tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work." Subsection (a) further explains that "directly and closely related" work "may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's more important work cannot be performed properly. Work 'directly and closely related' to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not 'directly and closely related' if the work is remotely related or completely unrelated to exempt duties." Proposed section 541.703(b) set forth 10 examples to illustrate the type of work that is and is not normally considered as directly and closely related to exempt work.

The final section 541.703 retains the proposed language without change.

The AFL–CIO comments that under the proposed section, "it is hard to imagine any type of nonexempt work failing to qualify as 'directly and closely related.'"

The Department notes that the explanation of the phrase "directly and closely related" in final section 541.703(a) is taken from the current sections 541.108 and 541.202, including the specific language concerning what is not "directly and closely related" to which the AFL–CIO objected. *See* current 29 CFR 541.202(d) ("These 'directly and closely related' duties are distinguishable from * * * *those which are remotely related or completely unrelated to the more important tasks*") (emphasis added). Similarly, the notion that "directly and closely related" work contributes to or facilitates the performance of exempt work is a long-standing and common sense concept reflected in the current rule. *See* current 29 CFR 541.202(c). The Department did not intend any substantive change to the meaning of the phrase "directly and closely related" and intends that the term be interpreted in accordance with the long-standing meaning under the current rule. *See Harrison* v. *Preston Trucking Co.*, 201 F. Supp. 654, 658–59 (D. Md. 1962) ("[T]he test is not whether the work is essential to the proper

performance of the more important work, but whether it is related").

The International Association of Fire Fighters comments, without offering any specific suggestions, that the Department should add examples to the section concerning what is not "directly and closely related" to exempt work. Other commenters make specific suggestions for additional tasks and examples including, among others, computer employees performing software debugging and other tasks (Contract Services Association), therapists or counselors participating in outdoor activities with patients as part of a treatment program (FLSA Reform Coalition) and financial consultants engaging in activities related to acquiring customers (Securities Industry Association).

The Department has retained the proposed rule without any additions. The question of whether work is "directly and closely related" to the performance of exempt work is "one of fact depending upon the particular situation involved." *See* 1949 Weiss Report at 30. The final rule provides 10 representative examples to assist in illustrating the "directly and closely related" concept. Each of the examples is taken directly from the current rule. In the interest of streamlining the regulations, the proposed and final rule consolidated the most salient examples. Given the fact-intensive nature of the inquiry, the Department believes that, similar to the approach taken in the current rule, providing guiding principles and these specific illustrative examples best enables a determination of what is and is not "directly and closely related." The Department believes final section 541.703 is straightforward and amply offers guiding principles that readily can be applied.

Section 541.704 Use of Manuals

Subpart H of the final regulations moves regulatory language on the use of manuals from proposed section 541.204, regarding the administrative exemption, to a new section 541.704 because the section is equally applicable to the other section 13(a)(1) exemptions. Final section 541.704 makes a number of minor editorial changes to the proposed language, none of which are intended as substantive. Final section 541.704 states:

> The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

Some commenters object to the language in proposed subsections 541.204(b) and (c) regarding the use of manuals, although most commenters are supportive of the proposed language. One commenter suggests that the Department eliminate the phrase "very difficult or novel circumstances" so as not to exclude from the exemptions a highly skilled employee who must rely on or comply with manuals in other routine circumstances. Other commenters suggest that the regulations should distinguish manuals used to apply prescribed skills and knowledge in recurring and routine situations from manuals that simply set forth the bounds within which discretion and independent judgment are to be exercised with substantial leeway. These commenters state that the regulations should reinforce the idea that sharply-constrained authority to make day-to-day decisions within a narrow range of options will not satisfy the tests for exemption.

The Department has retained the provision on manuals in final section 541.704, with only minor wording changes. The proposal appropriately differentiated between manuals that dictate how an employee must apply prescribed skills in recurring and routine situations, and manuals that provide guidance involving highly complex information pertinent to difficult or novel circumstances. The provision adopted by the Department is consistent with existing case law. The employee in *McAllister* v. *Transamerica Occidental Life Insurance Co.*, 325 F.3d 997 (8th Cir. 2003), for example, was a claims coordinator responsible for handling the most complex death and disability insurance claims independently; including the complex and large dollar cases involving contestable claims, fraud and disappearances. The employee oversaw the investigation of claims, reviewed investigation files and determined if further investigation was necessary. The court found the employee to be an exempt administrator even though she relied upon a claims manual. The court quoted a statement made in the introduction to the manual itself, stating that the manual could not be written in sufficient detail to cover all facets of claims handling and that a large percentage of the work could not be guided by the manual. The court held the employee was exempt because the manual gave her authority to decide whether to pursue a fraudulent claim investigation and she had significant settlement authority. She did not merely apply specific, well-established guidance or constraining standards. *See also Haywood* v. *North American Van Lines, Inc.*, 121 F.3d 1066, 1073 (7th Cir. 1997) (employee administratively exempt even though she followed established procedures because the guidelines gave employees latitude in negotiating a settlement, including advising employees to use "common sense"); *Dymond* v. *United States Postal Service*, 670 F.2d 93 (8th Cir. 1982) (finding postal inspectors exempt even though some of their duties required them to follow a field manual that contained detailed procedures and standards). *Compare Brock* v. *National Health Corp.*, 667 F. Supp. 557, 566 (M.D. Tenn. 1987) ("staff accountants" utilizing two major reference manuals not exempt as administrative employees where they simply "tabulated numbers by merely following the prescribed steps set out in a manual"). *See also Ale* v. *Tennessee Valley Authority*, 269 F.3d 680, 686 (6th Cir. 2001) (training officer not exempt administrative employee where employee simply applied knowledge in following prescribed procedures and determining whether specified standards were met under Administrative Orders); *Cooke* v. *General Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997) (citing section 541.207(c)(2)'s preclusion of administrative exemption to "an inspector who must follow 'well-established techniques and procedures which may have been cataloged and described in manuals or other sources' ").

Final section 541.704 is intended to avoid the absurd result, noted by several commenters, reached in *Hashop* v. *Rockwell Space Operations Co.*, 867 F. Supp. 1287 (S.D. Tex. 1994). The plaintiffs in the *Rockwell Space Operations* case were instructors who trained "Space Shuttle ground control personnel during simulated missions." *Id.* at 1291. The plaintiffs were responsible for assisting in development of the script for the simulated missions, running the simulation, and debriefing Mission Control on whether the trainees handled simulated anomalies correctly. *Id.* at 1292. The plaintiffs had college degrees in electrical engineering,

mathematics or physics. *Id.* at 1296. Nonetheless, the court found the plaintiffs were not exempt professionals because the appropriate responses to simulated Space Shuttle malfunctions were contained in a manual. *Id.* at 1298. In the Department's view, the reliance by an engineer or physicist on a manual outlining appropriate responses to a Space Shuttle emergency (or a problem in a nuclear reactor, as another example) should not transform a learned professional scientist into a nonexempt technician.

The Department believes that the discussion of company manuals in the final rule is consistent with the weight of existing case law. The *Rockwell Space Operations* case appears to be an anomaly which has not been followed by other courts. In addition, final section 541.704 properly distinguishes between manuals that provide specific directions on routine and recurring circumstances and those that provide general guidance on addressing open-ended or novel circumstances.

Section 541.705 Trainees (Proposed § 541.704)

Proposed section 541.704 stated that the exemptions are not available to "employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee."

Proposed section 541.704 has been renumbered to 541.705 in the final regulation, but the proposed language is adopted without change.

The U.S. Chamber of Commerce (Chamber) suggests that this section should be modified to allow employees in bona fide executive training programs to qualify under the exemptions. The Chamber argues that the "principal" duty of those in such training programs is not the varied nonexempt tasks they may perform, but rather, it is receiving the skills and knowledge necessary to assume managerial and/or executive roles. Furthermore, the Chamber states, the "primary duty" of such trainees is substantially different from nonexempt employees.

The Department has no statutory authority to provide exemptions for management trainees who do not perform exempt duties and therefore must reject the Chamber's request to expand proposed section 541.704. *See* Wage and Hour Opinion of August 26, 1976, 1976 WL 41748; 1949 Weiss Report at 47–48. Employees, including trainees, who do not "actually perform" the duties of an exempt executive, administrative, professional, outside sales or computer employee cannot be considered exempt. *See* Wage and Hour Opinion of March 7, 1994, 1994 WL 1004555; *Dole* v. *Papa Gino's of America, Inc.*, 712 F. Supp. 1038, 1042 (D. Mass. 1989) (associate managers performing "crew member" work to "learn by doing" were nonexempt trainees).

Other comments request additional clarification of the definition of "trainee," ask whether trainees who would become exempt upon completion of their training should be exempt while in training, and ask whether "interns" are trainees.

The Department does not believe further clarification is necessary because section 541.705 is relatively straightforward. The inquiry in all cases simply involves determining whether or not the employee is "actually performing the duties of" an executive, administrative, professional, outside sales or computer employee. The Department recognizes that there may be formalized, bona fide executive or management training programs that involve employees "actually performing" exempt work, but other training programs can involve performance of significant nonexempt work. For example, an employee in a management training program of a restaurant who spends the first month of the program washing dishes and the second month of the program cooking does not have a primary duty of management. Accordingly, it is not appropriate to adopt a blanket exemption for all "trainees."

Section 541.706 Emergencies (Proposed § 541.705)

Proposed section 541.705(a) provided that an "exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work." Proposed section 541.705(b) stated that an "'emergency' does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate." Proposed section 541.705(c) set forth four illustrative examples to assist in distinguishing exempt emergency work from routine work that would not be considered exempt.

Proposed section 541.705 has been renumbered as 541.706, but the final rule retains the proposed language without change.

Comments from the Printing Industries of America and the Kullman Firm ask that the Department specifically include labor strikes and lockouts in this provision. Other comments, including those from the Miller Canfield law firm, suggest additional examples involving emergencies that endanger the public safety.

In light of the clear guiding principles set forth in proposed section 541.705, the Department sees no reason to change the language of the final provision. The Department agrees with Miller Canfield that emergencies arising out of an employer's business and affecting the public health or welfare can qualify as emergencies under this section, applying the same standards as emergencies that affect the safety of employees or customers. The main purpose of this provision is to provide a measure of common sense and flexibility in the regulations to allow for real emergencies "of the kind for which no provision can practicably be made by the employer in advance of their occurrence." *See* 1949 Weiss Report at 42. The Department also recognizes that, depending upon the circumstances, a labor strike may qualify as an emergency for some short time period, although all the facts must be considered in order to determine the length of the "emergency" situation. *See Dunlop* v. *Western Union Telegraph Co.*, 22 Wage & Hour Cas. (BNA) 859 (D.N.J. 1976).

The list of situations in which exempt employees could perform nonexempt work without loss of the exemption is not meant to be exhaustive. Other such instances of exempt employees performing nonexempt work under unanticipated circumstances without loss of the exemption could arise on a case-by-case basis. In addition, it continues to be the Department's position that nonexempt work cannot routinely be assigned to exempt employees solely for the convenience of an employer without calling into question the application of the exemption to that employee.

Section 541.707 Occasional Tasks (Proposed § 541.706)

Proposed section 541.706 provided that occasional, infrequently recurring tasks, "that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are

considered exempt work." To determine whether such work is exempt work, proposed section 541.706 set forth the following factors: "whether the same work is performed by any of the executive's subordinates; practicability of delegating the work to a nonexempt employee; whether the executive performs the task frequently or occasionally; and existence of an industry practice for the executive to perform the task."

Proposed section 541.706 has been renumbered to 541.707. Since this section is equally applicable to all the exemptions, the final section 541.707 deletes the inadvertent references to "executives" throughout and instead refers to "exempt employees."

Various commenters state that the regulations should take into account that exempt employees may choose, consistent with the nature of the employer's establishment and its operational requirements at a particular time, to perform nonexempt work necessary to accomplish the employee's primary duty. The Department believes that this issue has been adequately addressed in final section 541.106 (concurrent duties), and no changes are necessary here.

Section 541.708 Combination Exemptions (Proposed § 541.707)

Proposed section 541.707 provided that employees "who perform a combination of exempt duties as set forth in these regulations for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee who works 40 percent of the time performing exempt administrative duties and another 40 percent of the time performing exempt executive duties may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section."

Proposed section 541.707 has been renumbered as section 541.708. The final rule modifies the second sentence of section 541.708 to read: "Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption."

The final rule retains the allowance for "tacking," or combining exempt work which may fall under different subparts of Part 541, while responding to comments raising concerns about the interplay of "primary duty" with the example set forth in proposed section 541.707. The FLSA Reform Coalition and the American Insurance Association, for example, point out that the example in the proposed section suggests that an employee who works 40 percent of the time performing exempt administrative duties would be nonexempt absent the additional time spent on executive duties. The Department agrees with these concerns, and also agrees that such a suggestion in the proposal is contrary to the definition of "primary duty" in section 541.700. Under section 541.700, such an employee would be an exempt administrator, even without the executive duties, if his or her administrative tasks constituted the employee's primary duty, regardless of the amount of time spent on them. Accordingly, the Department has changed the second sentence of the proposed section as follows, to clarify the intent and interplay of final section 541.708 with the primary duty concept of section 541.700: "Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption." The Department's clarification responds to similar comments by the HR Policy Association, the Society for Human Resource Management, the Food Marketing Institute, the National Council of Agricultural Employers and the Public Sector FLSA Coalition.

Section 541.709 Motion Picture Producing Industry (Proposed § 541.708)

Proposed section 541.708 provided an exception to the salary basis requirements for otherwise exempt executive, administrative, and professional employees in the motion picture producing industry. Generally, so long as such employees are earning a base rate of at least $650 a week based on a six-day workweek, employers may classify them as exempt even though they work partial workweeks and are paid a daily rate, rather than a weekly salary.

Proposed section 541.708 has been renumbered as section 541.709. The final section 541.709 retains the proposed language, except for a single clarifying correction in grammar (changing "under subparts B, C and D of this part" to "under subparts B, C or D of this part"). The final rule also adjusts the $650 figure to $695, consistent with the increased minimum salary level for exemption.

The Department received only a few comments on this section. However, the Akin, Gump, Strauss, Hauer & Feld law firm argues, on behalf of a number of entertainment technology companies, that the rationale for section 541.709 is the project-based nature of the motion picture industry, one in which otherwise exempt employees are hired for finite periods of time and often work partial workweeks. Since the same "peculiar employment circumstances" existing in the motion picture producing industry also exist throughout much of the entertainment industry, the firm states, section 541.709 should be expanded to cover the "entertainment industry" generally. The commenter suggests that the definition of the entertainment industry in the Employee Retirement Income Security Act (ERISA) could be adopted for purposes of section 541.709.

In adopting the exception for the motion picture producing industry in 1953, the Department agreed with the Association of Motion Picture Producers that given the "peculiar employment conditions" of the industry, the producers are not able to economically employ needed specialists on a constant basis, but must frequently employ such employees for partial workweeks. Accordingly, the industry developed over the years "methods of compensation which reflect this pattern of operations." *See* 18 FR 2881 (May 19, 1953); 18 FR 3930 (July 7, 1953).

Without further information and consideration of particular employment circumstances, the Department cannot extend the exception to the entire entertainment industry as suggested. The Department is not unaware, however, that technological advances in the past half century make it more likely that, on a case-by-case basis, the rationale underlying section 541.709 might be applied more broadly depending upon the specific facts. In that regard, the Department issued an opinion letter in 1963 extending the exception to employees of producers of television films and videotapes, noting, "the production of T.V. films and videotapes encompasses the same employment practices and conditions which characterize the production of motion pictures." Wage and Hour Opinion of October 29, 1963; *see also* Wage and Hour Field Operations Handbook, section 22b09 (adopting this extension to television and videotapes).

An additional commenter argues for the elimination of the "exemption" for production assistants and post-production assistants. This commenter misunderstands that section 541.709 relates only to an exception from the salary basis requirements for *otherwise exempt* employees in the industry.

Section 541.710 Employees of Public Agencies (Proposed § 541.709)

Proposed section 541.709(a) provided that an "employee of a public agency

who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because: (1) Permission for its use has not been sought or has been sought and denied; (2) Accrued leave has been exhausted; or (3) The employee chooses to use leave without pay." Proposed section 541.709(b) stated that "deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced."

Proposed section 541.709 has been renumbered as final section 541.710, and retains the proposed language without change.

The language in section 541.710 is from the current section 541.5(d), and the reasons for its promulgation were explained in 57 FR 37677 (August 19, 1992) and continue to be valid. The Department received comments from public employers and employees during the current rulemaking addressing many of the provisions of the entire proposal, including the salary basis of payment. None of their comments, however, addressed the constitutional or statutory public accountability requirements in the funding of state and local governments that was the original rationale for this particular provision. The Department continues to believe this is a necessary exception to the salary basis requirement for public employees, and it is included in the final regulations.

## V. Paperwork Reduction Act

This rule contains no new information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping requirements codified at 29 CFR Part 516, which were approved by the Office of Management and Budget under OMB Control number 1215–0017. See 29 CFR 516.0 and 516.3.

## VI. Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is an "economically significant" regulatory action under section 3(f)(1) of Executive Order 12866. Based on the analysis presented below, the Department has determined that the final rule will have an annual effect on the economy of $100 million or more. For similar reasons, the Department has concluded that this rule also is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). As a result, the Department has prepared a Regulatory Impact Analysis (RIA) in connection with this rule as required under Section 6(a)(3) of the Order and the Office of Management and Budget has reviewed the rule. The RIA in its entirety is presented below.

*Regulatory Impact Analysis*

Chapter 1: Executive Summary

The final rule will restore overtime protection for lower-wage workers, strengthen overtime protection for middle-income workers including first responders, and reduce costly and lengthy litigation. Both workers and employers will benefit from having clearer rules that are easier to understand and enforce. More workers will know their rights and if they are being paid correctly, more employers will understand exactly what their obligations are for paying overtime, and clearer more up-to-date rules will help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately.

Specifically:

- Raising the salary level test to $455 will strengthen overtime protection for more than 6.7 million salaried workers who earn $155 or more and less than $455 per week regardless of their duties or exempt status.
- There are 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current regulation, will be automatic under the final rule. This includes 2.6 million nonexempt salaried white collar employees who are at particular risk of being misclassified.
- There are 1.3 million currently exempt white collar salaried workers who will gain overtime protection.
- The final rule is as protective as the current regulation for the 57.0 million paid hourly and salaried workers who earn between $23,660 and $100,000 per year.
- An estimated 107,000 workers who earn $100,000 or more per year could lose their overtime protection from the new highly compensated test.
- The total first-year implementation costs to employers are estimated to be $738.5 million, of which $627.1 is related to reviewing the regulation and revising overtime policies and $111.4 million is related to conducting job reviews.
- Transfers from employers to employees, in the form of greater overtime pay or higher base salaries, are estimated to be $375 million per year. Therefore, the total cost to employers is estimated to be $1.1 billion in year-one and $375 million per year thereafter.
- Updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least $252.2 million per year.
- There is not likely to be a substantial impact on small businesses or state and local governments.

Due to data limitations, a variety of benefits from the final rule can only be discussed qualitatively. For example:

- It will be more difficult to exempt workers from overtime as executive employees.
- Raising the salary level test to $455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.
- Updating and clarifying the rule will reduce the human resource and legal costs for classifying workers (particularly for small businesses), and reduced litigation could improve job opportunities.
- Updating the rule is an action forcing event and a catalyst for compliance. Employers who may not have undertaken an audit of the classification of their workforce will be more likely to do so after the promulgation of the final rule, resulting

in greater levels of compliance with the law.

Chapter 2: Summary of the Updates to Part 541 That Affect the Economic Analysis

The first step in analyzing the costs and benefits associated with this rulemaking is to compare the existing Part 541 regulations with the final rule and determine the likely impact it will have on the exempt or nonexempt status of workers. After analyzing the impact of the salary level increase, updating the duties tests, and the highly compensated test, the Department reached the following conclusions:

- Employees earning less than $155 per week will not be affected.
- Increasing the salary level test will strengthen overtime protection for salaried workers who earn $155 or more and less than $455 per week regardless of their duties or current exempt status. Hourly workers in this income range will continue to be guaranteed overtime protection.
- Exempt employees earning less than $455 per week will gain overtime protection, thus resulting in additional payroll costs to employers.
- The final rule is as protective as the current regulation for workers who earn between $23,660 and $100,000 per year. On the whole, employees will gain overtime protection because some revisions are more protective than the existing short duties tests. However, this number is too small to estimate quantitatively.
- An estimated 107,000 employees earning $100,000 per year or more could lose overtime protection under the highly compensated test.
- The final rule is more protective for police officers, fire fighters, paramedics, emergency medical technicians, and other first responders, and the highly compensated test does not apply to those who are not performing office or non-manual duties.
- The Part 541 exemptions also do not apply to manual laborers or other non-management blue-collar workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

2.1 The Impact of Streamlining the Duties Tests and Raising the Salary Level Test

Under the existing regulations, the minimum salary level for exemption is only $155 per week ($8,060 annually). Employees earning at least $155 per week and less than $250 per week are tested for exemption under the existing "long" duties tests. Employees earning at least $250 per week ($13,000 annually) are considered "higher salaried" employees under the existing regulations, and are tested for exemption under the "short" duties tests. The final rule increases the minimum salary level for exemption to $455 per week, a $300 per week increase.

As discussed in the preamble, the Department disagrees with the commenters who argue that the Department's proposal to move away from the "long" and "short" duties test structure of the existing regulations will result in employees losing overtime protection. This assertion fails to account for the impact of the increased minimum salary level in the final rule. The final rule guarantees overtime protection for all workers earning less than $455 per week ($23,660 annually), the new minimum salary level for exemption. Thus, all employees earning at least $155 per week and less than $250 per week—the workers currently tested for exemption under the "long" duties tests—will be guaranteed overtime protection, regardless of their job duties, under the final regulations. Overtime protection is also guaranteed under the final rule for employees earning at least $250 per week and less than $455 per week who are currently tested for exemption under the existing "short" duties tests.

Comparisons between the existing "long" duties tests and the standard tests in the final regulation to describe the impacts on workers are thus misleading and inappropriate. The "long" duties tests, under which some employees are exempt and others nonexempt, have been replaced in the final rule by guaranteed overtime protection. Accordingly, the Department concludes that no worker who earns less than $455 per week will lose their overtime protection under the final regulations. Most employees earning less than $455 per week ($23,660 annually) who are exempt under the existing regulations will be entitled to overtime pay under the final regulations (there are some workers, such as teachers, doctors, lawyers, and clergy, who are statutorily exempt or whose exempt status is not affected by the increased salary requirement in the final rule).

The additional overtime protections for employees currently earning less than $455 per week and tested for exemption under the "long" and "short" duties tests are illustrated in Table 2–1:

TABLE 2–1.—COMPARISON OF SALARY LEVELS

| Earnings | Existing regulations | Final regulations |
|---|---|---|
| Less than $155/week | Guaranteed Overtime | Guaranteed Overtime. |
| $155 to $249.99/week | Long Duties Test | Guaranteed Overtime. |
| $250 to $454.99/week | Short Duties Test | Guaranteed Overtime. |
| $455/week to $100,000/year | Short Duties Test | Standard Duties Test. |
| $100,000/year or more | Short Duties Test | Highly Compensated Test. |

In the sections that follow, the Department presents its assessment of the impact the standard tests will have on the exempt status of workers compared to the current short duties tests. In several cases, the Department determined that the impact of the final rule will be too small to assess quantitatively because of the methodology used to estimate the number of exempt workers (presented below in Chapter 3).

The methodology used to estimate the number of currently exempt workers is based upon the broad WHD exemption probability categories presented in Table 3–2 that were designed to produce national estimates of the number of exempt and nonexempt workers. The WHD exemption probability categories were not designed to estimate the number of exempt workers for each Part 541 exemption (executive, administrative, or professional) because there is significant overlap in the exemptions with some workers in a number of occupations being potentially exempt under more than one duties test. Moreover, some occupations include both supervisory and production workers. Given the lack of data on the duties being performed by specific workers in the Current Population Survey, the Department concludes that it is impossible to quantitatively estimate the number of exempt workers

resulting from the *deminimis* differences in the standard duties tests compared to the current short duties tests (see the discussions presented below).

2.2 Impact of the Final Duties Test for Executive Employees

Although some commenters asserted the proposed duties test for executive employees would reduce overtime protection for workers, as discussed in the preamble above and shown in Table 2–2, the final standard duties test for executives, like the proposed duties test, is stronger than the current short duties test because it incorporates an additional requirement taken from the current long duties test: An exempt executive must have authority to hire or fire other employees, or the exempt executive's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. The final rule also returns to the language in the current rule "whose primary duty" is management, instead of the proposed rule's "with a primary duty" of management.

Because of these changes, the Department concludes the standard duties test for executive employees in the proposed and final regulations is more protective than the current short test and some workers may gain overtime protection. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

TABLE 2–2.—COMPARING THE DUTIES TEST FOR EXECUTIVE EMPLOYEES

| Salary level | Current short test $250 per week | Final standard test $455 per week |
|---|---|---|
| Duties | Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and<br>Who customarily and regularly directs the work of two or more other employees. | Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;<br>Who customarily and regularly directs the work of two or more other employees; and<br>Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. |

2.3 Impact of the Final Duties Tests for Administrative Employees

The proposed duties tests for administrative employees generated a significant number of comments. As discussed in the preamble above, the final rule's duties test for administrative employees is significantly different than the test contained in the proposed rule. In drafting the final language, the Department sought to avoid introducing new terms (such as "position of responsibility") that generated confusion in the comments on the proposal and to retain terms (such as "primary duty," "discretion and independent judgment" and "general business operations") that are used in the current rule and have been clarified by court decisions and opinion letters. The final regulatory text also requires that the discretion and independent judgment must be exercised "with respect to matters of significance," language that appears only in the current interpretive guidelines and not the existing regulatory text.

As Table 2–3 indicates, the standard duties test for administrative employees in the final rule is very similar, if not functionally identical, to the current short duties test when the current interpretive guidelines are taken into account as would be appropriate. Based on the significant changes the Department made in the final rule to return the administrative duties test to the structure in the current rule, the Department has concluded that the standard duties test for administrative employees in the final rule is as protective as the current short test. Therefore, the Department has determined that very few, if any, workers will lose their right to overtime as a result of updating the current short test with the final standard duties test. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

TABLE 2–3.—COMPARING THE DUTIES TEST FOR ADMINISTRATIVE EMPLOYEES

| Salary level | Current short test $250 per week | Final standard test $455 per week |
|---|---|---|
| Duties | Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and<br>Which includes work requiring the exercise of discretion and independent judgment. | Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and<br>Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. |

2.4 The Impact of the Final Duties Tests for Learned Professional Employees

For reasons discussed in the preamble above, the final standard duties test for the learned professional exemption was modified from the proposed test to track the current rule's primary duty test and to restructure the proposed rule's reference to acquiring advanced knowledge through other means such as an equivalent combination of intellectual instruction and work experience so that it is consistent with the current regulation. As the preamble explains, the Department did not intend to depart from the current rule's educational requirements for the

learned professional exemption. Accordingly, the final rule clarifies that, just as under the current primary duty test, an employee must meet all three requirements of the test in order to be exempt—the primary duty must be performing work that requires advanced knowledge; the knowledge must be in a field of science or learning; and the knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The final rule also expands on each of those three components, using language from the current rule. For example, an employee's "work requiring advanced knowledge" must include work requiring the consistent exercise of discretion and judgment (see Table 2–4). The final standard duties test for learned professionals also adds language from the current long test in section 541.301(b) by defining work requiring advanced knowledge as work that is "predominantly intellectual in character" as distinguished from the "performance of routine mental, manual, mechanical or physical work." These revisions clarify that the final rule is at least as protective as current rule.

TABLE 2–4.—COMPARING THE DUTIES TEST FOR PROFESSIONAL EMPLOYEES

| Salary level | Current short test $250 per week | Final standard test $455 per week |
|---|---|---|
| Duties | Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and<br>Which includes work requiring the consistent exercise of discretion and judgment; or<br>Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. | Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or<br>Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. |

Other commenters expressed concern the proposed duties test for learned professionals would result in many workers in some occupations (*e.g.*, Licensed Practical Nurses, dental assistants, and cooks) losing overtime protection. Although most of the specific concerns raised by these comments were addressed by the Department's modifications to the proposed rule's professional duties test, discussed above, the Department notes the final rule clarifies a number of occupations. For example, Licensed Practical Nurses could not be classified as learned professionals because, unlike Registered Nurses, the possession of a specialized advanced academic degree is not a standard prerequisite for entry into that occupation. Therefore, the Department has determined very few, if any, workers will lose overtime protection as a result of updating the current short duties tests with the final standard duties test for learned professionals. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.5 The Impact of the Final Duties Test for Creative Professional Employees

As discussed in the preamble above, the comments stating the proposed revisions weakened the current duties tests illustrate the confusion and misunderstanding that surrounds the current short duties test for artistic professionals. The Department considers the language in the final rule to be a restatement of the artistic primary duty test in the current short test (see Table 2–4). Further, the final rule reflects current case law regarding the creative professional exemption for journalists while recognizing, as the current regulations do, that the duties of employees referred to as journalists vary along a wide spectrum from the nonexempt to the exempt (29 CFR 541.302(f)). Therefore, the Department considers the language in the final rule for creative professionals to be as protective as the current short test and that few, if any, creative professionals will lose overtime protection as the result of the revisions. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.6 The Impact of the Final Duties Tests for Teachers and the Practice of Law or Medicine

As discussed above in the preamble, contrary to the assertions made by some commenters, the proposed and final rule merely restate the current exclusions from the salary requirements and do not change the existing exemption criteria for teachers in educational establishments and licensed practitioners of law and medicine. The Department concludes these provisions in the final rule are not likely to result in any additional teachers in educational establishments, or licensed practitioners of law or medicine losing overtime protections compared to the current regulations.

2.7 The Impact of the Final Duties Tests for Computer Employees

Based on the comments received and for reasons discussed in the preamble above, several revisions were made in the final rule to align the current regulatory text with the specific standards adopted by Congress in 1996 for the computer employee exemption in section 13(a)(17) of the Act. As shown in Table 2–5, the Department considers the duties tests in the final regulations for computer employees to be functionally identical to those in the current regulations (section 541.303(b)) and statute (29 U.S.C. 213(a)(17)). Therefore, the Department concludes that it is unlikely that any additional employees will lose overtime protection as a result of the final duties tests for computer employees as compared to current law.

TABLE 2–5.—THE DUTIES TESTS FOR COMPUTER EMPLOYEES IN THE CURRENT AND FINAL REGULATIONS

| Salary | Current short test<br>$250 per week | Section 13(a)(17)<br>$27.63 an hour | Final standard test<br>$455 per week or $27.63 an hour |
|---|---|---|---|
| Duties ..... | Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field (as provided in 541.303).<br>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering; and<br>Whose work requires the consistent exercise of discretion and judgment. | Employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is<br>(A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications;<br>(B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;<br>(C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or<br>(D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. | The exemptions apply only to a computer employee whose primary duty consists of:<br>(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;<br>(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;<br>(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or<br>(4) A combination of the aforementioned duties, the performance of which requires the same level of skills. |

2.8 The Impact of the Final Duties Tests for Outside Sales Employees

As discussed in the preamble above, the Department has determined that the application of the proposed primary duty test to the outside sales exemption is preferable to the 20 percent tolerance test. Utilization of the explicit primary duty concept also provides a consistent approach between the structure of the outside sales exemption and the exemptions for executive, administrative, and professional employees. Moreover, any potential issues under the final rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700. Therefore, the Department concludes that few, if any, employees would lose overtime protection as a result of the final revisions to the duties tests for outside sales employees. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.9 The Impact of the Final Rule on Police Officers, Fire Fighters, Paramedics, and Other First Responders

As discussed in the preamble above, the final rule expressly provides that the section 13(a)(1) exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians (EMTs), and other first responders "regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work." Most courts have held that such workers generally are non-exempt because they typically do not perform the duties that are required for the executive or administrative exemption. Similarly, federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work requiring knowledge of an advanced type in a "field of science or learning" requiring knowledge "customarily acquired by a prolonged course of specialized intellectual instruction" as required under the current and final rules. The Department has no intention of departing from this established case law. Moreover, some police officers, firefighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test not found in the current short test that an exempt executive must have the authority to "hire or fire" other employees or make recommendations given particular weight on hiring, firing, advancement, promotion or other change of status. Therefore, the Department concludes that the executive duties tests for police officers, fire fighters, paramedics, EMTs, or other first responders in the final rule is more stringent than the current short tests and some such workers may actually gain overtime protection. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.10 The Impact of the Final Highly Compensated Test

Some employees earning $100,000 or more per year could lose overtime protection because of the less stringent duties test applicable to these employees under the highly compensated test adopted in the final regulations. However, the number of highly compensated employees earning $100,000 or more per year who could lose protection is relatively small—approximately 107,000 (see Chapter 4). Taking into account the differences in regional wage levels, the highly compensated test has been set high enough to avoid exempting employees who are likely to be otherwise entitled to overtime protection. Adopting a $100,000 salary level for the highly compensated test, increased from the proposed $65,000 level, will result in far fewer workers being reclassified as exempt compared to the proposed rule. Moreover, in the Department's enforcement experience, most salaried

white collar workers earning $100,000 or more per year would satisfy the existing short test and the final standard test. As shown below in Chapter 4, most salaried white-collar workers earning $100,000 or more per year are already exempt and there are very few hourly workers earning $100,000 or more per year in the white-collar occupations (only 47,000) likely to be affected. The Department also notes that the highly compensated test will not affect police, fire fighters, paramedics, EMT's and other first responders who are not performing office or non-manual work, nor will it affect manual laborers or other blue-collar workers who perform work involving repetitive operations with their hands, physical skill and energy.

2.11 The Impact of the Final Safe Harbor Provision

As explained in the preamble above, the Department has decided to retain in final subsection 541.603(c) the proposed approach that an employer who has an actual practice of making improper deductions will lose the exemption during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the improper deductions. However, if an employer has a clearly communicated policy prohibiting improper deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. The Department believes that the safe harbor provision is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole without providing a windfall to workers who have not been harmed. The final rule encourages employers to adopt proactive management practices that demonstrate the employers' intent to pay on a salary basis and correct violative payroll practices. In addition, employees will benefit from the additional notification of their rights under the FLSA. The updated safe harbor provision in the final rule will reduce costly and lengthy litigation while ensuring that workers whose pay is decreased in violation of the salary basis test receive their back wages. Reducing litigation costs will free up resources and stimulate economic growth.

2.12 The Impact of a Clearer and Easier to Understand Rule

Although there are a variety of benefits from the final rule that accrue to both workers and employers, data limitations enable the Department to discuss many benefits only qualitatively. One of the largest benefits to workers comes from having clearer rules that are easier to understand and enforce. More workers will know their rights and if they are being paid correctly (instead of going years without knowing they should be paid overtime). Fewer workers will be unintentionally misclassified, therefore they won't have to go to court and wait years for their back pay. Clearer more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately.

Salaried workers will also benefit from more equitable disciplinary actions (*i.e.*, under the current rule an employer would have to suspend an exempt manager for a full week for a Title VII violation in order to preserve the employee's exempt status even if the company's policy called for just a three day suspension without pay. Under the final rule salaried employees would lose only three days of pay).

Like workers, employers will also benefit from having clearer rules that are easier to understand. More employers will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced.

As explained elsewhere in the preamble, the Department recognizes the benefit of retaining relevant portions of the current standard so as not to completely jettison decades of federal court decisions and agency opinion letters and has made significant changes to the final rule that are intended to clarify the existing regulation, to make the rule easier to understand and apply to the 21st Century workplace, and to better reflect existing federal case law without substantially changing the current law. The Department believes that the final rule accomplishes these objectives and will result in some reduction in litigation, particularly in the long term.

Chapter 3: Estimating the Number of Workers Impacted by the Final Rule

In this chapter, the Department presents its estimates of the number of workers covered by the FLSA, subject to the salary level or salary basis tests, and who are currently Part 541-exempt or nonexempt.

- An estimated 35.2 million hourly paid workers and 7.6 million nonhourly workers are in occupations with no measurable probability of meeting the current duties tests (*e.g.*, blue-collar occupations).
- An estimated 32.7 million hourly workers and 31.7 million nonhourly workers are in occupations with some possibility of meeting the duties tests (*e.g.*, white-collar occupations).
- Of the estimated 31.7 million nonhourly workers in occupations with some possibility of meeting the duties tests, an estimated 19.4 million are exempt under the current rule.

As discussed below, the Department's approach is similar to that used by previous researchers, with the primary difference being that the Department used a nonlinear model to estimate the relationship between income and the exemption probability among current workers.

3.1 Estimating the Number of Workers Covered by the FLSA

Based on the previous work in this area by the U.S. General Accounting Office (GAO), the University of Tennessee, CONSAD Research Corporation (CONSAD), and the Economic Policy Institute (EPI), the Department started with the latest available data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS), 2002 Current Population Survey (CPS) Outgoing Rotation Group public use data set to estimate the number of workers that would be affected by changes in the Part 541 regulations. The primary reason the Department used this particular data source is its size (more than 474,000 observations) and breadth of detail (*e.g.*, occupation and industry classifications, salary, and hours worked). As the previous researchers found, no other data source provides the necessary detail for this type of analysis.

The GAO used the CPS because after reviewing "several Bureau of Labor Statistics (BLS) and DOL reports to determine whether any data sources could be used for [GAO's] purposes [and] discussions with DOL and experts, [the GAO] decided that the CPS Outgoing Rotations was the best available data source to estimate both the proportion of the labor force that is

covered by the white-collar exemptions and the demographic characteristics of this population." (GAO/HEHS–99–164, pg. 40)

As discussed below, in order to provide transparency and the means for others to replicate our results, the Department chose to use the 2002 CPS Outgoing Rotation Group public use data set even though the employment weights for the observations are based on the 1990 Census and not the 2000 Census.

The Department created a subset of the entire survey that only included employed workers 16 years of age and older (Item PREMPNOT = 1—This is the name of the variable and its value in the BLS dataset used to create this subset. Similar variable names and values are provided below to assist researchers in replicating the Department's results). The number of employed workers in 2002 was estimated by summing the CPS outgoing rotation weight (PWORWGT; note this weight must be divided by 120,000 to provide annual averages and to account for the 4 implied decimal points in the data) for each of the remaining observations in the dataset. This resulted in a total employment estimate of 134.3 million, which does not match BLS's published 2002 total household employment of 136.5 million.

The 1.6 percent discrepancy is due to different weights being used to estimate the published employment totals. The weights in the public use file utilized by the Department in this analysis are based on the 1990 Census. In January 2003, the BLS revised the weights using the 2000 Census. Although BLS changed its published employment totals back to January 2000, the weights in the public use files were not updated. The 134.3 million total for 2002 employment matches the published BLS 2002 employment estimate before the weights were changed. As noted below in Chapter 4, several commenters criticized the estimates in the Preliminary Regulatory Impact Analysis (PRIA) for being difficult to reproduce. Therefore, the Department chose not to use an internally available dataset with updated weights and instead used the publicly available dataset with 1990 Census weights to make its estimates easier to reproduce.

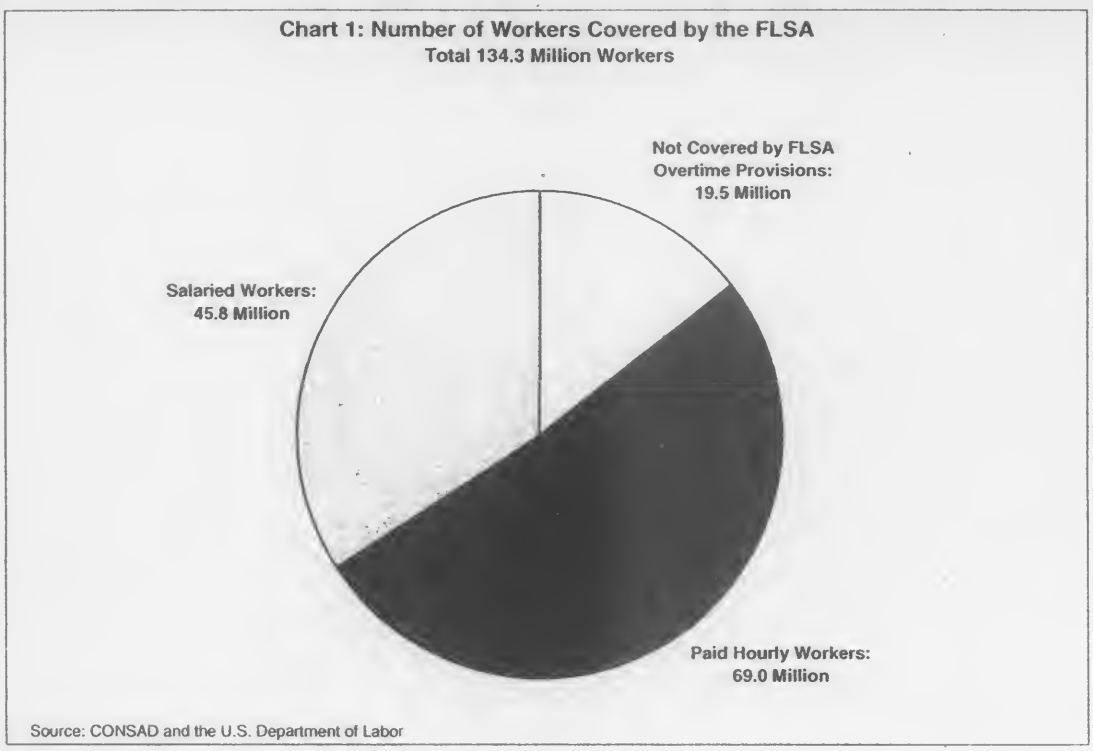
Using weights based on the 1990 Census does not significantly affect the accuracy or quality of the results. The difference between the employment totals (136.5 − 134.3 = 2.2 million) based on the two sets of weights is distributed across all occupations, in all industries in all regions of the country, and is thus unlikely to bias the estimates. For the final regulatory impact analysis, the Department has endeavored to ensure maximum transparency even though the estimates differ slightly from the most recent BLS-published estimates.

Next, the Department excluded the 14.9 million workers not covered by the FLSA, such as the self-employed and unpaid volunteers (item PEIO1COW = 6, 7, or 8), and the clergy and religious workers (item PTIO1OCD = 176 and 177). An additional 3.1 million workers were excluded because they are in occupations specifically exempted from the FLSA's overtime provisions (see Table 3–1), which reduced the total to 116.3 million workers. Another group, 1.5 million federal employees, were excluded from the total (item PEIO1COW = 1) because they are not subject to the regulations promulgated by the Department (they are covered by U.S. Office of Personnel Management regulations). However, federal workers (PEIO1COW = 1) in Postal Offices (PEIO1ICD= 412), the Tennessee Valley Authority (PEIO1ICD = 450 and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, and Virginia), and the Library of Congress (PEIO1ICD = 852 in the Washington D.C. MSA) were included in the analysis, as they are covered by final rule. The remaining 114.8 million workers represent the Department's best estimate from available data of the total number of employees who are covered by the FLSA's overtime provisions (see Chart 1). They are comprised of 69.0 million hourly paid workers and 45.8 million salaried workers (item PEERNHRY = 1 and 2, respectively). For the purposes of this RIA, the Department, like the GAO, assumed that workers paid on a nonhourly basis (CPS variable, PEERNHRY = 2) were paid on a salary or fee basis, and henceforth uses the term "salaried workers" to refer to workers classified as nonhourly in the CPS.

TABLE 3–1.—OCCUPATIONS EXEMPT FROM THE FLSA'S OVERTIME PROVISIONS

| CPS occupation code | Number of workers |
|---|---|
| Self-Employed and Unpaid Family: | |
| 29 U.S.C. 203(e) | 14,288,000 |
| Clergy and Religious Workers: | |
| WHD Field Operations Handbook, Section 10b03 | 569,000 |
| Federal Workers covered by OPM regulations: | |
| 29 U.S.C. 204(f) | 1,546,000 |
| Certain Employees of Carriers Over Highways, Rail, Air, and Sea: | |
| 29 U.S.C. 213(b)(1), (b)(2), (b)(3), and (b)(6) (PTIO1OCD = 823–826 in PEIO1ICD 400, PTIO1OCD = 505, 507 & 804 in PEIO1ICD 410, PTIO1OCD = 828, 829 & 833 in PEIO1ICD 420, and PTIO1OCD = 226, 508 & 515 in PEIO1ICD 421) | 1,562,000 |
| Certain Agricultural Workers: | |
| 29 U.S.C. 213(b)(12) (PEIO1ICD = 10, 11 & 30) | 995,000 |
| Certain Partsmen, Salesmen, and Mechanics at Auto Dealers: | |
| 29 U.S.C. 213(b)(10) (PTIO1OCD = 263, 269, 505, 506, 507 & 514 in PEIO1ICD 612) | 543,000 |
| Total | 19,503,000 |

Source: CONSAD and the U.S. Department of Labor.




3.2 Estimating the Number of Workers Who Are Currently Exempt and Nonexempt

Since the CPS does not contain a variable that can be used to determine whether workers are Part 541-exempt or nonexempt under the current, proposed, or final rules, the Department relied on a methodology that has been used in previous research and supported by the record. As noted by the GAO in its report, in order to estimate the number of workers covered by the white-collar exemptions using the CPS data, a determination must be made on the basis of the worker's primary occupational classification (GAO/HEHS–99–164, pg. 40). Although there are many variables in the CPS dataset, including earnings, occupation, industry, paid hourly, and hours worked, none of these variables either individually or in combination permit a precise mapping of a worker's exempt or nonexempt status under Part 541 because there is no information on the actual duties performed by a worker. As found in previous research, in order to develop estimates of Part 541-exempt workers under the current regulations, it is necessary to use some measure of expert judgment. The use of expert judgment in cases where it is necessary to make informed decisions or lower uncertainty is also consistent with OMB's regulatory analysis guidance.

In response to a specific request from the GAO, the Wage and Hour Division (WHD) in 1998 assembled a group of experienced WHD employees to develop estimates of the probability that FLSA covered salaried workers in various CPS occupational categories would be Part 541-exempt under the current regulations (U.S. General Accounting Office, "Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place," GAO/HEHS–99–164, September 30, 1999). Based upon their collective experience in FLSA enforcement, the WHD staff classified each of the 499 Occupational Classification Codes (OCC) used in the CPS (Item PEIO1COCD) according to an estimated probability that some workers in a particular OCC would be Part 541-exempt. The GAO, the University of Tennessee (U.S. Department of Labor, "The 'New Economy' and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)," January 2001), CONSAD ("Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541," January 14, 2003), and the EPI ("Eliminating the Right to Overtime Pay," June 26, 2003), all based their estimates of the number of workers who are exempt under the current rule on these judgments or probabilities. The EPI report was submitted for the record as part of the AFL–CIO's comments.

The GAO explained this methodology in the following manner: "In determining which of the workers would likely be exempt and therefore included in our estimate, we applied the percentage ranges provided by the officials at DOL." However, "Rather than counting the number of employees actually classified as exempt by employers, we estimated how many employees are likely to be classified as exempt, based on the occupational classifications and income reported in the CPS sample." (GAO/HEHS–99–164, pg. 41 and 42) The Department, as did the GAO, used the CPS variable for a worker's occupation (Item PTIO1OCD) as a proxy for the person's job classification (there are a variety of jobs in each CPS occupation code).

The GAO also noted that there are data limitations and some uncertainty associated with their methodology that reduces the ability to precisely estimate the number of currently exempt workers (GAO/HEHS–99–164, pg. 42). The Department notes that these same limitations and uncertainties, combined with the broad probability classifications provided by DOL to GAO

and used in this RIA and other research, make it impossible to accurately estimate the number of exempt workers by detailed industry or by state. Moreover, because of this uncertainty, the Department did not rely on its estimates of the number of exempt workers to set the salary levels and instead used these estimates as just one of several methods to confirm the reasonableness of the $455/week and $100,000/year salary levels.

Both the 1999 GAO report and the PRIA discussed the probability classifications in terms of Standard Occupational Classifications (SOCs). This resulted in some confusion among researchers attempting to replicate the estimates. For example, the AFL–CIO stated, "the study's methodology is confusing, and because CONSAD does a poor job of explanation, it is not capable of replication * * * CONSAD relies upon both the Current Population Survey (CPS) and the 1998 Standard Occupational Classification (SOC) system. Conflicts between these two data sets make the study opaque."

In order to develop the probability estimates, the WHD staff utilized Appendix B in the CPS documentation to obtain the list of occupational titles. The CPS Appendix specifies the occupational title and the associated SOC codes used by the CPS for each OCC code. The CPS Appendix is available on the U.S. Census Bureau Web site (*http://www.census.gov/apsd/techdoc/cps/sep97/det-occ.html*). According to the BLS, the OCC "classification is developed from the 1980 Standard Occupational Classification." The WHD staff used the documentation on the SOC codes in assessing the exempt probability range for the associated OCC codes. This analysis was first used by GAO, and then followed by the University of Tennessee and by CONSAD Research Corporation in the Part 541 PRIA.

In addition, for the PRIA, CONSAD also made its own assessments based upon O*NET data (O*NET, the Occupational Information Network, is a comprehensive database of worker attributes and job characteristics available at *http://www.onetcenter.org/whatsnew.html*).

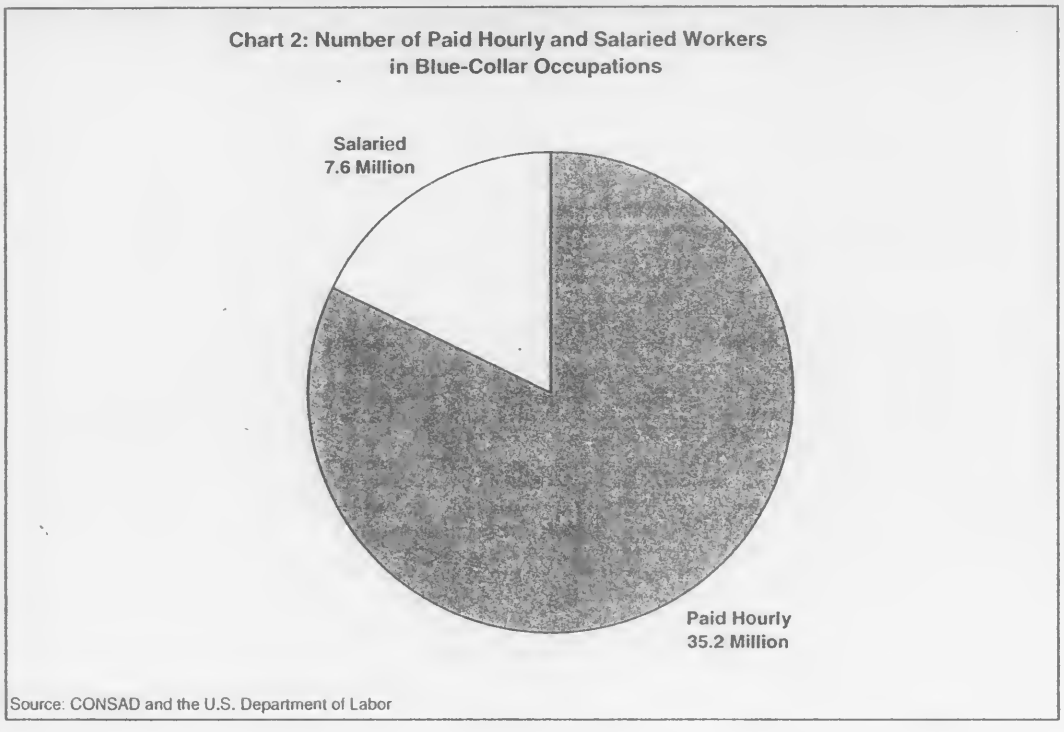
For the final RIA, however, the Department has reverted to the original estimates developed in 1998 by its WHD experts for the GAO. This adjustment from the proposed rule does not materially affect the total number of workers impacted, and ensures transparency and enables the public to replicate and evaluate the final RIA. Although newer and more detailed than the occupation descriptions available to the WHD staff in 1998, O*NET is still under development. Also, the O*NET categories do not directly correspond to the occupation categories used in the CPS making it difficult for the public to replicate the results. Some O*NET descriptions apply to more than one CPS occupation and some CPS occupations apply to more than one O*NET description.

Of the 499 occupation codes in the CPS, one is not related to employment (code 905 is assigned to unemployed persons whose last job was in the Armed Forces), two are assigned to clergy and religious workers (codes 176 and 177) who are not covered by the FLSA, one had no observations (code 149 for home economics teachers), and five had no observations after the removal of various industry exemptions (code 474 for horticultural specialty farmers, code 499 for hunters and trappers, code 826 for rail vehicle operators, code 639 for machinist apprentices, and code 655 for miscellaneous precision metal workers).

3.3 Estimated Number of Nonexempt Workers in the Blue-Collar Occupations

In 1998, the WHD experts estimated that 239 of the remaining 490 categories would be entirely comprised of nonexempt workers in "blue-collar" occupations. The estimated number of hourly and salaried workers in each of the 239 occupations is presented in Table A–1 of Appendix A at the end of this preamble. Although the Department has consistently held (and continues to hold) the view that job titles and job descriptions cannot be used to determine the exempt status of any particular employee, for the purpose of this economic analysis only, the Department, with the expertise of the WHD, has determined that the CPS occupational groups in Table A–1 most likely contain jobs with nonexempt duties. This assumption was also made by the GAO and other researchers.

There are 35.2 million hourly paid workers and 7.6 million salaried workers in these "nonexempt" blue-collar occupations (see Chart 2).




For purposes of this economic analysis, the Department has assumed that no workers within the 239 blue-collar occupations are Part 541-exempt. However, it is important to note that the final rule will strengthen overtime protection for 2.8 million blue-collar salaried workers in these occupations who earn at least $155 and less than $455 per week regardless of their duties or whatever occupational group in which they may be classified. Although the Department has determined that most, if not all, of these workers are currently nonexempt, they are currently subject to the long and short duties tests; therefore, their exempt status is fundamentally less certain than under the bright line salary test in the final rule.

3.4 Estimated Number of Workers in the White-Collar Occupations

To determine the number of exempt workers that could be affected by the final rule, the Department, like the GAO, concentrated on the 251 occupations likely to include exempt workers. As the GAO stated, "To develop our estimate, we analyzed each of the 257 job titles likely to include exempt workers." (GAO/HEHS–99–164, pg. 41) After accounting for the six occupations with no observations (noted above), this corresponds with the 257 titles used by the GAO in 1999.

Each of the remaining 251 "white-collar" occupations was then classified into one of four exemption probability ranges, or categories, presented below in Table 3–2. The GAO did the same in its 1999 report when "DOL officials provided [them] with one of four ranges of likelihood of exemption for each occupation." (GAO/HEHS–99–164, pg. 42)

TABLE 3–2.—PART 541 EXEMPTION PROBABILITY CATEGORIES FOR SALARIED WORKERS UNDER THE CURRENT SHORT DUTIES TESTS

| Classification | Lower bound estimate | Upper bound estimate |
|---|---|---|
| 1. High Probability of Exemption | 90% | 100% |
| 2. Probably Exempt | 50% | 90% |
| 3. Probably Not Exempt | 10% | 50% |
| 4. Low or No Probability of Exemption | 0% | 10% |

Source: U.S. Department of Labor.
Note: Many occupations were classified as having a "Low or No Probability of Exemption" because the CPS data may include some supervisory employees who could potentially be exempt under the executive duties test, although the occupations would generally be nonexempt. (See GAO/HEHS–99–164, data limitations, pg. 42)

Next, the Department excluded workers who are exempt under the current and final rules because they are in occupations that are not subject to the salary level or salary basis tests and will not be affected by the final rule (see Table 3–3). As noted by the GAO in its 1999 report "The exemption for physicians, lawyers, and teachers does

not depend on the income of the employee." (GAO/HEHS–99–164, pg. 41) These occupational groups consist of: outside sales employees (CPS item PTIO1OCD = 277); teachers and academic administrative personnel (item PTIO1OCD = 14, 113–159, and 163) in educational establishments (item PEIO1ICD = 842 and 850); certain medical professions (item PTIO1OCD = 84, 85, 87, 88, and 89); and lawyers and judges (item PTIO1OCD = 178).

TABLE 3–3.—NUMBER OF WORKERS IN CPS OCCUPATIONS THAT ARE NOT SUBJECT TO THE PART 541 SALARY LEVEL TEST

| Occupational title | Number of workers |
|---|---|
| Teachers & Academic Administrative Personnel in Industry 842 and 850 | 6,106,083 |
| Physicians | 550,748 |
| Dentists | 48,565 |
| Optometrists | 20,288 |
| Podiatrists | 3,999 |
| Health Diagnosing Practitioners, n.e.c. (1) | 17,020 |
| Lawyers and Judges | 622,549 |
| Street and Door-to-Door Sales Workers | 184,998 |
| Total | 7,554,250 |

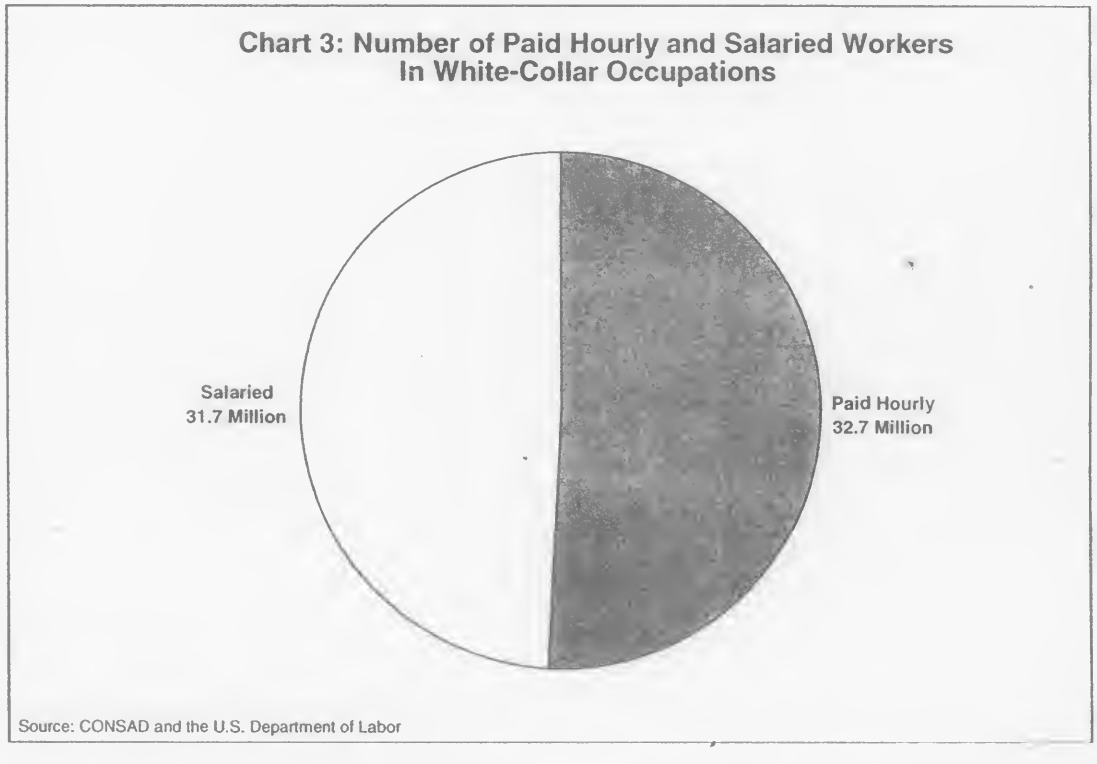
(1) Not elsewhere classified.

Source: CONSAD and the U.S. Department of Labor

Note: These occupations are identified separately here since they differ from those in Table 3–1: they are covered by FLSA's overtime provisions but are not subject to the Part 541 salary level tests.

After excluding from the analysis most of the observations for teachers and academic administrative personnel, and all of the observations for outside sales employees, certain medical professions, lawyers and judges, there remained 64.4 million workers in potentially exempt "white-collar" occupations who are both covered by the FLSA and subject to the Part 541 salary level tests and thus could be affected by the final rule.

As noted above, for purposes of estimating the number of exempt workers, the Department, like the GAO, assumed that workers paid on a nonhourly basis (CPS variable, PEERNHRY=2) were paid on a salary or fee basis. There are 32.7 million hourly workers and 31.7 million salaried workers in potentially exempt "white-collar" occupations (see Chart 3).




The estimated number of hourly and salaried workers in each of the 251 white-collar occupations is presented in Table A–2 of Appendix A. Table A–2 also presents the Exempt Status Codes developed by WHD in 1998 for each CPS occupation code.

3.5 Methodology Used To Estimate the Number of Exempt Salaried Workers

In order to develop a baseline estimate of the number of currently exempt white-collar salaried workers, the Department reviewed several approaches. The first approach was used by the GAO, which "made the following assumption: duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary. Under this assumption, as workers have more exempt duties and responsibilities, their incomes increase—as does the likelihood of

being exempt." (GAO/HEHS–99–164, pg. 41) The GAO sorted the observations in each occupational code by earnings from highest to lowest. Then, beginning at the highest earnings, the GAO kept all of the observations until the number of workers represented by the observations as a percent of total employment in the occupation equaled the target estimated probability of being exempt for that occupation. The remaining observations (lower income workers) were assumed to be nonexempt. For example, the method used to estimate the upper bound coverage estimates for the Probably Not Exempt Classification (which has a 10 to 50 percent probability range of exemption) was developed by including the observations representing the highest 50 percent of earnings. The lower bound coverage estimates, on the other hand, were developed including the observations representing only the highest 10 percent of earnings.

Although this was the methodology used by the GAO, the Department decided not to follow it for the final RIA because the compensation within each occupation varies not only because of exempt status and duties, as the GAO assumed, but also because of the industry and geographic location where the worker is employed. The Department determined the GAO approach creates biased estimates for low-wage industries and localities because the GAO methodology excludes, as nonexempt, most of the observations for intermediate and low-wage workers who could be exempt in comparatively low-wage industries and occupations. In other words, while it is true that, all other things being equal, exempt employees generally receive higher salaries than nonexempt employees, it is also true that employees in certain industries and localities generally receive higher salaries than employees in the same occupation in other industries and localities.

Further, in order to develop more accurate estimates based upon the GAO's methodology of completely excluding the lower-wage workers, the data would have to be stratified by both industry and locality. As the AFL–CIO stated in its comments, this analysis would have to be done at the 3-digit industry level because "Generalizing to a 2-digit code loses important distinctions within industry sectors, and this causes a corresponding loss of precision." Similarly, the analysis may also have to be done at the county level, because generalizing to the state level could also cause the loss of too much precision. Multiplying the nearly 1,000 3-digit industry codes by the more than 3,000 counties would result in some 3 million industry and county combinations. As large as the CPS is, however, it will not accurately support this level of detailed analysis. GAO, in fact, did not even present (much less develop) its estimates at the state or 2-digit industry level of detail.

The second approach was to give all observations in an occupation the same probability regardless of income. Under this approach, estimates are generated by multiplying the CPS weight (item PWORWGT) for each observation (worker) by the average of the upper and lower bound exemption probability associated with the occupation code. Although this approach corrects for the bias against the low-wage industries and localities, the Department determined it was unsatisfactory because it does not account for the fact that higher income workers are more likely to be exempt. For example, someone in real estate sales (OCC 254) earning $405 per week would be given the same 30 percent probability of being exempt (*i.e.*, average of 10 percent and 50 percent for "probably not exempt classification") as one earning $2,155 per week. Even considering the existence of regional and industry salary differentials, this approach did not seem reasonable.

The Department employed two basic approaches to address these issues, which are discussed below. First, the Department used a linear model to combine aspects from both of the first two approaches. The Department excluded the 803,000 salaried workers with weekly earnings (item PTERNWA) below $155, because these workers are nonexempt under both the current and final rules. The GAO used a similar approach by considering workers earning less than $250 per week as nonexempt and eliminating them from the calculations. (GAO/HEHS–99–164, pg. 41) The Department used the lower figure primarily to account for nontraditional work arrangements. For example, under a job sharing arrangement, two workers sharing an exempt position could each work part-time earning only a portion of the total salary allocated to the position, when one of these workers is out, the other covers. At such times, the exempt worker would not be eligible for overtime even if the weekly hours exceed 40. There are only 670,000 salaried workers in the 251 occupations earning at least $155 but less than $250 per week. As the analysis presented below demonstrates, only a small percentage of these were estimated to be exempt.

The Department then modified the observation's weight for each OCC by multiplying the CPS weight (item PWORWGT) by the probability that an individual with that salary in that OCC is exempt. The specific probability of exemption for each salaried worker in a particular occupation code was estimated using linear interpolation according to the following equation:

$$\text{Prob\_Exempt} = \text{LB} + \frac{(\text{PTERNWA} - 155) \times (\text{UB} - \text{LB})}{(\$2{,}885 - 155)}$$

Where:

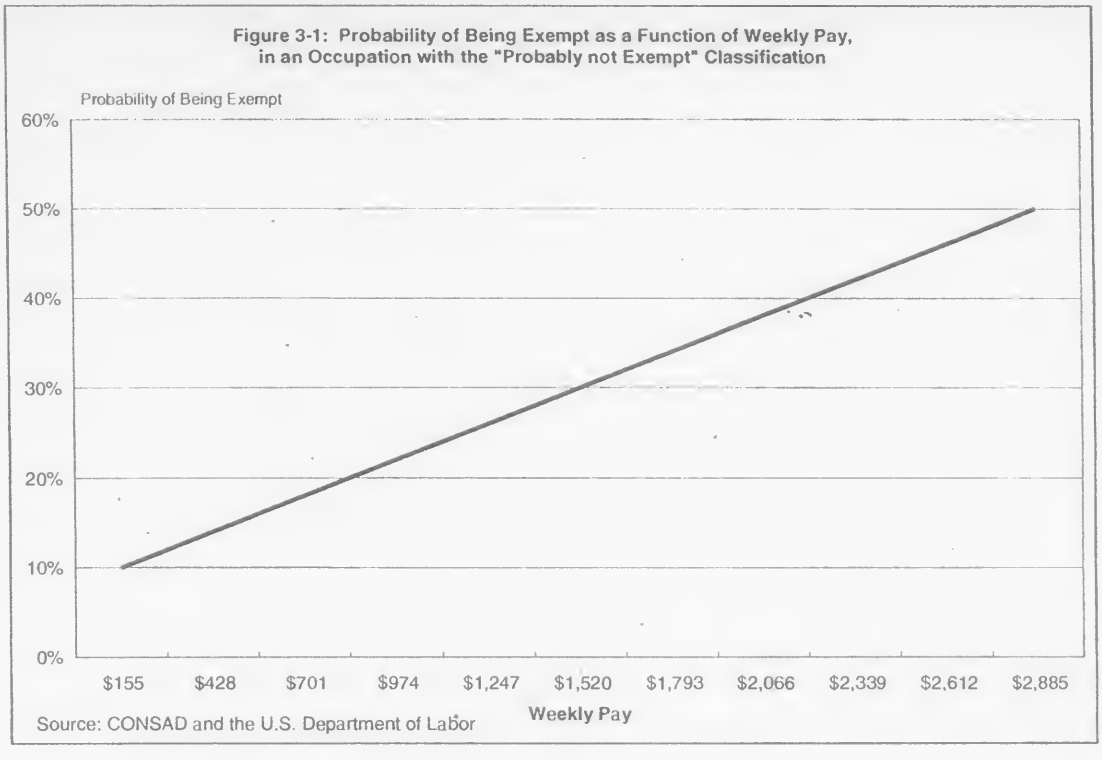
Prob_Exempt = Probability of individual in the occupational classification (OCC) being exempt

LB = WHD lower bound probability from Table 3–2

PTERNWA = CPS weekly earnings amount

UB = WHD upper bound probability from Table 3–2

The equation above specifies that the probability of a worker with a weekly salary of $155 being exempt is equal to the lower bound probability specified by the WHD experts for a given white-collar occupation, while the probability of an individual with the highest weekly salary in the occupation (often the top coded value of $2,885) being exempt is equal to the upper bound probability specified for a given white-collar occupation. The probability of exemption for weekly salaries between $155 and $2,885 is derived using the above linear interpolation equation. Figure 3–1 presents a graphical illustration for the "Probably Not Exempt" classification (see Table 3–2). Similar graphs could be developed for the other three classifications but were not included in the RIA.



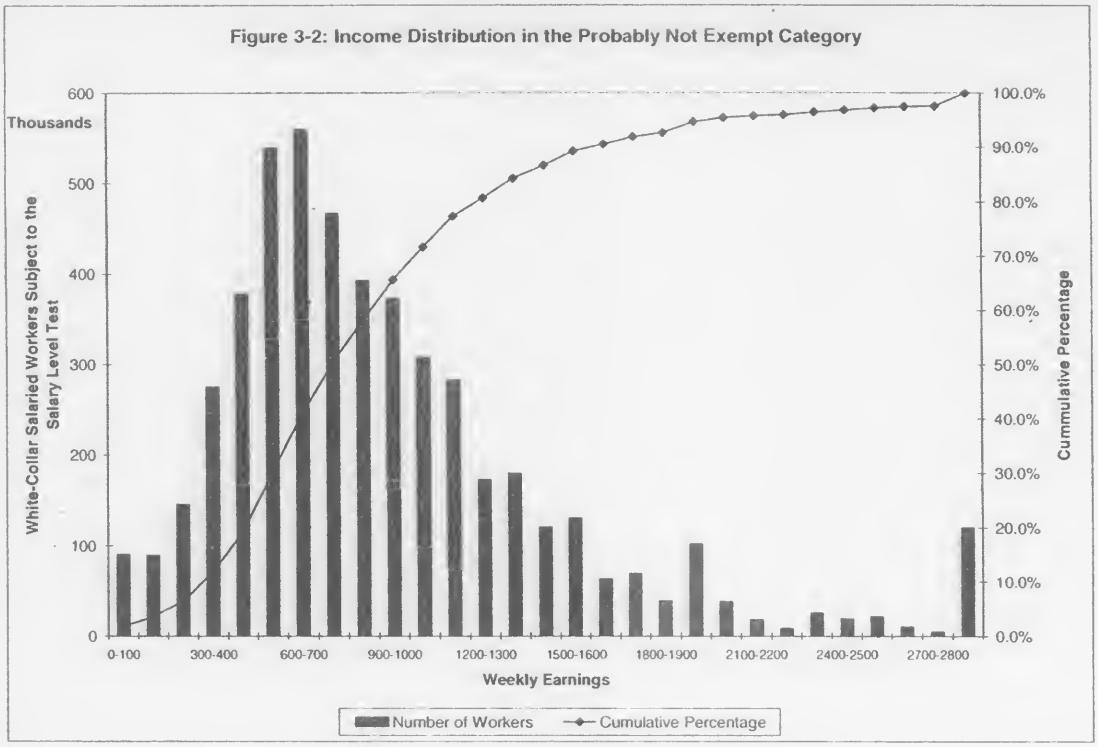

Although the linear model was designed to more accurately include lower-wage industries and regions while accounting for the determination by WHD that higher earnings are associated with a higher probability of exemption, the model appears to underestimate the total number of currently exempt workers compared to using the midpoint of the WHD probability range (*e.g.*, averaging the WHD upper and lower bound estimates) at the national level. Table 3–4 shows this effect.

TABLE 3–4.—COMPARISON OF PART 541-EXEMPT WORKER ESTIMATES MID-POINT VERSUS LINEAR MODEL

| WHD category | Number of white-collar salaried workers earning $155 or more* | Midpoint of the WHD probability range | Estimated number exempt | |
|---|---|---|---|---|
| | | | Number of workers times midpoint probability | Linear model |
| High Probability of Exemption | 14,053,817 | 95% | 13,351,126 | 13,170,751 |
| Probably Exempt | 6,102,827 | 70% | 4,271,979 | 3,812,164 |
| Probably Not Exempt | 4,904,421 | 30% | 1,471,326 | 1,076,901 |
| Low or No Probability of Exemption | 5,822,134 | 5% | 291,107 | 130,662 |
| Total | 30,883,199 | ..... | 19,385,538 | 18,190,479 |

*Excludes workers not subject to salary test.
Source: CONSAD and the U.S. Department of Labor.

This occurs because the underlying earnings distribution is not symmetric. Rather, it is skewed toward low earnings levels. When the linear model of exemption probabilities is applied to that earnings distribution, it produces estimates that are skewed toward low earnings levels. Figure 3–2 presents the histogram and cumulative distribution for the "Probably Not Exempt" category. The higher bar in Figure 3–2 at $2,800 in weekly earnings level is a result of the top coding of the CPS data that includes all of the workers with weekly earnings of $2,800 or more into one group. Similar graphs were developed for the other three classifications but were not included in the RIA.




Because the linear model results in more observations being assigned a probability lower than the midpoint than a probability higher than the midpoint, it tends to underestimate the number of exempt workers compared to multiplying the number of workers by the midpoint probability. The Department considers the midpoint estimate to be a valid benchmark since it has been used by other researchers (such as EPI) and is equivalent to averaging the GAO estimates using updated data. Although this is not a classic statistical bias, the linear model implies that the average probability of being exempt within each category range is slightly lower than implied by the midpoint of the range, which was not the intent of the original probability determinations made by the WHD study. Since the overall estimate of the number of currently exempt workers using the linear model is 1.2 million workers less than this benchmark, the Department decided to explore if a nonlinear model that is consistent with the assumptions about the likelihood of exemption would produce national level estimates that more closely match the midpoint benchmark.

The Department applied a series of nonlinear models to try and compensate for the nonsymmetrical income distributions in the four exemption categories. First, the observations with weekly earnings less than $155 were excluded because these workers are nonexempt under the current and final rules. Next, the observations that were top coded for weekly earnings (Item PTWK =1) were excluded from the distribution to smooth out the right-hand tail (*i.e.*, all of these observations were assigned the upper bound probability and keeping them in the distribution would only have distorted the curves). Finally, the cumulative probability distributions of three nonlinear functions (*i.e.*, normal, lognormal, and gamma) were fitted to the cumulative income distributions for the remaining observations in each of the four exemption categories.

Each of the functions was calibrated to the empirical data by using the mean and standard error of the empirical distributions. For the normal distribution the mean was set to the sample mean and the standard deviation was set to the standard error. For the gamma distribution, alpha was set to the square of the quotient of the sample mean divided by the standard error, and beta was set to the standard error squared divided by the sample mean. The lognormal distribution was developed by taking the logs of the sample data and then using a normal distribution with the mean set to the mean of the logs of the sample data and the standard deviation set to the standard error of the logs of the sample data (see Table 3–5).

TABLE 3–5.—PARAMETERS OF EMPIRICAL INCOME DISTRIBUTIONS

| WHD category | Sample mean | Standard error | Mean of logged sample data | Standard error of logged sample data |
|---|---|---|---|---|
| High Probability of Exemption | 1,107 | 538 | 6.9 | 0.5 |

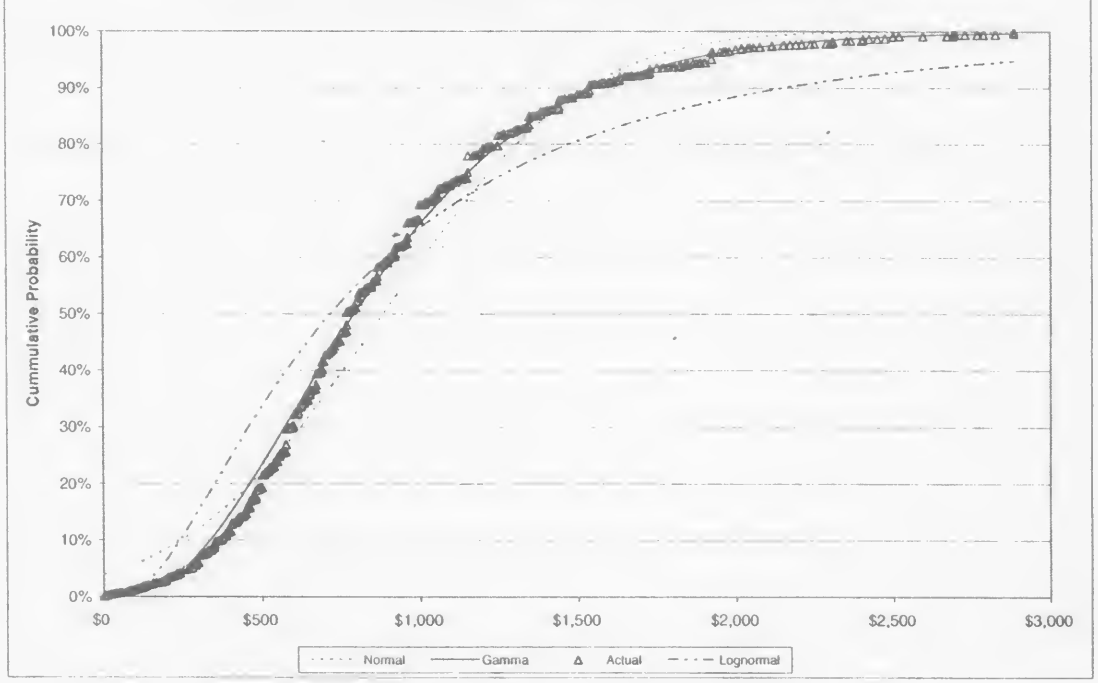
TABLE 3–5.—PARAMETERS OF EMPIRICAL INCOME DISTRIBUTIONS—Continued

| WHD category | Sample mean | Standard error | Mean of logged sample data | Standard error of logged sample data |
|---|---|---|---|---|
| Probably Exempt | 928 | 512 | 6.7 | 0.8 |
| Probably Not Exempt | 886 | 502 | 6.6 | 0.9 |
| Low or No Probability of Exemption | 630 | 375 | 6.2 | 0.8 |

Source: CONSAD and the U.S. Department of Labor.

Figure 3–3 presents plots depicting the goodness of fit of the three nonlinear functions that were estimated for the "Probably Not Exempt" category. Similar plots were developed for the other three classifications but were not included in the RIA. As one can see in figure 3–3, all three distributions had the same general shape as the empirical data; however, the function estimated for the gamma distribution appears to fit the actual data better than the functions estimated for the other two distributions. The Department, however, did not use a formal goodness of fit test to choose a distribution for the principal estimates of this final rule; rather, the Department measured how well each of the distributions matched up against the estimate as a function of the midpoint probabilities, since calibrating the totals to the midpoint probabilities was the primary reason for examining the non-linear models.

Figure 3-3: Goodness of Fit Plots for the Probably Not Exempt Category




Before determining the distribution that would be used to develop the baseline for the RIA, the Department estimated the number of exempt workers using each of the three distributions and compared the estimates to the benchmark developed using the midpoint probability. For each of the four exemption categories (EC), the probability that an individual with a specific salary in each category is exempt was estimated using nonlinear interpolation according to the following equation:

$$Prob\_Exempt = LB + Function\_EC(PTERNWA) \times (UB - LB)$$

Where:

Prob_Exempt = Probability of an individual in the exemption classification being exempt

LB = Lower bound probability from Table 3–2 for the exemption category

PTERNWA = CPS weekly earnings amount

UB = Upper bound probability from Table 3–2 for the exemption category

Function_EC(PTERNWA) = the cumulative probability of the distribution function for the

exemption category (*i.e.*, calibrated as discussed above) at that earnings

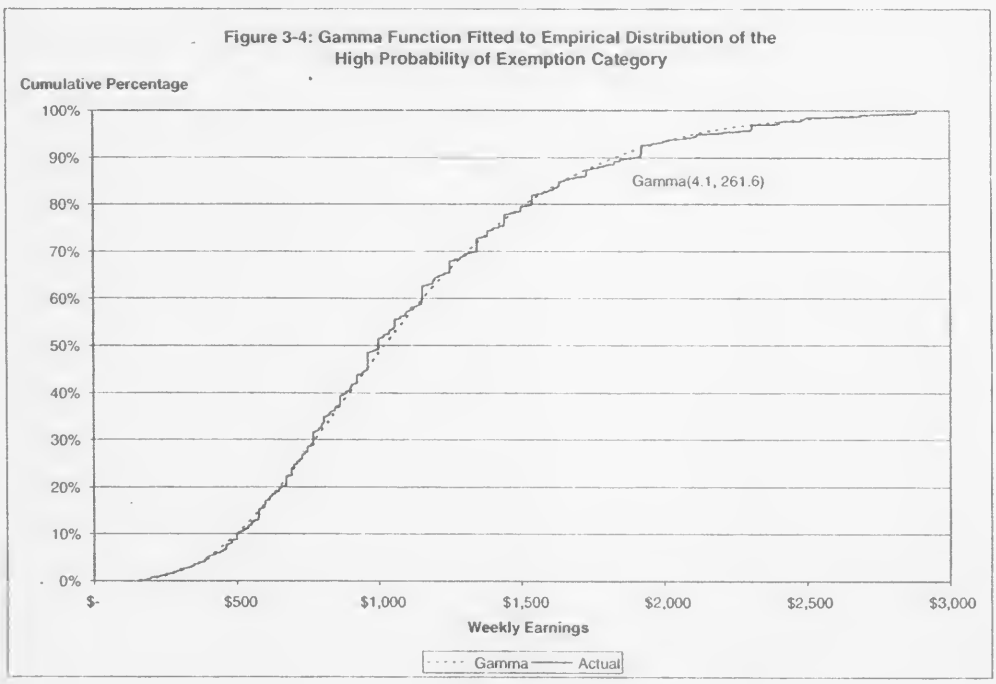
The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt (based upon the earnings and exemption category) by the CPS weight for each worker and then summing the modified weights for each occupation. Observations with earnings less than $155 per week were assigned a probability of zero and observations with top coded earnings were assigned the upper bound probability for the category. As shown in Table 3–6, the gamma distribution resulted in estimates that most closely approximated the number of exempt workers estimated using the midpoint probability. The symmetrical normal distribution underestimated the midpoint total by approximately 104,000 workers (0.5%) while the lognormal distribution overestimated the midpoint total by 3.2 million (16.5%). The gamma distribution resulted in essentially the same estimated number of exempt workers as using the midpoint probability. The two methods differ by approximately 0.2 percent, or less than 60,000 workers.

TABLE 3–6.—COMPARISON OF PART 541-EXEMPT WORKER ESTIMATES

| WHD category | Midpoint probability estimate | Normal distribution model estimate | Lognormal distribution model estimate | Gamma distribution model estimate |
|---|---|---|---|---|
| High Probability of Exemption | 13,351,126 | 13,341,039 | 14,053,814 | 13,370,021 |
| Probably Exempt | 4,271,979 | 4,232,533 | 5,492,548 | 4,294,132 |
| Probably Not Exempt | 1,471,326 | 1,432,806 | 2,452,211 | 1,482,972 |
| Low or No Probability of Exemption | 291,107 | 274,707 | 582,213 | 292,266 |
| Total | 19,385,538 | 19,281,085 | 22,580,786 | 19,439,391 |

Source: CONSAD and the U.S. Department of Labor.

Although the Department did not conduct formal goodness of fit tests, Figures 3–4 through 3–7 indicate that the gamma distribution preserves the shape of the empirical cumulative distribution for the four exemption categories. Thus, for the RIA the Department developed its baseline estimates of exempt workers using a gamma distribution model. Although some other distribution could exist that improves upon the gamma distribution, the Department has determined that it would not significantly alter the RIA results given how well the gamma distribution approximates the empirical data. In addition, as demonstrated above in Table 3–6, the estimated number of workers impacted by the final rule does not depend critically on any particular nonlinear model; in fact, the estimated number of workers impacted even under the linear model is not substantially different than under the gamma distribution model, proving that the Department's estimates are relatively robust to estimation procedure choices.



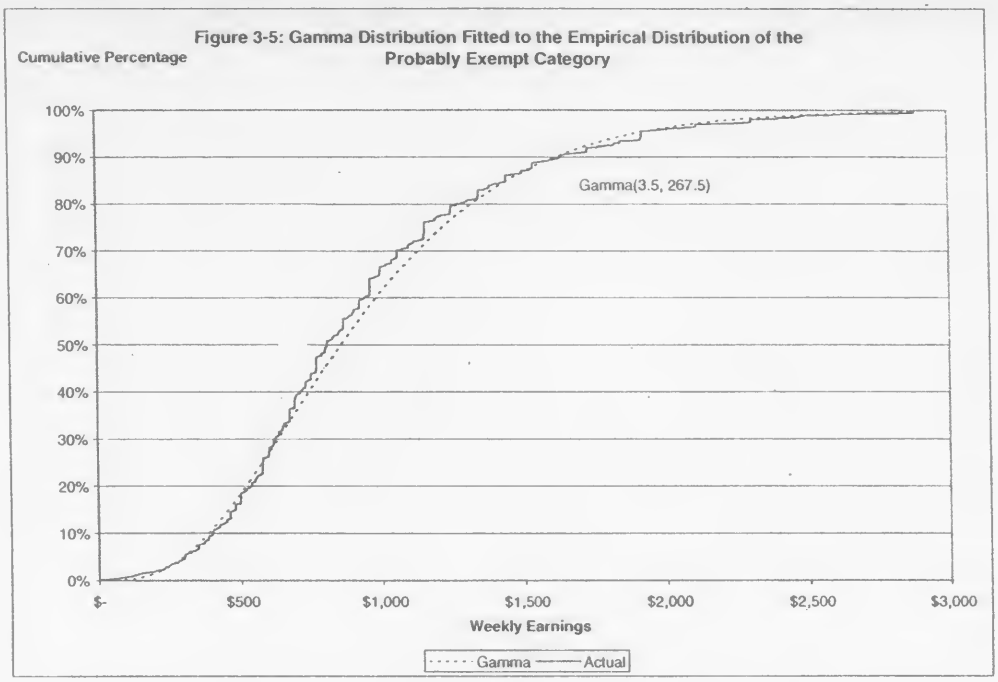


Figure 3-5: Gamma Distribution Fitted to the Empirical Distribution of the Probably Exempt Category
Cumulative Percentage
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Gamma(3.5, 267.5)
$-
$500
$1,000
$1,500
$2,000
$2,500
$3,000
Weekly Earnings
Gamma
Actual

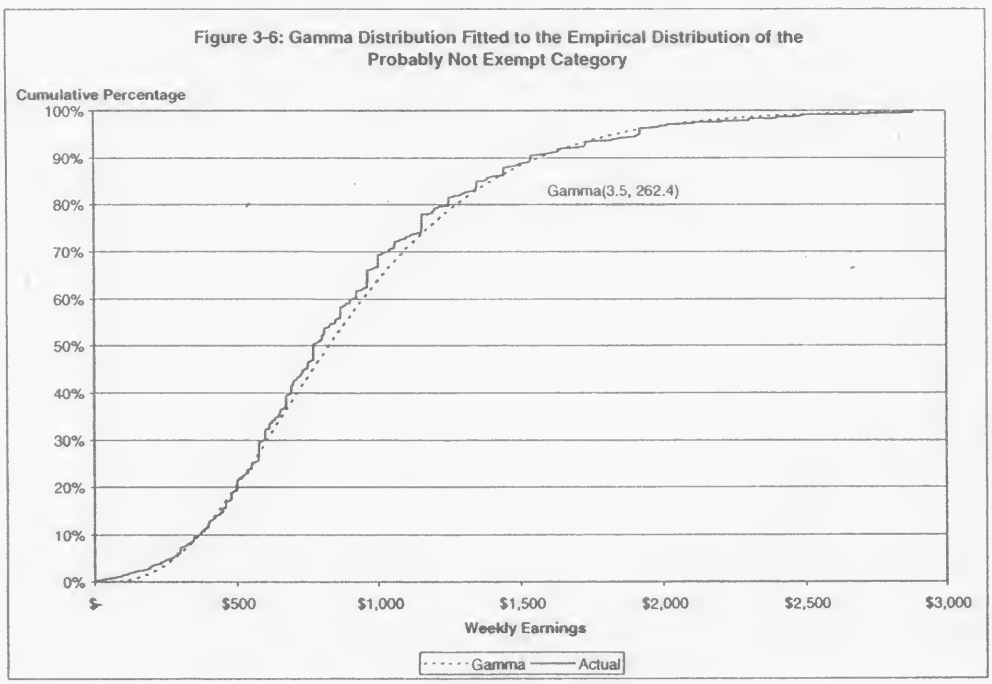
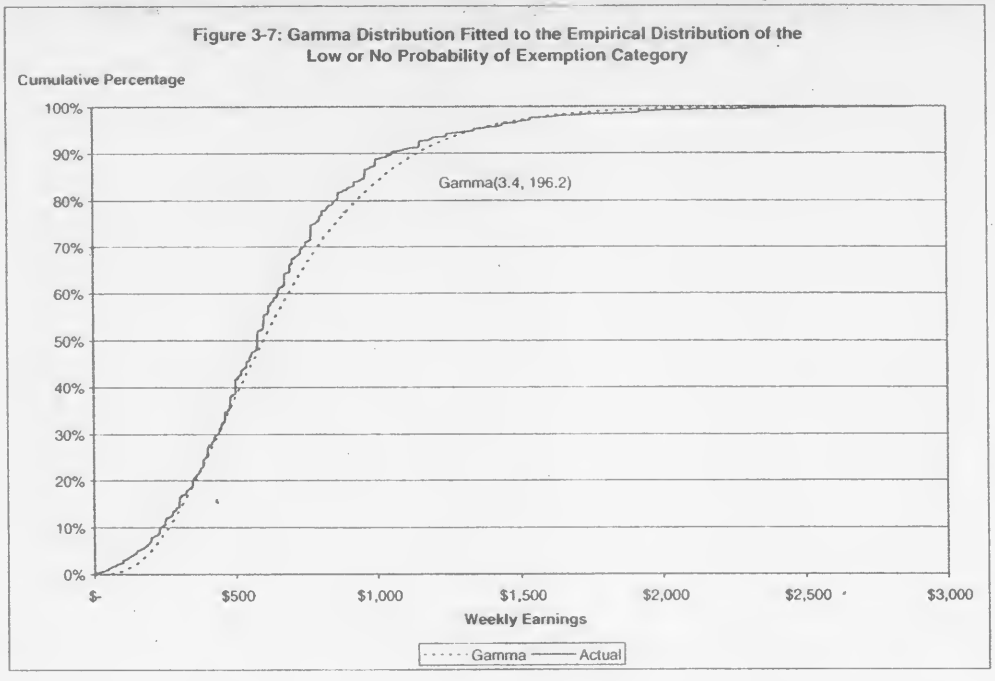


Figure 3-6: Gamma Distribution Fitted to the Empirical Distribution of the Probably Not Exempt Category
Cumulative Percentage
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Gamma(3.5, 262.4)
$-
$500
$1,000
$1,500
$2,000
$2,500
$3,000
Weekly Earnings
Gamma
Actual




Like the linear model, this methodology accounts for the existence of lower-wage industries and regions while remaining consistent with the GAO's assumption that "duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary." The non-linear model also accounts for the different marginal effect on exemption probabilities that lower wage and higher wage workers are likely to have. For example, the change in the exemption probability for social workers as their income rises is likely to be relatively small for social workers earning between $155 and $455 per week compared to a relatively constant change in the exemption probability for social workers earning between $455 and $1,250 per week. However, once workers earn a relatively high pay level, the rate of change in their exemption probability is likely to decrease as their income increases and they approach the maximum exemption probability and maximum income reported for their job. The Department also feels that this methodology is consistent with recent findings in the economic literature. For example, Bell and Hart ("Unpaid Work," Economica, 66: 271–290, 1999) and Bell, Hart, Hubler, and Schwerdt ("Paid and Unpaid Overtime Working in Germany and the UK," IZA Discussion Paper Number 133, Bonn, Germany: The Institute for the Study of Labor, March 2000) found that unpaid overtime is more often worked by employees with managerial status and with comparatively high wage rates; whereas paid overtime is more often worked by employees with lower wage rates.

Due to data limitations, this analysis was conducted on a national level and was intended to produce national estimates. For a specific occupation, individuals in low-wage industries or localities will likely have slightly higher probabilities than estimated using the gamma distribution model, while individuals in high-wage industries and localities will likely have slightly lower probabilities. However, the Department believes the overall estimates using this approach are reasonable because these factors tend to balance each other at the national level.

Clearly, this approach cannot be used by an employer to determine the exempt status of individual employees. The approach was designed to estimate the number of exempt employees in entire occupations for statistical purposes only, not to determine the specific status of a particular individual in a specific occupation. The latter requires consideration of the individual's specific duties, which must be done on a case-by-case basis.

### 3.6 Estimated Number of Exempt Salaried Workers

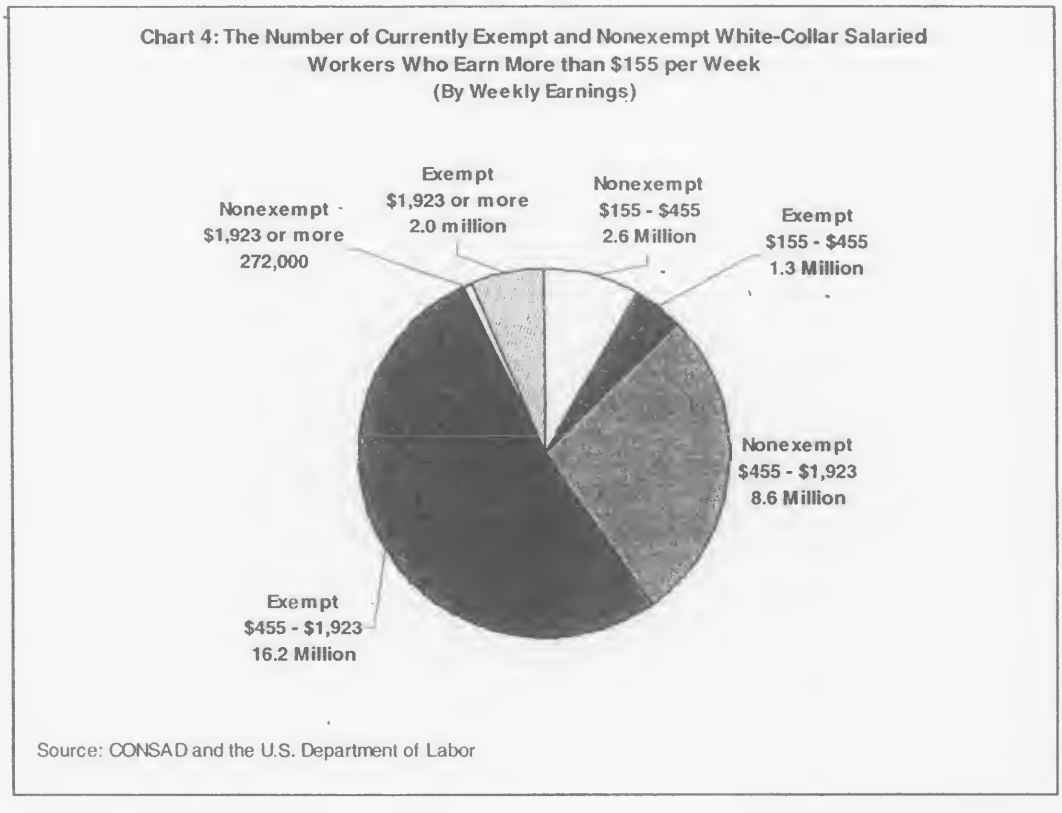
The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt by the CPS weight for each worker to produce a modified weight, and then summing the modified weights for each occupation. Based on this analysis, the Department estimates that 19.4 million of the 30.9 million white-collar workers who earn $155 or more per week and are subject to the Part 541 salary tests are currently exempt. Table 3–7 presents the number of exempt workers in each WHD category by weekly earnings. Table A–3 in Appendix A presents the number of exempt workers in each white-collar occupation. Also presented in Table A–3 is the number of nonexempt salaried workers in each of the 251 white-collar occupations earning at least $155 per week.

TABLE 3–7.—NUMBER OF EXEMPT WORKERS BY EARNINGS AND WHD EXEMPTION PROBABILITY CATEGORY

| WHD exemption probability category | Weekly earnings | | | |
|---|---|---|---|---|
| | $155 to $455 | $455 to $1,923 | $1,923 + | Total |
| High Probability of Exemption | 815,600 | 11,105,374 | 1,449,047 | 13,370,021 |
| Probably Exempt | 364,607 | 3,540,717 | 388,809 | 4,294,132 |
| Probably Not Exempt | 88,111 | 1,257,050 | 137,811 | 1,482,972 |
| Low or No Probability of Exemption | 29,535 | 253,597 | 9,134 | 292,266 |
| Total | 1,297,852 | 16,156,738 | 1,984,801 | 19,439,391 |

Source: CONSAD and the U.S. Department of Labor.

Chart 4 shows the distribution of the currently exempt and nonexempt workers by weekly earnings.




*Chapter 4: Estimating the Change in Overtime Protection*

In this chapter, the Department presents the estimated changes in exempt status of workers that are likely to occur as a result of the final rule. The estimates presented below are based on the assessment of the final rule presented in Chapter 2 and elsewhere in the preamble and on the coverage estimates presented in Chapter 3. The methodology detailed below differs from the PRIA because of modifications made to the proposed rule to address the comments. In addition to changes resulting from the revised methodology, the estimates are different from the PRIA because the data sources have been updated.

The major findings in this chapter are as follows:

- Workers earning less than $155 per week will remain nonexempt under the final rule.
- An estimated 6.7 million workers earning $155 or more but less than $455 per week will be guaranteed overtime protection under the revisions regardless of their duties.
- There are an estimated 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current rules, will be automatic under the new rules.

• There are an estimated 1.3 million white-collar salaried workers earning at least $155 but less than $455 per week currently exempt under the long and short duties tests who will gain overtime protection.

• Workers earning at least $455 per week will benefit from the clarification of the duties test requirements. This clarification is expected to reduce the uncertainty surrounding the application of the current outdated regulations. Both workers and employers will benefit from reduced litigation and from having greater confidence in the exemption status of employees. Workers will better understand their rights, employers will know their obligations, and WHD investigators will be better able to enforce the law.

• The Department has determined that the differences in the number of workers earning $455 or more to $1,923 per week who will be exempt under the standard tests as compared to the number currently exempt are too small to estimate quantitatively. In addition, the very few, if any, workers that might be converted from nonexempt status to exempt status as a result of the updated administrative and professional tests are likely to be offset by workers gaining overtime protection as the result of the tightened executive test.

• The Department estimates that approximately 107,000 workers (47,000 hourly and 60,000 salaried) could be converted to exempt salaried status as a result of the new test for highly compensated workers. As explained more fully below, the primary reason for the low estimate is the small number of workers earning $100,000 or more per year, combined with the Department's assessment that most white-collar workers earning $100,000 or more per year are very likely currently Part 541-exempt.

4.1 Comments to the Proposed Rule on the Number of Exempt Workers

The Department received comments in response to the estimated number of workers whose exempt status could change, contained in the PRIA and the CONSAD report upon which the PRIA was partially based. For example, the AFL–CIO stated, "The Department asserts that its proposal will cause 644,000 employees to lose their right to overtime, 68 Fed. Reg. at 15580, and that roughly 1.3 million workers will become automatically nonexempt * * * [F]laws in the study's approach and methodology, as well as its lack of transparency, call into serious question the reliability of these estimates."

The Building and Construction Trades Department of the AFL–CIO stated, "As the Economic Policy Institute points out in a report it recently issued, DOL seems to assume, without any factual support, that all of these highly compensated employees are already exempt under the current white-collar regulations. * * * However, as the Economic Policy Institute Briefing Paper observed, it is not at all clear that all of these highly compensated employees are already exempt under current law."

Several labor unions, citing the EPI analysis, asserted the Department's preliminary analysis greatly underestimated the effect of changing the overtime regulations. For example, the AFL–CIO stated, "Based on its analysis of 78 occupations, EPI concluded that more than 8 million workers will lose overtime protection under the proposed regulatory changes * * * This includes 2.5 million salaried workers and 5.5 million hourly employees who meet the duties test under the proposed rule and who are at risk of being converted to salaried status, thus eliminating their overtime protections. There are 1.3 million workers [who] would lose overtime protection because of the new '"Highly Compensated Employee' category." In response to these comments and in the interest of transparency, the Department has chosen to set forth a detailed presentation of the methodology used to compute the estimates regarding the impact of the final rule.

4.2 Critique of the EPI Report

Before explaining how the Department estimated the impact of the final rule, it is important to discuss the EPI report because it has received considerable publicity and was the only detailed alternative impact analysis of the proposed rule that was submitted to the record. The Department has concluded that the EPI report is unsound because its conclusions are based on a substantial number of errors, particularly regarding whether the proposal represented a change from the tests in the current regulation. Because those errors led EPI to overstate significantly the number of employees losing overtime protection as a result of the Department's proposal, it is important to present an overview of the most serious errors in the EPI report.

First, the basis for the EPI estimate that millions of workers would lose their right to overtime was the contention that the proposed standard duties tests that applied to workers earning $425 or more per week were weaker than the current long and short duties tests. Many other commenters adopted this contention. For example, the National Treasury Employees Union stated, "Millions of workers with salaries between $22,101 and $65,000 who now receive overtime pay could be reclassified as exempt under the broadened definitions of executive, administrative, and professional employees." The Public Justice Center added, "If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will give this exempted portion of the workforce extra work, since they are essentially 'free labor.' And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker."

Most of the adverse comments resulted from mistakenly comparing the new standard duties tests to the old long duties tests. As explained above, this comparison is not valid because the current long duties test is only applicable to workers earning less than $250 per week and the few workers that are subject to the long test under the current rule will be guaranteed overtime protection under the final rule.

The EPI report erroneously claims that "Changes in the primary duty test and the redefinition of 'executive' will allow employers to deny overtime pay to workers who do a very low level of supervising and a great deal of manual or routine work, including employees who do set-up work in factories and industrial plants. Employees who can only recommend—but not carry out—the hiring or firing of the two employees they supervise will be exempted as executives." In fact, both the Department's proposed and final rules will make it more difficult to qualify as an exempt executive. The final rule contains the same two requirements as the current regulation's short duties test, and it adds a third requirement from the existing, but essentially inoperative, long duties test. The "only recommend" hiring or firing language that EPI finds objectionable is the same language currently in section 541.1(c), which has been in the regulations since 1949. Moreover, that requirement now appears only in the long test and thus is applicable only to employees earning less than $250 per week. The Department's proposed and final rules make this authority to recommend hiring or firing the third prong of the standard test, thus strengthening the executive duties test for workers earning $455 or more to $1,923 per week. Similarly, the reference to set-up work

that EPI finds objectionable also is taken substantially word-for-word from the current regulation at section 541.108(d), which describes work that may be treated as exempt work if it is directly and closely related to exempt work. Thus, EPI simply misses the mark in claiming the Department's proposed rule would exempt more workers as executives than under the current regulations. This claim is equally invalid under the final rule.

EPI also claims the "exemption for professional employees has been dramatically expanded to include *occupations* that not only do not require an advanced degree or postgraduate study, but also those that do not require even an associate's degree or any prolonged course of academic training or intellectual instruction (emphasis added)." In fact, the Department's proposed and final rules do not change the current regulation's educational requirements for exemption as a learned professional. The Department retains the current regulatory requirement limiting the professional exemption to employees whose primary duty is work that requires advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction. The Department also recognizes, as the current regulation has recognized since 1949 at section 541.301(d), that an advanced, specialized degree is "customarily" required but that an employee with equal status and knowledge—"the occasional chemist who is not the possessor of a degree in chemistry"—is not "barred from the exemption." But, as the final regulation continues to recognize (section 541.301(d)), in all cases the exemption is restricted to professions where an advanced, specialized academic degree is a "standard prerequisite for entrance into the profession." Because the professional exemption only applies to workers whose primary duty consists of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, it is simply impossible for the changes proposed or finalized here to extend that exemption to occupations that do not meet this test, as EPI claims.

Like many other commenters, EPI has confused the occupations specifically covered by proposed section 541.301(e). Based upon its misperception that the Department had changed the regulatory standard, the EPI report stated that under the proposed rule, "no minimum level even of on-the-job training will be required" for the professional exemption. In fact, the proposed and final rules clearly state that professional occupations do not include those whose duties may be performed with general knowledge acquired by an academic degree in any field or with knowledge acquired through an apprenticeship or from training in routine mental, manual, mechanical, or physical processes.

Similarly, the EPI report claims that licensed practical nurses (LPNs) and an additional 40 percent of other technologists and technicians in the health care field will become newly exempt as learned professionals. In fact, there are no such changes regarding nurses and others in the health care field. The Department's current regulation, at section 541.301(e)(1), has long recognized that registered nurses perform exempt duties (and whether they are, in fact, exempt turns on whether they are paid on a salary basis). The proposed and final regulatory exemptions are similarly limited to registered nurses, not LPNs. Moreover, the final rule specifically states that "licensed practical nurses and other similar health care employees * * * generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations." The current regulation also recognizes that certified medical technologists would satisfy the duties test if they complete "3 academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association." This exact language appeared in the proposed rule and is in the final rule. Thus, EPI's claim that 40 percent of health technologists will lose the right to overtime pay because they would be considered learned professionals simply is incorrect.

EPI's claim that "the great majority of dental hygienists will be exempt professionals" also is similarly wrong. The proposed and final rules provide that dental hygienists would qualify for exemption only if they have successfully completed four years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association. The regulation simply restates what has long been in the Wage and Hour Division's Field Operations Handbook and its opinion letters (*e.g.*, 1975 WL 40986, WHD Opinion Letter, WH–363, November 10, 1975) regarding dental hygienists, and thus there is no change from current law.

Section 541.301(f) of the final rule also notes that accrediting and certifying organizations may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

EPI's report also is similarly flawed regarding the administrative exemption, which it claimed "is vastly expanded by * * * eliminating the requirement that the employee's primary duty must be staff work rather than production work." In fact, the proposal expressly stated that it would "reduce but not eliminate the emphasis on the so-called production versus staff dichotomy in distinguishing between exempt and non-exempt workers." Thus, the EPI's report simply misstates the impact of the proposal in this area. Moreover, the final rule retains the current regulatory requirement that an exempt employee's primary duty must be work directly related to the management or general business operations of the employer or the employer's customers, and includes a provision found only in the interpretive portion of the current rule (section 541.205(a)) clarifying that this phrase refers to activities relating to the running or servicing of a business as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment.

In addition to the workers that EPI estimated would lose the right to overtime protection under the proposed standard duties tests, EPI also estimated that millions of workers would lose their right to overtime protection as the result of the proposed duties tests for highly compensated employees: "In FLSA-covered industries and occupations, there were 8.3 million white-collar employees who earned at least $65,000 in 2000. Approximately 7.4 million were paid a salary, and about 843,000 were paid hourly. Like the Department of Labor, we assume that hourly workers who would be exempt under the new rules if they were paid a salary will be converted to a salary basis by their employers and will therefore be exempt * * * We also assume that every employee paid $65,000 or more will be able to meet at least one prong of the many duties tests. There is no minimum educational attainment or job experience to qualify for this exemption."

The Department determined that EPI's estimate of 8.3 million is incorrect. First, this inflated figure includes a significant number of workers who are already exempt under the current short test, which double-counts millions of workers. More importantly, EPI erroneously described the impact of the highly compensated test, stating it would "deny overtime pay to white-collar employees who earn $65,000 or more a year, even if they do not meet the definition of executive, administrative or professional employees." In fact, the proposal would have exempted employees only if they earned at least $65,000 and performed "office or non-manual work" and performed "one or more of the exempt duties and responsibilities of an executive, administrative, or professional employee." EPI similarly erred when it claimed that, "every employee paid $65,000 or more will be able to meet at least one prong of the many duties tests." This claim ignored the fact that only employees performing office or non-manual work could meet the test, thus ensuring that highly paid blue-collar workers such as plumbers, electricians, steelworkers, autoworkers and longshoremen would never qualify for exemption. Further, the highly compensated test in the final rule has been increased to $100,000 or more per year.

These errors by EPI and other commenters are a good example of why the current regulation needs to be updated and clarified. If the group of "experts in employment law and in the application of the FLSA exemptions" that was consulted by EPI made these errors, it is probably similarly difficult for most small businesses to accurately understand their overtime obligations under the current rule.

The Department also concluded the EPI analysis is flawed because it erroneously assumes that employers completely control the terms of employment and can at their sole discretion and without consequence convert millions of workers to exempt status to avoid paying overtime. In fact, the economic laws of supply and demand usually dictate the terms of employment; therefore, if employers offer too little compensation for the hours of work they demand they will not be able to attract a sufficient number of qualified workers to meet their needs. If employers could completely dictate the terms of employment, in the absence of a state or local ordinance, hourly workers covered by the FLSA would only receive the federally-mandated minimum wage. Similarly, salaried workers would be paid no more than $250 per week, the minimum required to meet the current short duties test. These workers would then be required by their employers to work extremely long hours with no overtime. Since this is clearly not the situation in today's labor market, it is a mistake to assume that employers are in complete control of the terms of employment.

Consider the example of registered nurses. The Department received many comments alleging the proposal would cause registered nurses to lose overtime. For example, the American Nurses Association stated, "the proposed income test for white-collar employees, who are paid $65,000 or more annually, will exclude some of the most experienced registered nurses from overtime protections and will undermine efforts to retain these valuable members in the nursing workforce." The Massachusetts Nurses Association stated, "according to a recent national survey conducted by Advance For Nurses (a nursing publication), 32 percent of all nurses are salaried, which, given the long-established status of RNs as 'professionals' under the FLSA, means that 32 percent of nurses are subject to possible automatic exclusion from the FLSA simply based upon income if the proposed rule were adopted * * * Thus, the proposed regulation would likely render a great many rank-and-file RNs per se exempt from the FLSA."

These comments fail to recognize that RNs already satisfy the duties test for exemption under the current regulations, and have since 1971. Section 541.301(e)(1) of the current rule specifically states "Registered nurses have traditionally been recognized as professional employees by the Division in the enforcement of the act * * * [N]urses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of 541.3(a)(1) of the regulations." Given that most (94.1 percent) registered nurses have weekly earnings greater than $250, almost all registered nurses could be classified as exempt under current regulations if they were paid on a salary basis. Nevertheless, 75.5 percent of RNs continue to be paid by the hour and are eligible for overtime pay, strongly indicating there are other labor market factors involved in determining how RNs are paid.

Just as many RNs continue to be paid overtime despite the fact the current regulations classify them as performing exempt professional duties, the Department believes the same will happen for other occupations under the duties tests for highly compensated employees. There are many more factors involved in employee compensation beyond the FLSA requirements and an employer's desire to minimize overtime costs. The nature of the work (particularly peak work loads in relation to average work loads), the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis.

A review of the literature on pay policies posted by Human Resource (HR) professionals on publicly accessible Internet sites with workforce and salary themes (*e.g.*, Salary.com) also indicates the ability of employers to dictate the terms and conditions of employment is limited by a variety of labor market conditions. The pertinent market conditions include: Competition among employers, scarcity of skilled workers, accessibility of information, and worker mobility.

The effect of competition for skilled workers by firms operating in local or regional labor markets is clearly explained in the HR literature, "Just as organizations compete to sell their products and services, they also compete with one another for talented employees." (Lena M. Bottos and Christopher J. Fusco, SPHR 2002, Competitive Pay Policy, Salary.com, Inc.) Firms expend time and resources designing compensation plans that attract and retain skilled workers, without exhausting their limited financial resources. Under those conditions, exploiting workers by imposing unsatisfactory working conditions, such as excessive unpaid overtime, detracts from such firms' overall competitive strategies. It also exposes them to increases in labor turnover as displeased workers seek and find new jobs with competing employers.

Therefore, the Department concludes that any analysis or comment that explicitly or implicitly assumes that employers completely control all the terms of employment and can heedlessly convert millions of workers from nonexempt to exempt status to avoid paying overtime is inconsistent with prevailing economic theory (particularly regarding high-wage labor markets) and empirical analysis. For this reason, as well as the many mistakes and incorrect assumptions explained above, the Department finds the alternative impact analysis conducted by EPI and submitted by the AFL-CIO to the record to be unpersuasive.

4.3 Estimated Number of Workers Converted to Nonexempt Status as a Result of Raising the Salary Level

The Department estimates that the final rule will strengthen overtime protection for millions of workers. Raising the salary level test to $455 will:

- Strengthen overtime protection for an additional 6.7 million salaried workers earning $155 or more but less than $455 per week regardless of their duties or exempt status. This includes 1.3 million exempt white-collar salaried workers who will gain overtime protection and 5.4 million nonexempt salaried workers whose overtime protection will be strengthened by the higher bright-line salary level test compared to a combination of the salary basis test and the confusing long and short duties tests in the current regulations.
- Another 3.4 million white-collar employees who are paid by the hour (and earn $155 or more but less than $455 per week) but work in occupations with a high probability of being exempt also will have their overtime protection strengthened. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid.
- These 10.1 million workers are predominantly married women with less than a college education.

The estimated 1.3 million currently exempt salaried workers earning at least $155 but less than $455 per week for all white-collar occupations is the Department's best estimate of the number of workers who are likely to gain compensation under the final rule. A detailed breakdown of the estimates is presented in Table A–4 of Appendix A. The occupations gaining most from raising the salary level are 203,000 managers and administrators not elsewhere classified, 143,000 supervisors and proprietors of sales occupations, 52,000 accountants and auditors, 49,000 registered nurses, and 48,000 teachers not elsewhere classified.

When developing this estimate, the Department did not focus exclusively on the number of workers reporting overtime (41 or more hours worked). The Department assumed that all of the estimated 1.3 million exempt salaried workers earning at least $155 but less than $455 per week are likely to work some overtime during the year for two reasons: First, the CPS Outgoing Rotation Group dataset likely underestimated the number of employees who work some overtime during the year; and second, employers have an economic disincentive to exempt workers that never work overtime.

Moreover, because the CPS Outgoing Rotation Group dataset is based on only twelve one-week reference periods, it provides a significantly lower estimate of the number of employees who actually worked overtime at some point during the year than a survey based upon a full-year reference period such as the CPS Supplement. For example, the Bureau of Labor Statistics notes that because the Annual Social and Economic Supplement to the CPS has a "reference period [that] is a full year, the number of persons with some employment or unemployment greatly exceeds the average levels for any given month, which are based on a 1-week reference period, and the corresponding annual average of the monthly estimates." (BLS, Work Experience of the Population in 2002, Press Release.) The Department has determined that the same is likely to be true for the number of workers who work overtime.

The Department believes that including all 1.3 million workers is reasonable given the exempt status of these workers. Conferring exempt status on an employee has both costs and benefits. The cost is that these workers may work less than 40 hours per week without using leave, and under the salary basis test employers cannot adjust employee pay for working less than 40 hours. In fact, the CPS data states that about 23 percent of likely exempt workers worked less than 35 hours per week during the reporting period. In this situation, employers have to pay for hours that are not worked. This cost must be offset by the benefit of flexibility. Both employers and employees may prefer a salary basis for payment in order to smooth out cash flows; however, that preference depends on the employer having a need for flexibility in the number of hours the employee works, and the employee accepting that their pay will not be tightly tied to hours worked. In other words, employers will have a need for overtime and salaried employees would be willing to work overtime. Therefore, employers have an economic disincentive to exempt workers that never work overtime, and the Department considers an exemption a strong signal that the worker is likely to work some overtime during the year.

Furthermore, the Department considers the estimated 1.3 million workers gaining compensation to be a lower bound estimate of the workers who will benefit from raising the salary level to $455 per week. Specifically, the following workers will also benefit:

- An estimated 2.6 million nonexempt salaried workers earning $155 or more but less than $455 per week in the white collar occupations will gain some overtime protection (in the form of a reduced probability of being misclassified) from the $455 bright line salary level test compared to the current combination of long and short duties tests.
- Up to 14.0 million hourly paid workers earning $155 or more but less than $455 per week in the white-collar occupations will also benefit from the $455 bright line salary level test. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid. This estimate includes the 3.4 million white-collar employees noted above who are paid by the hour but work in occupations with a high probability of being exempt.
- Raising the salary level test to $455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.

4.4 Estimated Number of Workers Changing Exempt Status as a Result of Updating the Duties Tests

Given the comparability of the standard tests in the final rule and the current short tests (see Chapter 2), the Department has determined the final rule is as protective as the current regulation for the 57.0 million workers who earn between $23,660 and $100,000 per year. The differences in the number of workers who could change exempt status under the standard duties tests compared to the current regulation are too small to estimate quantitatively. The very few, if any, workers whose exempt status might possibly change as a result of updating the administrative and professional duties tests are likely to be offset by workers gaining overtime protection as a result of the tightened executive test.

Clearly, the final standard duties test for the executive exemption is more protective than the current regulation with the additional requirement from

the current long test. The numerous significant changes the Department made in the final rule to return the administrative duties test to the structure of the current rule, as well as the retention of terms that are used in the current rule that have been the subject of numerous clarifying court decisions and opinion letters, have made the standard duties test for administrative employees in the final rule as protective as the current short test. Further, the significant changes the Department made in the final standard duties test for the learned professional exemption to track the current rule's primary duty test, to restructure the reference to acquiring advanced knowledge through other means so that the final rule is consistent with the current rule, to add language from the current long test that defines work requiring advanced knowledge as "work that is predominantly intellectual in character," and to define work requiring advanced knowledge as including work requiring the consistent exercise of discretion and judgment have made the learned professional exemption in the final rule at least as protective as the current rule. It should also be noted that both the current and final rule recognize that the areas in which the professional exemption may be available are expanding as knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields.

Before reaching this determination, the Department convened a group of WHD and DOL employees with a combined total of more than 160 years of WHD experience. The group was asked to quantitatively compare the duties tests in the current and final standards with respect to how the updated final rule could impact the probability of exemption. The group concluded that, given the minor and editorial updates to the duties tests in the final rule, the CPS data limitations, and the broad probability ranges previously developed (see Table 3–2), the differences in the exemption probabilities under the current and final rule would be too small to estimate.

As the GAO previously noted, basing the estimates on the CPS and the 1998 judgments of the WHD staff imposes some limitations on the analysis: "There are two major limitations on the use of CPS data. First, the CPS occupational classifications do not distinguish between supervisory and nonsupervisory employees, which is important for the long and short duties tests under the Fair Labor Standards Act (FLSA). Therefore, one job title, 'managers and administrators,' could include the President of General Motors, but it may also include an office assistant. Second, CPS respondents self-identify their duties and some may tend to exaggerate them. This may result in overestimates of the number of management employees and, consequently, may overestimate the number of exempt employees." (GAO/HEHS–99–164, pg. 42)

4.5 Estimated Number of Salaried Workers Converted to Exempt Status as a Result of the Highly Compensated Test

Although the test in the final rule for highly compensated employees who earn $100,000 or more per year is clearly more protective than a simple salary level test, it is less stringent than both the current short duties tests and the standard duties tests in the final rule. The Department estimates that under the highly compensated test:

- About 107,000 nonexempt white-collar workers who earn $100,000 or more per year could be converted to exempt salaried status as a result of the new highly compensated test. This includes 60,000 salaried and 47,000 paid hourly workers.
- No blue-collar workers will be affected because the test only applies to employees performing office or non-manual work. Carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other employees who perform manual work are not exempt under the test no matter how highly paid they might be.
- No police officers, fire fighters, paramedics, emergency medical technicians (EMTs), and other first responders will be affected by the highly compensated test.
- The vast majority of salaried white-collar workers who earn $100,000 or more per year, 2.0 million of the 2.3 million, or 87.0 percent, are already exempt under the current short test and will not be affected by the highly compensated test.

The methodology used to estimate the number of salaried workers that could be classified as exempt under the duties tests for highly compensated employees is similar to the methodology used to estimate the number of exempt workers under the current short duties tests. The primary distinction is that a higher set of probabilities was estimated for each white-collar CPS occupational classification reflecting the more limited duties tests for highly compensated workers.

Since the exemption for highly compensated workers is a new provision, the probabilities of exemption for the four classifications could not be estimated on the basis of historical experience, as was done for the current duties tests in 1998 by the WHD staff (see Chapter 3). Therefore, the Department used a comparative approach whereby the probabilities developed by the WHD staff were modified based upon an analysis of the provisions of the highly compensated test in the final rule relative to the short duties tests in the current rule. The Department determined that this comparative approach should be used for the highly compensated test because it is substantially different from the current short duties test, whereas it should not be used for the standard duties tests because they are substantially similar to the current short duties tests.

In utilizing this approach, the Department rejected the worst-case assumption used by some commenters, that under the proposed highly compensated tests all workers earning more than the highly compensated salary level ($65,000 per year in the proposal) could be made exempt. Rather, the Department determined that some workers earning more than $100,000 per year would remain nonexempt because the final highly compensated test requires that exempt work be office or nonmanual and that the employee "customarily and regularly" perform one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee, and that the employee be paid at least $455 per week on a salary basis. Other workers would remain nonexempt because most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital and minimizing their turnover costs.

Although the highly compensated test in the final rule is clearly more stringent than either a simple salary test or the highly compensated test in the proposed rule, it is also clear that the highly compensated test in the final rule is less stringent than both the current short tests and the standard duties tests in the final rule. To account for this, the Department determined that both the lower and upper bound probability estimates for the four probability categories should be higher than those used in Chapter 3 to estimate the number of currently exempt workers (see Table 3–2).

- For the "Low or No Probability of Exemption" classification, the Department raised the lower bound

probability of exemption from 9.9 percent estimated using the methodology presented in Chapter 3 for earnings of $1,923 per week (*i.e.*, $100,000 per year) to 15.0 percent, and the upper bound probability of exemption by approximately the same 5 percentage points, from 10 percent to 15 percent (see Table 3–2). This represents an increase of at least 50 percent for both the lower and upper bound probabilities.

These increases are sizable for occupations that have little or no probability of being exempt under the current short tests, but were included because the WHD staff in 1998 considered it conceivable that some exempt supervisors might be in the group.

- For the "Probably Not Exempt" classification both the lower and upper bound probabilities were raised by 10 percentage points. This raised the lower bound probability by approximately 21 percent from the 48.4 percent calculated at $1,923 per week (*i.e.*, $100,000 per year) to 58.4 percent, and increased the upper bound probability by 20 percent from the 50 percent in Table 3–2 to 60 percent.

These increases are sizable for occupations that have a relatively low probability of being exempt under the current short tests.

- For the "Probably Exempt" classification the lower bound probability was increased from 88 percent (at $100,000 per year) to 94 percent and the upper bound probability was raised from 90 percent to 96 percent. This raised both probabilities by 6 percentage points and effectively reduced the probability of being nonexempt by 50 percent for workers in this category who earn more than $100,000 per year.
- For the "High Probability of Exemption" category both the lower and upper bound were set at the maximum value of 100 percent.

The lower bound probability for both the "Probably Exempt" and the "High Probability of Exemption" categories were already extremely high at earnings of $100,000 per year using the methodology in Chapter 3 (88 percent and 99 percent, respectively). This is consistent with the belief of the WHD staff that most workers in these categories earning at least $100,000 are probably already exempt.

The estimated probabilities of Part 541—exemption status under the duties tests for highly compensated employees are presented in Table 4–1 for each coverage classification.

TABLE 4–1.—PART 541—EXEMPTION PROBABILITY CATEGORIES FOR SALARIED WORKERS UNDER THE FINAL HIGHLY COMPENSATED TEST

| Category | Lower bound estimate (percent) | Upper bound estimate (percent) |
|---|---|---|
| 1. High Probability of Exemption | 100 | 100 |
| 2. Probably Exempt | 94 | 96 |
| 3. Probably Not Exempt | 58.4 | 60 |
| 4. Low or No Probability of Exemption | 15 | 15 |

Source: U.S. Department of Labor, based upon estimates in Table 3–2.

The specific probabilities of exemption for the annual salaries between the $100,000 salary level for the highly compensated test and the top coded salary of $150,000 per year (*i.e.*, $2,885 per week) were estimated using linear interpolation according to the following equation:

$$Prob\_Exempt\_HC = LB^* + \frac{(PTERNWA - \$1{,}923) \times (UB^* - LB^*)}{(\$2{,}885 - \$1{,}923)}$$

Where:

Prob_Exempt_HC = Probability of the individual in occupational classification OCC being exempt under the duties tests for highly compensated employees

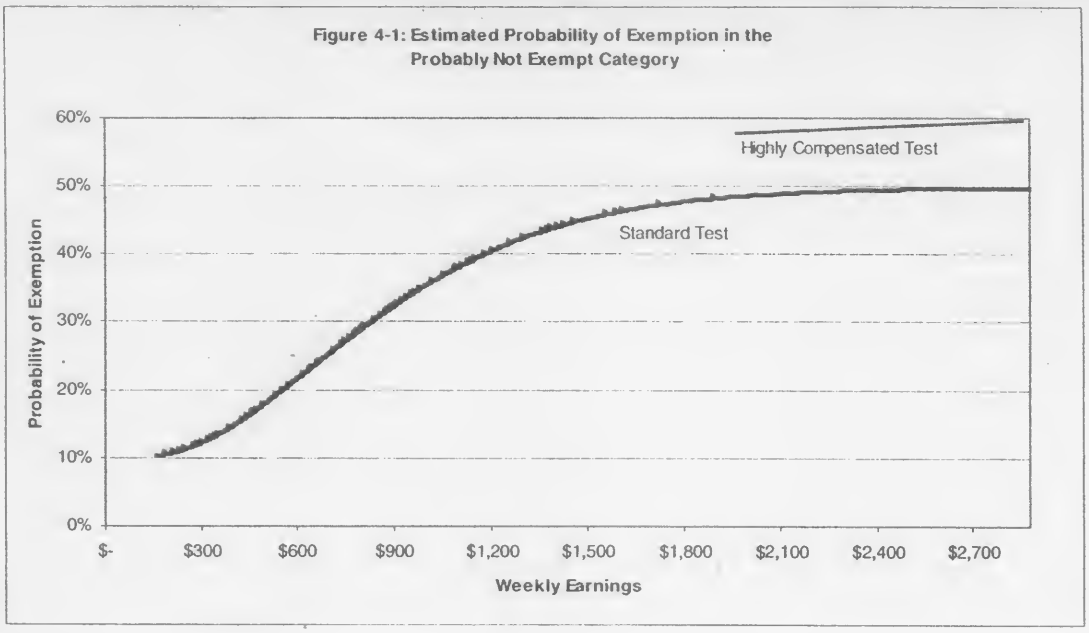
PTERNWA = CPS weekly earnings variable

LB* = Lower bound probability from Table 4–1

UB* = Upper bound probability from Table 4–1

Linear interpolation was used rather than a nonlinear model because the income distributions for all four categories are relatively linear once weekly earnings reach $1,923 (*i.e.*, the $100,000 annual earnings level). Figure 4–1 presents a graphical illustration of the probable exemption status for the "Probably Not Exempt" classification. Similar illustrations could have been developed for the other three classifications but were not included in the final RIA.

As Figure 4–1 illustrates, the probability of being exempt is higher under the highly compensated test than under the standard test. To estimate the number of additional employees that become exempt as a result of the new highly compensated test, the Department simply subtracted the estimated number of workers who would be exempt under the standard tests from the total number who would be exempt under the highly compensated tests.




The Department excluded salaried computer system analysts and scientists (in occupation 64) and salaried computer programmers (in occupation 229) because they could have already been made exempt under section 13(a)(17) of the Act. In addition, salaried registered nurses (in occupation 95) and salaried pharmacists (occupation 96) were excluded because they could have already been made exempt under both the current short tests and the standard duties tests in the final rule. Thus, the Department estimates approximately 60,000 additional salaried workers earning $100,000 or more per year could become exempt under the highly compensated test as compared to the current short test or the standard duties tests in the final rule. A detailed breakdown of the additional number of workers who could be made exempt under the highly compensated tests is presented in Table A–5 of Appendix A.

4.6 Estimated Number of Hourly Paid Workers Converted to Exempt Status as a Result of the Highly Compensated Test

The procedure used to estimate the number of highly compensated hourly employees that could be converted to exempt salaried status under the final rule is different from that used in Section 4.5 because, under both current regulations and the final rule, virtually all hourly workers are considered nonexempt (except those not required to be paid on a salary basis, such as doctors and lawyers). Thus, before any hourly worker could be made exempt under the highly compensated tests, employers would first have to convert them to a salaried basis and pay them at least $455 per week plus commissions and bonuses that brings their total compensation to $100,000 or more per year. To estimate the number of hourly workers that could be converted, the Department utilized a number of reasonable assumptions.

First, the Department assumed that over the 29 years since the last revision to Part 541 the market has established an optimal distribution between the number of salaried and hourly workers who earn $100,000 or more per year. Although there are many more factors involved in employee compensation beyond the FLSA requirements as was noted above in Section 4.2, it appears that both employers and employees prefer a salary basis for earnings at this level, given the greater than 7 to 1 ratio of salaried workers (2,321,000) to hourly workers (345,000) subject to the Part 541 salary tests.

The nature of the work, the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis. Therefore, the Department has determined that just as 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn $100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties, the same will happen for other white-collar occupations under the highly compensated test and that many paid hourly workers will remain paid by the hour. The Department then assumed:

- For both the "Low or No Probability of Exemption" and the "Probably Not Exempt" categories, that highly compensated white-collar hourly workers would have the same marginal probability of being converted to exempt salaried status as the currently nonexempt highly compensated salaried white-collar workers. Thus, highly compensated white-collar hourly workers in these two categories were assigned probabilities of exemption of 5 percent and 10 percent, respectively.

These probabilities are consistent with the Department's first assumption that the market has established an optimal distribution between the number of salaried and hourly workers who earn $100,000 or more per year and that only a marginal change is likely to occur in the exempt status of paid hourly workers who earn $100,000 or more per year in these two categories.

Second, the Department assumed that:

- The probability of being converted to exempt salaried status for highly compensated white-collar hourly workers in the "Probably Exempt" category is twice that of highly compensated white-collar hourly workers in the "Probably Not Exempt" category, or 20 percent. Unlike the two

categories discussed above, the Department did not base its estimates on the marginal probabilities for salaried white-collar workers in the "Probably Exempt" category because, as discussed in Section 4.5, the upper bound probability for such workers in that category was limited by its close proximity to 100 percent.

• The Department also assumed that the probability of being converted to exempt salaried status for highly compensated white-collar hourly workers in the "High Probability of Exemption" category is twice that of highly compensated white-collar hourly workers in the "Probably Exempt" category, or 40 percent. The Department once again did not base its estimate on the marginal probabilities for salaried white-collar workers in the "High Probability of Exemption" category because, as discussed in Section 4.5, the upper bound probability for such workers in that category was limited by its close proximity to 100 percent.

These estimates are presented in Table 4–2.

TABLE 4–2.—ESTIMATED PROBABILITY OF EXEMPTION FOR WHITE-COLLAR HOURLY WORKERS EARNING AT LEAST $100,000 PER YEAR

| Category | Estimated probability (percent) |
|---|---|
| 1. High Probability of Exemption | 40 |
| 2. Probably Exempt | 20 |
| 3. Probably Not Exempt | 10 |
| 4. Low or No Probability of Exemption | 5 |

Source: U.S. Department of Labor.

Further, the Department rejected the worst-case assumption that under the highly compensated test all paid hourly workers earning $100,000 or more per year could be made exempt. Rather, the Department determined that some paid hourly workers earning more than $100,000 per year would remain nonexempt because the final highly compensated test requires that exempt work be office or nonmanual and that the employee "customarily and regularly" perform one or more of exempt duties. Other paid hourly workers would remain nonexempt because most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital and minimizing their turnover costs.

The next step was to estimate the number of hourly white-collar workers earning $100,000 or more per year who would meet the duties tests for highly compensated employees in the final rule. The Department excluded approximately 29,000 computer professionals (in occupations 64 and 229) because these computer professionals earning $100,000 or more per year would currently be exempt under section 13(a)(17) of the Act. Approximately 22,000 registered nurses (occupation 95) and 10,000 pharmacists (occupation 96) were also excluded because current section 541.301(e)(1) has long recognized that registered nurses and pharmacists perform exempt duties (and whether they are, in fact, exempt turns on whether they are paid on a salary basis). If it were advantageous for employers to convert any of these workers to exempt status, they could and presumably would have been converted under the current rule. After excluding these two groups, there are approximately 182,000 hourly white-collar workers earning at least $1,923 per week in the 251 white-collar occupations who potentially could be impacted by the highly compensated tests. Workers in occupations not subject to the salary level test (*i.e.*, teachers in educational establishments, doctors and lawyers) were previously excluded from the analysis whether they are paid on a salary or hourly basis.

The number of hourly workers in each white-collar occupation earning at least $1,923 per week was multiplied by the associated probability in Table 4–2 and summed across all occupations to arrive at the Department's estimate that about 47,000 hourly workers could be converted to exempt salaried status as the result of the highly compensated test (Note: this procedure is equivalent to using the same linear model as in Section 4.5 with all of the lines being horizontal). Managers and administrators not elsewhere classified (occupation 22) account for approximately 31 percent of all hourly workers that could potentially be converted to exempt salaried status. No other occupation accounts for more than five percent of the total. Table A–6 in Appendix A presents the detailed breakdown by occupation.

4.7 Estimated Total Number of Workers Converted to Exempt Status as a Result of the Highly Compensated Tests

The Department estimates that 107,000 workers could be converted to exempt status as a result of the new highly compensated tests. The major reason for the decrease in this estimate compared to the PRIA is the salary level for the test being raised to $100,000 and there are far fewer workers earning this higher salary. The Department estimates there are 2.3 million salaried workers earning at least $100,000 in white-collar occupations subject to the salary test, compared to 7.0 million earning at least $65,000. In addition, after excluding the computer programmers, RNs and pharmacists, because they could already be made exempt if paid on a salaried basis under the current rule, 2.0 million of the 2.1 million remaining highly compensated white-collar salaried workers (95.2 percent) are estimated to be already exempt under the current short duties tests. In addition, there are only 182,000 hourly workers that could be potentially impacted by the highly compensated test at the $100,000 level. Moreover, the final rule's highly compensated test applies only if the employee performs office or non-manual work.

Thus, for example, police officers, firefighters, paramedics, and other first responders could not be exempt under the highly compensated test although the Department estimates that 1,300 police commissioners, police and fire chiefs, and police captains who earn $100,000 or more per year could be converted to exempt status. (However, 940 of these 1,300 workers are performing exempt duties but are currently nonexempt because they report that they are paid by the hour, rather than on a salary basis. Therefore, the Department believes that many of them are unlikely to be converted because of the final rule.) Finally, by increasing the earnings level for the highly compensated test and adding the requirement that the exempt duties must be performed customarily and regularly, the Department increased the probability that the salaried workers at that level would already be exempt under the current rule.

The Department notes that the CPS earnings data includes wages, commissions and tips, but does not include some bonuses. According to the Census Bureau Web site, the usual weekly earnings "data represent earnings before taxes and other deductions, and include any overtime pay, commissions, or tips usually received (at the main job in the case of multiple jobholders). Earnings reported on a basis other than weekly (*e.g.*, annual, monthly, hourly) are converted to weekly. The term 'usual' is as perceived by the respondent. If the respondent asks for a definition of usual, interviewers are instructed to define the term as more than half the weeks worked during the past 4 or 5 months." (*http://www.bls.census.gov/cps/bconcept.htm*)

The Department concludes that infrequent bonuses (*e.g.*, Christmas bonuses) are probably not reported as usual earnings, while regular non-discretionary bonuses (such as those described in section 541.601(b) of the final rule) are likely to be included. Given that some workers surveyed for the CPS may not have reported their non-discretionary bonuses, the Department may have slightly underestimated the number of workers potentially impacted by the highly compensated test. However, the Department believes this is balanced by the fact that the analysis was conducted using weekly earnings rather than annual earnings as is required by the highly compensated test, which may result in an overestimate of the number of workers earning $100,000 or more per year (weekly earnings were used because the CPS dataset does not contain a variable for annual salary). Since there are many more white-collar hourly workers earning less than $100,000 per year than earning $100,000 or more per year, it is likely that basing the estimate on a single week of data will likely result in the inclusion of many more workers with an abnormally high earnings week (*e.g.*, due to a large amount of overtime or an unusually high commission) in the estimate of workers earning $100,000 or more per year than the number of workers excluded from the total of workers earning $100,000 or more per year due to one abnormally low earnings week (*e.g.*, due to the lack of overtime or an unusually low commission).

Finally, as discussed above in Section 4.6, the estimate of 47,000 hourly workers who could be converted to exempt salaried status is likely an overestimation due to the assumptions made about the ease of converting these workers to a salary basis.

4.8 Estimated Total Impact of the Part 541 Revisions

As indicated in Table 4–3, the Department estimates 1.3 million salaried workers earning less than $455 per week who are currently exempt under the long and short duties tests could benefit from higher earnings in the form of either paid overtime or higher base salaries. In addition, an estimated 47,000 hourly workers and 60,000 salaried workers with annual earnings of $100,000 or more could be converted to exempt status as a result of the new highly compensated test.

TABLE 4–3.—ESTIMATED IMPACT OF THE FINAL RULE ON THE OVERTIME STATUS OF WHITE-COLLAR WORKERS

| | |
|---|---|
| Exempt to Nonexempt | 1,298,000 |
| Salaried Nonexempt to Exempt | 60,000 |
| Hourly Nonexempt to Salaried Exempt | 47,000 |

Source: CONSAD and the U.S. Department of Labor.

Chapter 5: Economic Profiles

In the PRIA, the Department presented estimates at the 2-digit standard industry code (SIC) and by state. As noted above, several commenters suggested more detailed breakdowns should have been published. For example the AFL–CIO stated, "Generalizing to a 2-digit code loses important distinctions within industry sector, and this causes a corresponding loss of precision within the study."

However, there are not a sufficient number of observations in the CPS dataset to provide reliable estimates even at the 2-digit level of detail, much less the 4-digit level suggested by the AFL–CIO. For example as discussed above, the methodology used in Chapter 3 was conducted on a national level and was intended to produce national estimates of the number of currently exempt workers. To produce industry specific or regional estimates, the income distributions would have had to have been developed at more disaggregated levels in order to account for the industry or regional wage structure. While sufficient to produce national estimates, the Department determined that the CPS dataset was too small to develop income distributions for each of the categories at this more disaggregated level.

Similarly, the costs presented below in Chapter 6 were estimated at a national level and then allocated to specific major industry groups on the basis of employment or number of employers. Presenting the data at a more disaggregated level would simply indicate a degree of precision that does not exist.

The Department decided to present nine industry sectors and the government sector because these estimates are based on at least 998 observations, and an average observation number of 18,230 per sector. The Department felt that these sample sizes were sufficient to accurately represent the sectors. Further disaggregation would have required the Department to extrapolate from smaller samples. For example, a subset among all 50 states and industry categories would have implied a dependence on a minimum sample size of 1 observation (for a particular sector and state), and an average sample size of 14 observations across all states and sectors. Extrapolating from these small sub-samples would be problematic, and would not offer the level of precision desired by the commenters.

For this reason, the Department has developed the economic profiles for the nine major industry categories plus State and Local Government. Although compiled from more detailed levels, these profiles were aggregated to match the level of precision available in the coverage and cost estimates. The Department notes that due to these very same data limitations, the GAO took a similar approach in presenting aggregated data: "Our work presents data for six industry groupings: (1) Services; (2) retail trade; (3) manufacturing; (4) finance, insurance, and real estate; (5) public sector; and (6) other. We developed these groups by combining 932 detailed CPS industry codes." (GAO/HEHS–99–164, pg. 41)

Also, the number of employees presented in this chapter does not match the numbers presented in Chapter 3 because of different data sources and different time periods. For example, the covered employment numbers presented in Chapter 3 only count each individual once regardless of the number of jobs held. The covered employment numbers presented in Chapter 5 are based on the number of workers employed by each employer so some individuals are counted more than once.

5.1 Private Sector Profile

The AFL–CIO commented on the PRIA that, "CONSAD has not provided—and, given the sheer number of the sources, probably could not provide—sufficient detail to allow for the reader to understand and/or replicate the process." The AFL–CIO also stated, "the study's methodology is confusing, and because CONSAD does a poor job of explanation, it is not capable of replication. For example, CONSAD uses a myriad of statistical sources from several different time periods to come up with the data it needs to estimate the number of exempt employees under the proposal and the corresponding impact on business." In the following section, the Department has attempted to provide the detail that will allow the reader to understand and replicate this analysis.

Since the FLSA and the Part 541 overtime regulations apply nationally, the Department obtained data on firms in the private sector primarily from the

U.S. Department of Commerce's Economic Census. The Economic Census is the only data source that has the scope covered by the revised regulations. The most recent Economic Census that is available was published in 2001 for the year 1997. As noted in the footnotes to the tables that follow, even this source had to be supplemented in some cases with additional data.

First, the Department notes that it relied on only a single data source to produce its estimates of the number of salaried and hourly workers covered by the FLSA, the 2002 CPS Outgoing Rotation Group data set. This was also the only source used to produce the estimates of the number of exempt workers and the associated changes in overtime costs related to changes in the regulations. As noted in Chapter 3, the CPS data were supplemented with probabilities developed by the WHD enforcement staff concerning the likelihood that workers in various white-collar occupations would be exempt. These same assessments were previously used by both the GAO and the University of Tennessee. They were also used in an analysis by the EPI that the AFL–CIO submitted for the record. In order to make the estimates easier to replicate, the Department has added a considerable amount of additional detail in this preamble that was not provided in the PRIA. For example, the Exempt Status assessments of the WHD staff for each occupation are presented in Appendix A.

Second, in order to estimate the one-time implementation costs, the Department had to rely on the 1997 Economic Census (supplemented by the 1997 County Business Patterns) because some costs are based on the number of establishments or firms and these are the latest available data. Such information is not available in the 2002 CPS Outgoing Rotation Group dataset. After assessing the economic impact of the revisions, the Department relied on a number of other statistical sources, such as multiple years of IRS and Dun & Bradstreet (D&B) data, to obtain the payroll, revenue, and profit data needed to put the estimated payroll and implementation costs in perceptive. Moreover, as the AFL–CIO conceded, "relying on several sources is not itself a fatal flaw."

Although the Department used various data sources covering different time periods, this could not be avoided to complete the required economic analysis since the primary data set used in the analysis, the 2002 CPS, is based on the Standard Industrial Classification (SIC) while most of the more recent data is based upon the newer North American Industry Classification System (NAICS). The U.S. Census Bureau cautions that "While many of the individual SIC industries correspond directly to industries as defined under the NAICS system, most of the higher level groupings do not. Particular care should be taken in comparing data for retail trade, wholesale trade, and manufacturing, which are sector titles used in both NAICS and SIC, but cover somewhat different groups of industries." (*http://www.census.gov/epcd/ec97brdg/introbdg.htm*) Given that the profit data from Dun & Bradstreet (D&B) were also SIC based, the Department decided to use data sets that were also SIC based rather than conduct a complicated crosswalk conversion that potentially introduces other errors into the analysis.

Although the use of SIC based data required the use of data from several different years, the Department also determined that this was unlikely to significantly bias the results. The CPS Outgoing Rotation Group data came from 2002; the Economic Census, County Business Patterns, and IRS data came from 1997; and the D&B data came from 2000, 2001 and 2002.

The D&B data on profits match up fairly well with the payroll cost estimates derived from the 2002 CPS data presented in Chapter 6. The D&B data from 2002 were from the same year as the CPS data. The use of D&B data from 2000, the peak of the economic expansion, is likely to somewhat overstate 2002 profits, while the use of D&B from 2001, the year of the last recession and the 9/11 terrorist attacks, is likely to somewhat understate 2002 profits. So on average, the Department has determined that the use of D&B data from these three years is reasonable and provides a valid comparison with the cost estimates based upon the 2002 CPS data.

However, using the 1997 Economic Census, 1997 County Business Patterns, and the 1997 IRS data is likely to affect the analysis because the economy expanded for three years after the 1997 data were collected. For example, civilian employment in 1997 averaged 129.6 million, while employment in 2002 averaged 134.3 million (based upon the old weights). Therefore, use of the 1997 data is likely to understate the 2002 payroll employment.

In Chapter 7, the Department adjusted the dollar values for the 1997 payroll data because wages continued to increase from 1997 to 2002. Nevertheless, the comparison of the adjusted 1997 payroll data with the cost estimates based upon the 2002 CPS data are likely to overstate the economic impacts presented in Chapter 7 because the denominator (based upon the 1997 employment) will be relatively smaller than the numerator (based upon 2002 employment).

While acknowledging these data issues, the Department notes that they are unavoidable because the 1997 data is the latest available for the required economic analysis. Although some more recent data (*e.g.*, 2001 County Business Patterns and 2001 Statistics of U.S. Business) are available, these could not be used in this analysis because the newer data are based on the North American Industry Classification System (NAICS), while this analysis is tied to the dated Standard Industrial Classification (SIC) used in both the CPS and D&B data.

Finally, some of the one-time implementation costs were based upon the number of establishments in the 1997 Economic Census (supplemented by the 1997 County Business Patterns). Although the Department was unable to ascertain the relation of the establishment estimates in 1997 to those in 2002, it believes that on average the counts in 1997 are likely to be less than those in 2002. Therefore, the impact of some one-time implementation costs (*i.e.*, those based on establishment counts) is likely to be somewhat understated. Again, attempting to update establishment counts using NAICS-based data would involve a complicated crosswalk conversion that potentially introduces other errors into the analysis. However, the sales revenue estimates are similarly based on 1997 data. Although the Department adjusted the dollar sales revenue data in Chapter 7 to account for inflation, no adjustments were made to account for the growth in the number of establishments. The Department believes these two effects will offset themselves to some degree when calculating the cost to revenue ratios in Chapter 7 and concludes this is the best approach available given the scope of the regulations and the limitations of the available data sources.

In summary, the Department attempted wherever possible to ensure the compatibility of the different cost, payroll, revenue, and profit numbers. The Department adjusted the 1997 estimates for inflation and wage growth in order to allow for a valid comparison with the later year cost estimates. In practice, however, this adjustment made very little difference in the per firm percentage impacts described below; for example, the average decrease in impact due to adjusting the revenue numbers for inflation was less than one-tenth of

one percent. Therefore, the Department's per firm impact estimates are robust to these assumptions. Unfortunately, the Department is unable to adjust upward the number of establishments. This source of possible underestimation of cost, however, is more than offset since the Department did not quantify any of the benefits of this rule for the purposes of per firm impact analysis. These benefits do accrue to the same employers as the costs estimated in the following section.

The resulting estimates, based on 1997 data, indicate that there are 6.5 million establishments with 99.8 million employees, annual payroll totaling $2.8 trillion, annual sales revenues of $17.9 trillion, and annual pre-tax profits of $579.7 billion in the affected industry sectors (see Table 5–1). Across all industries, the services industry has the largest numbers of establishments, employees, and payroll. This is followed by retail trade for establishments and employees, and manufacturing for payroll. Annual sales are largest in wholesale trade followed by manufacturing. Annual pre-tax profits are largest for the finance, insurance, and real estate industry followed by manufacturing.

On average, employment per establishment ranges from seven employees in the agricultural services, forestry, and fishing industry to 47 employees in manufacturing. The average annual payroll per establishment ranges from $71,000 in the agricultural services, forestry, and fishing industry to $1.6 million in manufacturing. The average annual sales per establishment ranges from $504,000 in the agricultural services, forestry, and fishing industry to $10.7 million in manufacturing, while the average annual pre-tax profits per establishment ranges from $20,000 in the agricultural services, forestry, and fishing industry to $1.0 million in the mining industry.

TABLE 5–1.—ESTIMATES OF ESTABLISHMENTS COVERED BY THE FLSA AND THEIR ASSOCIATED EMPLOYMENT, PAYROLLS, SALES AND PROFITS

| Industry Division | Number of establishments | Number of employees [1] | Annual payroll ($1,000) [2] | Sales, receipts, value of shipments ($1,000) | Pre-Tax profits ($1,000) [3] |
|---|---|---|---|---|---|
| Agricultural Services, Forestry, and Fishing[4] .. | 116,523 | 777,671 | $8,318,830 | $58,687,096 | $2,357,130 |
| Mining | 25,103 | 531,683 | 21,566,696 | 179,763,175 | 25,488,881 |
| Construction | 639,478 | 5,702,374 | 176,357,238 | 859,877,289 | 28,628,686 |
| Manufacturing | 377,456 | 17,796,092 | 608,751,849 | 4,037,904,247 | 94,604,018 |
| Transportation and Public Utilities[5] | 331,594 | 6,767,563 | 247,245,240 | 1,226,952,529 | 76,411,219 |
| Wholesale Trade | 521,127 | 6,544,480 | 241,917,819 | 4,362,657,653 | 86,688,186 |
| Retail Trade | 1,561,195 | 20,145,349 | 268,498,043 | 2,459,061,733 | 37,467,739 |
| Finance, Insurance, and Real Estate | 661,389 | 7,397,569 | 273,607,500 | 2,250,789,643 | 156,048,617 |
| Services[6] | 2,302,848 | 34,164,093 | 939,353,069 | 2,462,227,737 | 71,969,249 |
| All Industries | 6,536,713 | 99,826,874 | 2,785,616,284 | 17,897,921,102 | 579,663,726 |

Note: Unless otherwise noted, data are from USDOC (2001a).

Note: For SICs 07, 08, 09, and 89, the number of establishments, number of employees, and annual payroll are derived from the USDOC (1999) database. Sales data are derived from the D&B (2001a) database.

[1]Employment is estimated when data suppression occurs.

[2]Values may be underestimated due to data suppression in USDOC (2001a).

[3]Pre-tax profits are based on sales data and pre-tax profit rates from D&B (2002), except for SIC 09 which is from D&B (2001b), and SICs 21, 60, 63, and 64 which are from IRS (2000).

[4]Excludes agriculture (SICs 01 and 02).

[5]Excludes railroad transportation (SIC 40). All data for the U.S. Postal Service (SIC 43) are from USPS (1997). Also, data do not include large certificated passenger carriers (in SIC 45) that report to the Office of Airline Statistics, U.S. Department of Transportation.

[6]Excludes private households (SIC 88).

Sources: U.S. Department of Commerce, Bureau of the Census (USDOC, 2001a), 1997 Economic Census: Comparative Statistics, downloaded from http://www.census.gov/epcd/ec97sic/index.html#download;

U.S. Department of Commerce, Bureau of the Census (USDOC (1999), 1997 County Business Patterns; Dun & Bradstreet (D&B, 2001a), National Profile of Businesses Database for Fiscal Year 2000;

Dun & Bradstreet (D&B, 2001b), Industry Norms and Key Business Ratios for Fiscal Year 2000/2001; Dun & Bradstreet (D&B, 2002), Industry Norms and Key Business Ratios for Fiscal Year 2001/2002;

U.S. Department of the Treasury, Internal Revenue Service (IRS, 2000) Corporate Tax Returns for Active Corporations for 1997; And U.S. Postal Service (USPS, 1997), 1997 Annual Report.

5.2 Private Sector Small Business Profile

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the Department to estimate the number of small businesses affected by the final rule. For the industries of interest here, the Small Business Administration (SBA) generally defines small businesses using either a criterion based on employment or a criterion based on annual sales. For a complete list of the SBA criteria, see the SBA Web site at *http://www.sba.gov/size/indextableofsize.html.*

To estimate the number of, and employment in, firms covered under SBREFA and affected by the final rule, the Department used the data described above on the numbers of firms, establishments, employment, payroll, and annual receipts for various firm size categories (*i.e.*, employment ranges). The first step in this process involved developing an employment-based firm size standard for each affected industry. For the manufacturing and the retail and wholesale trade sectors, the SBA firm size standard is based directly on employment. For other industries, the SBA most often uses annual sales to define a small business entity. For the industries where employment is not used, the standards specified by the SBA have been converted to employment-based firm size estimates. Specifically, employment-based firm size standards were estimated by first calculating an employment level, based on the industry average annual receipts per employee, that would be sufficient to produce total sales per firm that are consistent with the sales-based firm size standard. Then, the employment-based firm size standard was chosen on the basis of the firm size categories defined in the County Business Patterns data.

Specifically, the chosen employment-based standard corresponds to the boundary between firm size categories in County Business Patterns that is closest to the calculated employment level, regardless of whether it is higher or lower than the calculated level.

Using these employment-based firm size standards for each affected industry, the data have been used to estimate the percentages of all firms, establishments, employment, payroll, and receipts in the industry that correspond to the SBA firm size standard for a small business entity. Separate percentages have been calculated for each industry covered by the final rule. The percentages have then been used, in conjunction with the corresponding estimates in Table 5–1, to calculate the numbers of affected firms, establishments, employment, and sales, receipts, or value of shipments in each industry that are associated with firms covered under SBREFA.

The resulting estimates, based on 1997 data, for establishments covered by SBREFA and the FLSA, indicate that there are 5.2 million establishments with 38.7 million employees, annual payroll totaling $939.7 billion, annual sales revenues of $5.7 trillion, and annual pre-tax profits of $180.5 billion in the affected industry sectors (see Table 5–2). Across all industries, the services industry has the largest numbers of establishments, employees, and payroll. This is followed by retail trade for establishments, and manufacturing for employees and payroll. Annual sales are largest in wholesale trade followed by manufacturing. Annual pre-tax profits are largest for wholesale trade and services followed by manufacturing.

On average, employment per establishment ranges from four employees in the finance, insurance, and real estate industry to 22 employees in manufacturing. The average annual payroll per establishment ranges from $43,000 in the agricultural services, forestry, and fishing industry to $613,000 in manufacturing. The average annual sales per establishment range from $145,000 in the agricultural services, forestry, and fishing industry to $4.7 million in wholesale trade, while the average annual pre-tax profits per establishment range from $5,000 in the agricultural services, forestry, and fishing industry to $319,000 in the mining industry.

TABLE 5–2.—NATIONAL ESTIMATES OF ESTABLISHMENTS COVERED BY BOTH SBREFA AND THE FLSA, AND THEIR ASSOCIATED EMPLOYMENT, PAYROLLS, SALES AND PROFITS

| Industry division | Number of establishments | Number of employees [1] | Annual payroll ($1,000) [2] | Sales, receipts, value of shipments ($1,000) | Pre-tax profits ($1,000) [3] |
|---|---|---|---|---|---|
| Agricultural Services, Forestry, and Fishing [4] .. | 112,753 | 533,953 | $4,881,450 | $16,352,802 | $591,216 |
| Mining | 20,422 | 196,576 | 6,813,271 | 61,505,605 | 6,505,730 |
| Construction | 626,526 | 4,083,143 | 110,470,847 | 541,608,129 | 21,109,308 |
| Manufacturing | 336,378 | 7,438,944 | 206,153,159 | 1,051,526,216 | 27,723,186 |
| Transportation and Public Utilities [5] | 213,230 | 1,651,188 | 42,500,111 | 187,741,483 | 6,210,156 |
| Wholesale Trade | 419,518 | 3,412,996 | 110,749,281 | 2,002,294,028 | 40,071,557 |
| Retail Trade | 1,072,889 | 7,321,520 | 85,165,909 | 672,361,280 | 17,360,512 |
| Finance, Insurance, and Real Estate | 430,060 | 1,623,287 | 48,840,399 | 283,951,606 | 22,193,420 |
| Services [6] | 1,985,065 | 12,460,309 | 324,122,531 | 872,922,124 | 38,694,702 |
| All Industries | 5,216,843 | 38,721,918 | 939,696,957 | 5,690,263,273 | 180,459,786 |

Note: Firms covered under SBREFA are based on the Small Business Administration (SBA) firm size standard (maximum number of employees) for a small business entity.

Note: Unless otherwise noted, data are from USDOC (2001a).

Note: For SICs 07, 08, 09, and 89, the number of establishments, number of employees, and annual payroll are derived from the USDOC (1999) database. Sales data are derived from the D&B (2001a) database.

[1] Employment is estimated when data suppression occurs.

[2] Values may be underestimated due to data suppression in USDOC (2001a).

[3] Pre-tax profits are based on sales data and pre-tax profit rates from D&B (2002), except for SIC 09 which is from D&B (2001b), and SICs 21, 60, 63, and 64 which are from IRS (2000).

[4] Excludes agriculture (SICs 01 and 02).

[5] Excludes railroad transportation (SIC 40). All data for the U.S. Postal Service (SIC 43) are from USPS (1997). Also, data do not include large Certificated passenger carriers (in SIC 45) that report to the Office of Airline Statistics, U.S. Department of Transportation.

[6] Excludes private households (SIC 88).

Sources: U.S. Department of Commerce, Bureau of the Census (USDOC, 2001a), 1997 Economic Census: Comparative Statistics, downloaded from *http://www.census.gov/epcd/ec97sic/index.html#download;*

U.S. Department of Commerce, Bureau of the Census (USDOC (1999), 1997 County Business Patterns; Dun & Bradstreet (D&B, 2001a), National Profile of Businesses Database for Fiscal Year 2000;

Dun & Bradstreet (D&B, 2001b), Industry Norms and Key Business Ratios for Fiscal Year 2000/2001; Dun & Bradstreet (D&B, 2002), Industry Norms and Key Business Ratios for Fiscal Year 2001/2002;

U.S. Department of the Treasury, Internal Revenue Service (IRS, 2000) Corporate Tax Returns for Active Corporations for 1997; and U.S. Postal Service (USPS, 1997), 1997 Annual Report.

5.3 State and Local Government Profile

The Bureau of the Census collects data on state and local government finances for the 50 states. The local government entities for which data are collected include: 3,043 county governments, which provide general government activities in specified geographic areas; 19,372 municipal governments, which provide general government services for a specific population concentration in a defined area; 16,629 township governments, which provide general government services for areas without regard to population concentrations; 34,683 special district governments, which provide only one or a limited number of designated functions, and have sufficient administrative and fiscal autonomy to qualify as independent governments; and 13,726 school district governments; which provide public elementary, secondary, or higher education, and have sufficient administrative and fiscal autonomy to qualify as independent governments.

Nearly 90,000 state and local governmental entities will be affected by the final rule. Nationwide, these entities receive more than $1.5 trillion in

general revenues, including revenues from taxes, some categories of fees and charges, and intergovernmental transfers (see Table 5–3). State and local government entities employ more than 16.7 million workers and their payrolls exceed $472.9 billion.

TABLE 5–3.—STATE AND LOCAL GOVERNMENT EMPLOYMENT, PAYROLL AND REVENUE

| Census region division | Total employment (1997) | Total payroll ($1,000) (1997) | Total revenue ($1,000) (FY 1999–2000) |
|---|---|---|---|
| NORTHEAST REGION | 3,125,659 | $105,089,601 | $343,863,277 |
| New England Division | 787,604 | 24,050,377 | 83,842,665 |
| Mid Atlantic Division | 2,338,055 | 81,039,224 | 260,020,612 |
| MIDWEST REGION | 4,024,781 | 107,566,034 | 341,985,336 |
| East North Central Division | 2,695,154 | 75,893,117 | 240,173,619 |
| West North Central Division | 1,329,627 | 31,672,917 | 101,811,717 |
| SOUTH REGION | 5,938,313 | 148,975,497 | 484,923,138 |
| South Atlantic Division | 2,984,616 | 78,443,501 | 260,912,968 |
| East South Central Division | 1,026,199 | 23,959,899 | 78,848,812 |
| West South Central Division | 1,927,498 | 46,572,098 | 145,161,358 |
| WEST REGION | 3,644,206 | 111,309,198 | 370,550,730 |
| Mountain Division | 1,093,048 | 27,431,594 | 91,648,161 |
| Pacific Division | 2,551,158 | 83,877,604 | 278,902,569 |
| U.S. Total—All Regions | 16,732,959 | 472,940,330 | 1,541,322,481 |

Note: Employment, payroll and revenue data downloaded from the Census Bureau Web site. Some data suppression existed in the original data file.

Note: General revenue consists of general revenue from own sources (taxes and some categories of fees and charges) plus intergovernmental revenue.

Source: U.S. Department of Commerce (USDOC, 2002a), 1997 Census of Governments, for employment and payroll; U.S. Department of Commerce (USDOC, 2002c), State and Local Government Finances, by Level of Government and by State: 1999–2000, for General revenues.

Chapter 6: Estimated Implementation Costs and Payroll Impacts of the Final Rule

In this section, the Department presents the methodology used to estimate the implementation costs and payroll impacts to employers that are associated with the final rule. As in the PRIA, the Department determined that there are two components to compliance: The one-time implementation costs associated with employers reviewing and coming into compliance with the revised regulations, and the incremental payroll transfers from employers to employees associated with changes in the exempt status of the labor force.

The estimated costs of the final rule that are described below may be somewhat overstated because they do not take into account costs already borne by some employers under existing state or local laws. As noted above, a number of state laws arguably impose more stringent exemption standards than those provided under the current rules, or even the new final rules. The FLSA does not preempt any such stricter state and local standards. *See* Section 18 of the FLSA, 29 U.S.C. § 218 and section 541.4 in the final regulations. As indicated in Chapters 3 and 5 of this analysis, however, because of data limitations and some uncertainty with the methodology, combined with the broad probability classifications provided by DOL to GAO and used in this RIA and other research, estimates of the number of exempt workers can only be done at a national level and cannot be disaggregated by state. Thus, the Department has not estimated the costs already imposed on some employers by stricter pre-existing state or local laws, and, consequently, the estimated costs to employers to comply with this final rule may be somewhat overstated.

6.1 One-Time Implementation Costs

The one-time implementation costs contain two components. The first component relates to the efforts employers will expend in adapting their overtime policies in response to the revised regulations, and then informing their employees about the updated policies. The second component relates to the efforts employers will expend in reviewing the duties performed by employees in particular job categories, and determining whether, based on their adapted overtime policies, employees in the job categories qualify for exemption from the overtime provisions of the FLSA. The final rule contains no new information-collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information-collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping requirements codified at 29 CFR Part 516, which were approved by the Office of Management and Budget under OMB Control Number 1215–0017.

For both components, the costs are based on the amounts of time typically required to perform the associated efforts, the average hourly costs of the employees who perform the efforts and the numbers of employers and establishments for which the efforts are performed. Separate cost estimates are developed for nine broad industry divisions in the private sector and for state and local government in the aggregate. The industry divisions for which implementation costs have been estimated include: Agricultural services; mining; construction; manufacturing; transportation, communication, and public utilities; wholesale trade; retail trade; finance, insurance, and real estate; and services.

6.2 Estimated Costs Related To Adapting Overtime Policies

To estimate the efforts typically required by employers to implement the revisions to the FLSA regulations, the Department of Labor contacted six human resource experts from different regions nationwide. For the first cost component, estimates were obtained for the amount of time employers will typically require to: (1) Read and understand the revised rule, (2) update and adapt their overtime policies, (3) notify their employees of the policy changes, and (4) perform all other pertinent activities at the corporate level. Separate estimates were provided

for employers in eight employment size ranges. The ranges are: 1 to 4, 5 to 9, 10 to 19, 20 to 49, 50 to 99, 100 to 499, 500 to 999, and 1,000 or more employees per employer.

Based on the judgments provided by the human resource experts, it is estimated that, on average nationwide, the efforts associated with revising overtime policies will range from two hours per employer in the smallest size range to 57 hours per employer in the largest size range. The Department assumed the efforts required to implement the revised regulations will be furnished substantially by human resources specialists. The costs per hour for human resources specialists at eight different skill or experience levels have been obtained from the National Compensation Survey data compiled by the Bureau of Labor Statistics (BLS). The average costs per hour for personnel, training, and labor relation specialists working for employers in the eight employment size ranges were estimated as weighted averages of the costs per hour for the various skill or experience levels reported by the BLS. Weights were developed by positing a typical staffing pattern for human resources specialists working for employers or establishments in different size ranges, and then calculating the average cost per hour for the mix of workers corresponding to that staffing pattern. The estimates of costs per hour calculated through this process rise monotonically as size range increases, and range from $16.03 for the smallest size range to $25.08 for the largest size range. These estimates were then multiplied by a loading factor of 1.4 to account for fringe benefits.

The cost per hour used for state and local governments is the estimated cost per hour for private sector employers in the size range from 100 to 499 employees.

TABLE 6–1.—ESTIMATED UNIT IMPLEMENTATION TIME/COSTS OF THE FINAL RULE BY SIZE OF EMPLOYER

| Unit time/cost category | Number of employees per employer | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1 to 4 | 5 to 9 | 10 to 19 | 20 to 49 | 50 to 99 | 100 to 499 | 500 to 999 | 1000+ |
| Hours per employer to revise overtime policies | | | | | | | | |
| Read and understand revised rule | 1.0 | 2.0 | 4.0 | 6.0 | 8.0 | 10.0 | 24.0 | 32.0 |
| Update or adapt overtime policies | 0.5 | 0.5 | 1.3 | 2.0 | 3.0 | 5.0 | 12.0 | 16.0 |
| Notify employees | 0.5 | 0.5 | 0.8 | 1.0 | 1.5 | 2.0 | 4.0 | 5.0 |
| Other related activities | 0.0 | 0.3 | 0.5 | 1.0 | 1.0 | 2.0 | 4.0 | 4.0 |
| Total hours per employer | 2.0 | 3.3 | 6.5 | 10.0 | 13.5 | 19.0 | 44.0 | 57.0 |
| Wage Rate for human resources specialists | $16.03 | $21.34 | $21.78 | $22.91 | $23.39 | $24.02 | $24.20 | $25.08 |
| Cost per hour | $22.44 | $29.88 | $30.49 | $32.07 | $32.75 | $33.63 | $33.88 | $35.11 |

Source: CONSAD and the U.S. Department of Labor.

The estimated implementation efforts and costs were derived by summing the corresponding estimates for the individual industry divisions and calculating ratios, as appropriate, to estimate average hours and average costs. For all industry divisions except state and local government, identical calculations were performed to estimate implementation costs. Those calculations are explained below and are followed by a discussion of the additional calculations involved in estimating implementation costs for state and local government.

For each industry division, the estimated cost that employers will incur to revise their overtime policies was calculated, for each employment size range, as the product of: (1) The total hours required per employer, on average, to perform the associated efforts, (2) the average cost per hour for human resources specialists working for employers in that size range, and (3) the number of employers in the size range. The derivation of values for items (1) and (2) have been discussed above. The values for item (3) were derived from data in the U.S. Department of Commerce (2002), Statistics of U.S. Businesses 1996. The total estimated values for the industry division were calculated by summing the values for the various size ranges. It should be noted that using the 1996 data may understate these implementation costs because the number of employers likely has grown since then.

The implementation costs for state and local government to review the final rule and to revise their overtime policies were estimated in a manner similar to that used for the private sector. However, because no data are available that describe the size distribution of state and local government entities, the estimation was performed at the aggregate level.

As is shown in Table 6–2, the total nationwide cost to review the final rule and revise the overtime policies is estimated to be $627 million.

TABLE 6–2.—ESTIMATED COSTS TO REVIEW THE FINAL RULE AND REVISE OVERTIME POLICIES, BY INDUSTRY

| Industry division | Number of employers | Total hours to revise overtime policies | Cost to revise overtime policies |
|---|---|---|---|
| Agricultural services | 101,356 | 350,553 | $9,845,483 |
| Mining | 17,384 | 98,090 | 3,009,596 |
| Construction | 597,393 | 2,227,515 | 63,501,051 |
| Manufacturing | 297,154 | 2,231,762 | 70,711,656 |

TABLE 6–2.—ESTIMATED COSTS TO REVIEW THE FINAL RULE AND REVISE OVERTIME POLICIES, BY INDUSTRY—Continued

| Industry division | Number of employers | Total hours to revise overtime policies | Cost to revise overtime policies |
|---|---|---|---|
| Transportation, communication & public utilities | 209,122 | 983,166 | 29,311,496 |
| Wholesale trade | 325,432 | 1,765,346 | 53,735,371 |
| Retail trade | 909,206 | 4,068,622 | 120,331,292 |
| Finance, insurance & real estate (FIRE) | 411,052 | 1,650,164 | 47,787,363 |
| Services | 1,877,862 | 7,662,502 | 222,849,283 |
| State and Local Government | 89,953 | 179,906 | 6,049,519 |
| All Industries | 4,835,913 | 21,217,625 | 627,132,111 |

Source: CONSAD and the U.S. Department of Labor.

Estimates were also developed for the portion of the implementation costs in each private-sector industry division incurred by small businesses (*i.e.*, businesses that are covered under the Small Business Regulatory Enforcement Fairness Act (SBREFA)). For each industry division, the portion of the aggregate costs of revising corporate overtime policies that will be incurred by firms covered by SBREFA was based on the portion of the total number of establishments in the industry division that are operated by small businesses and is presented in Table 6–3.

TABLE 6–3.—ESTIMATED SHARE OF COSTS TO REVIEW FINAL RULE AND REVISE OVERTIME POLICIES INCURRED BY SMALL BUSINESSES, BY INDUSTRY

| Industry division | Total industry | Small business share of total cost | |
|---|---|---|---|
| | | Percentage | Cost |
| Agricultural services | $9,845,483 | 0.9676 | $9,526,490 |
| Mining | 3,009,596 | 0.8135 | 2,448,307 |
| Construction | 63,501,051 | 0.9797 | 62,211,980 |
| Manufacturing | 70,711,656 | 0.8912 | 63,018,228 |
| Transportation, communication & public utilities | 29,311,496 | 0.6430 | 18,847,292 |
| Wholesale trade | 53,735,371 | 0.8050 | 43,256,973 |
| Retail trade | 120,331,292 | 0.6872 | 82,691,664 |
| Finance, insurance & real estate | 47,787,363 | 0.6502 | 31,071,344 |
| Services | 222,849,283 | 0.8620 | 192,096,082 |
| Total private sector | 621,082,592 | 0.8134 | 505,168,359 |

Source: CONSAD and the U.S. Department of Labor.

6.3 Estimated Cost To Reexamine Jobs

The methodology used to estimate the costs related to the reexamination of jobs was significantly different from that used in Section 6.2 because the Department assumed that employers would have to conduct the job review at the establishment level. Therefore, rather then basing the cost estimates on the number of employers, as was done for the review of the final rule and the revision of the overtime policies, the Department based the cost estimates for the job reviews on the number of potentially affected white-collar workers. In addition, since the CPS database does not contain information related to the size of the worker's employer, the Department used an average cost of $32.41 per hour ($23.15, obtained from the BLS National Compensation Survey for a labor relation specialist, multiplied by 1.4 to account for fringe benefits).

Based upon the analysis in Chapter 3, the Department assumed that none of the blue-collar jobs (*e.g.*, occupations in the 239 excluded OCCs) would have to be reviewed. As was shown in Chapter 2, none of the revisions should cause employers to think that currently nonexempt blue-collar workers could possibly be made exempt under the final rule. So employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

The Department assumed that for the white-collar workers earning less than $455 per week, employers would only review the jobs of workers who are currently exempt and would not review the jobs of any currently nonexempt workers. As was shown in Chapter 2, the $455 salary level in the final rule should make it absolutely clear to employers that the currently nonexempt white-collar workers earning less than $455 per week could not possibly be made exempt under the final rule. So, again, employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

As is more fully discussed in the next section of this chapter, employers will have to determine how to alter the compensation for each of the approximately 1.3 million currently exempt workers earning less than $455 per week. In some cases employers will decide to pay the overtime premium, while in others employers will decide to increase the worker's salary in order to maintain the exemption. The Department assumed that on average these reviews would take approximately ½ hour per currently exempt employee to complete. For most employees, the review will consist of an examination of their payroll records to determine how they should be paid under the final rule (*e.g.*, pay overtime or increase their salaries). The duties of the remaining, relatively small number of employees

(*i.e.*, only a portion of those whom employers decide to maintain in exempt status by increasing their salaries to $455 or more) will have to be reexamined to determine if they continue to qualify for exemption given the minor differences in the duties tests under the final rule compared to the current rule. While it may take employers more than 30 minutes to reexamine these few workers, it will take less than 30 minutes for many others. Thus, the Department estimated that the cost of reexamining the jobs of workers earning less than $455 per week would be about $21 million (1.3 million workers × ½ hour per worker × $32.41 per hour).

In assessing the costs of reviewing the jobs of the highly compensated white-collar workers, the Department assumed that employers would use an approach complementary to that assumed for the lower-wage white-collar workers. Employers would only review the jobs of workers who are currently nonexempt and would not review the jobs of any currently exempt workers earning $100,000 or more per year. As shown in Chapter 2, the duties test for the highly compensated workers is less stringent than those under either the current short tests or the standard tests in the final rule. Thus, the Department assumed that after completing the process of adapting their overtime policies in response to the revised regulations, employers would conclude that all currently exempt highly compensated workers would continue to be exempt under the final rule and, therefore, would not expend additional resources to review any of these jobs. In addition, as explained in Chapter 4, the Department excluded computer programmers, registered nurses and pharmacists. It is unlikely that employers would review these jobs due to the final rule given that these workers could already be made Part 541-exempt under the current rule if they are paid on a salaried basis.

The Department assumed that on average employers would take approximately ½ hour to review the duties of each currently nonexempt highly compensated employee to determine if they could be made exempt under the highly compensated test. In addition, the Department assumed that employers would expend an additional ½ hour to review the pay basis of each hourly worker to determine if it could be modified to comply with the requirements of the highly compensated test. For most employees, the review will consist of an examination of their payroll records to determine how they currently are paid and how they should be paid under the final rule (*e.g.*, paid overtime or paid on a salary basis). While it may take employers more than one hour to reexamine both the duties and compensation of some workers, it will clearly not be necessary for employers to review both the duties and compensation of many others (*e.g.*, there is no need to review the compensation of hourly workers whose duties are not exempt under the highly compensated test). The Department estimated that the cost of reexamining the jobs and pay of current salaried workers earning $100,000 or more per year would be approximately $4.4 million (270,000 workers × ½ hour per worker × $32.41 per hour) and the cost of reexamining the jobs of current hourly workers earning $100,000 or more per year would be approximately $6 million (182,600 workers × 1 hour per worker × $32.41 per hour). The Department believes that this estimate probably overstates the costs to businesses because many employers will probably choose not to review the jobs of hourly workers who could not easily be converted to a salary basis (*e.g.*, workers covered by union contracts).

For workers earning $455 to $1,923 per week, the Department assumed that none of the hourly workers would require a job review and that employers would review only a portion of the jobs held by salaried workers. Given the comparability of the standard tests in the final rule with the short tests in the current rule (see Chapter 2), the Department assumed that after completing the process of adapting their overtime policies in response to the revised regulations, employers would conclude that all of the current hourly workers earning $455 to $1,923 per week would continue to be nonexempt under the final rule and would not expend additional resources to review any of these jobs.

The Department also assumed that, given the comparability of the standard tests in the final rule with the short tests in the current rule, extensive reexamination of exemption status will likely be required for only a minor portion of the white-collar jobs in which salaried workers earning $455 to $1,923 per week are employed in any establishment. As demonstrated above, the duties tests in the standard tests of the final rule do not differ greatly from the current short duties tests. As a result, employers will likely conclude, after completing the process of adapting their overtime policies, that no change in exemption status is warranted for most of their white-collar jobs.

Appreciable effort will only be expended for reviewing the duties of the remaining, relatively small number of white-collar salaried employees earning $455 to $1,923 per week whose status might be impacted by the changed duties tests. To account for the slight changes in the rule (such as the inclusion of some requirements from the long tests), the Department assumed that employers would take one hour to review the duties of 10 percent of all white-collar salaried employees earning $455 to $1,923 per week to either ensure that they are still exempt or to determine if they could be made exempt under the final rule. Given the comparability of the duties tests in the current short tests and the final standard tests, the Department feels that both the one hour and the 10 percent may be overestimates. Nevertheless, based upon these assumptions, the Department estimated that the cost of reexamining the jobs of the white-collar salaried employees earning $455 to $1,923 per week would be approximately $80 million (10 percent × 24.7 million workers × 1 hour per worker × $32.41 per hour).

The total nationwide cost to conduct the job reviews is estimated to be $111 million. As is shown in Table 6–4, these costs were then apportioned to each industry division in proportion to its share of the affected work force.

TABLE 6–4.—ESTIMATED COSTS TO REEXAMINE JOBS, BY INDUSTRY

| Industry division | Total hours to re-examine affected jobs | Cost to reexam-ine affected jobs |
|---|---|---|
| Agricultural Services, Forestry, and Fishing | 11,552 | $374,407 |
| Mining | 15,598 | 505,542 |
| Construction | 125,380 | 4,063,562 |
| Manufacturing | 500,511 | 16,221,574 |
| Transportation and Public Utilities | 256,757 | 8,321,482 |

TABLE 6–4.—ESTIMATED COSTS TO REEXAMINE JOBS, BY INDUSTRY—Continued

| Industry division | Total hours to re-examine affected jobs | Cost to reexam-ine affected jobs |
|---|---|---|
| Wholesale Trade | 212,294 | 6,880,451 |
| Retail Trade | 403,130 | 13,065,451 |
| Finance, Insurance, and Real Estate | 488,120 | 15,819,984 |
| Services | 1,256,435 | 40,721,065 |
| State and Local Government | 167,532 | 5,429,724 |
| All Industries | 3,437,311 | 111,403,241 |

Source: CONSAD and the U.S. Department of Labor.

For each industry division, the portion of the aggregate costs of reexamining the exemption status of specific jobs that will be incurred by firms covered by SBREFA has been estimated on the basis of the proportion of the total employment in the industry division that is in such firms and is presented in Table 6–5.

TABLE 6–5.—ESTIMATED SHARE OF COSTS TO REEXAMINE JOBS INCURRED BY SMALL BUSINESSES, BY INDUSTRY

| Industry division | Total industry | Small business share of total indus-try cost | |
|---|---|---|---|
| | | Percentage | Cost |
| Agricultural services | $374,407 | 0.6866 | $257,068 |
| Mining | 505,542 | 0.3697 | 186,899 |
| Construction | 4,063,562 | 0.7160 | 2,909,511 |
| Manufacturing | 16,221,574 | 0.4180 | 6,780,618 |
| Transportation, communication & public utilities | 8,321,482 | 0.2440 | 2,030,442 |
| Wholesale trade | 6,880,451 | 0.5215 | 3,588,155 |
| Retail trade | 13,065,451 | 0.3634 | 4,747,985 |
| Finance, insurance & real estate | 15,819,984 | 0.2194 | 3,470,904 |
| Services | 40,721,065 | 0.3647 | 14,850,972 |
| Total private sector | 105,973,517 | 0.3663 | 38,822,554 |

Source: CONSAD and the U.S. Department of Labor.

6.4 Incremental Payroll Impact

The Department based its estimates of the incremental payroll impact on the preceding analysis used to estimate the number of salaried workers converted from exempt to nonexempt status as a result of raising the salary level for the standard tests to $455 per week. However, the Department acknowledges that these estimates may vary for a variety of reasons. For example, these estimates were developed utilizing a snapshot of the labor market provided by the 2002 CPS data, which may not be a perfect predictor of the amount of overtime worked in future years. Moreover, the Department also recognizes that employers may adjust their payrolls in reaction to the final rule in a variety of ways, especially in the long term as employers and employees adjust to the final rule.

However, employers are, at all times, obligated to pay overtime in accordance with the FLSA. For example, employers could pay overtime to their low-income, white-collar workers for any hours worked over 40, or they could raise the salaries of these currently exempt workers to at least $455 per week to maintain their exempt status. The Department estimates that 1.3 million low-income, white-collar salaried workers are likely to see larger paychecks as a result of these responses.

In this analysis, the Department assumes that the best estimate of the impact on employers of changing the status of some salaried workers from exempt to nonexempt as a result of raising the salary level for the standard tests is the lower of the amount of raising the worker's salary to $455 or the amount of the paying for the overtime hours that were previously exempt under the current rules. There were about 1,000 observations in the potentially impacted occupations with weekly earnings (item PTERNWA) $155 or more and less than $455, and actual hours worked (PEHRACT1, the CPS variable name) greater than 40.

The Department estimates the amount of raising the individual's salary to $455 by multiplying the net increase in salary ($455—PTERNWA) by the Prob_Exempt and by the weight (PWORWGT).

The Department estimated the number of exempt hours that would be converted to paid overtime hours by multiplying the number of hours in excess of 40 (PEHRACT1—40) for each of the workers by the Prob_Exempt and by the weight (PWORWGT). In this manner, the Department estimated 173.0 million hours would be converted from exempt to nonexempt as a result of raising the salary level to $455.

Since there is no hourly pay rate for salaried workers in the dataset, the employer impacts associated with converting exempt hours to nonexempt had to be estimated from the weekly earnings data. In addition, the Department assumed that the weekly wage for a salaried worker covers the usual hours worked by the employee. The equivalent hourly wage rate would be the weekly earnings (item PTERNWA) divided by the usual hours worked weekly (item PEHRUSL1). If the worker were converted from exempt to nonexempt status, the worker would only be paid an additional premium of one-half times the hourly rate for each hour worked in excess of 40, because the base compensation for the overtime hours is already included in the worker's salary. Thus, the amount of the employer's additional weekly overtime

pay would be the overtime hours converted to nonexempt times the hourly pay rate times 0.5 (this assumption is consistent with the enforcement approach currently used by the Department to calculate back pay when a salaried employee is found to not qualify for exemption under Part 541 and it is clear that the salary was intended to serve as payment for all hours worked each week).

The weekly increase in payroll for each worker is the lower of the amount of raising the worker's salary to $455 or the amount of paying for the overtime hours that were currently exempt. The total weekly impact due to raising the salary level would be the sum of the weekly increase in payroll for all workers. Since the data in the CPS annual Outgoing Rotation Group data set consists of 12 months of observations, the Department has assumed the data account for the seasonal variations in overtime hours worked. The annual impact is the weekly increase in payroll multiplied by 52, which is approximately $375 million. Table 6–6 presents the impact for each industry division and the portion attributed to small businesses in the private sector.

For the proposed rule, the Department estimated a range of impacts based, in part, on an alternative assumption that the pay of currently exempt salaried workers represents compensation for a standard 40-hour work week. For the final rule, the Department chose to develop a point-estimate instead of a range for the impact associated with raising the salary level tests, and has estimated the impact in a way that is consistent with the longstanding enforcement approach used by the Department to calculate back pay when a salaried employee is found to not qualify for exemption under Part 541. For these reasons, and those mentioned above, the Department acknowledges that the impact of raising the salary level tests may vary. Employers, however, are obligated to pay time-and-one-half for any overtime hours worked by nonexempt employees beyond 40 per week.

TABLE 6–6.—ESTIMATED PAYROLL IMPACT BY INDUSTRY AND SIZE OF BUSINESS

| SIC industry division | All firms incremental payroll impact | Percent SBREFA covered | SBREFA covered firms incremental payroll impact |
|---|---|---|---|
| Agricultural Services, Forestry, and Fishing | $802,343 | 68.7% | $551,210 |
| Mining | 90,738 | 37.0 | 33,573 |
| Construction | 14,486,732 | 71.6 | 10,372,500 |
| Manufacturing | 28,377,501 | 41.8 | 11,861,795 |
| Transportation and Public Utilities | 24,913,745 | 24.4 | 6,078,954 |
| Wholesale Trade | 7,168,683 | 52.2 | 3,742,053 |
| Retail Trade | 107,300,882 | 36.3 | 38,950,220 |
| Finance, Insurance, and Real Estate | 39,960,717 | 21.9 | 8,751,397 |
| Services | 141,881,530 | 36.5 | 51,786,758 |
| All Private Sector | 364,982,872 | 36.2 | 132,128,461 |
| State and Local Government | 9,850,334 | | |
| All Industries | 374,833,206 | | |

Source: CONSAD and the U.S. Department of Labor.

6.5 Total Costs of the Final Rule

The Department estimates that the total first-year costs are approximately $1.1 billion. This is equal to the sum of the implementation costs related to reviewing the regulation and revising company policies ($627 million), the implementation costs related to reviewing the jobs ($111 million), and the increased payroll costs related to raising the salary level to $455 per week ($375 million). In subsequent years, the Department estimates that employers could experience a payroll increase of as much as $375 million per year. Table 6–7 presents a summary of the costs by industry.

TABLE 6–7.—ESTIMATED FIRST YEAR COSTS BY INDUSTRY

| Industry division | Revise OT policies | Reexamine jobs | Payroll costs | Total first year costs |
|---|---|---|---|---|
| Agricultural Services, Forestry, and Fishing | $9,845,483 | $374,407 | $802,343 | $11,022,234 |
| Mining | 3,009,596 | 505,542 | 90,738 | 3,605,876 |
| Construction | 63,501,051 | 4,063,562 | 14,486,732 | 82,051,346 |
| Manufacturing | 70,711,656 | 16,221,574 | 28,377,501 | 115,310,731 |
| Transportation and Public Utilities | 29,311,496 | 8,321,482 | 24,913,745 | 62,546,723 |
| Wholesale Trade | 53,735,371 | 6,880,451 | 7,168,683 | 67,784,505 |
| Retail Trade | 120,331,292 | 13,065,451 | 107,300,882 | 240,697,625 |
| Finance, Insurance, and Real Estate | 47,787,363 | 15,819,984 | 39,960,717 | 103,568,065 |
| Services | 222,849,283 | 40,721,065 | 141,881,530 | 405,451,877 |
| State and Local Government | 6,049,519 | 5,429,724 | 9,850,334 | 21,329,577 |
| All Industries | 627,132,111 | 111,403,241 | 374,833,206 | 1,113,368,558 |

Source: CONSAD and the U.S. Department of Labor.

Total first-year costs for small business are approximately $676 million as shown in Table 6–8. This is equal to the sum of the implementation costs related to reviewing the regulation and revising company policies ($505 million), the implementation costs related to reviewing the jobs ($39 million), and the increased payroll costs related to raising the salary level to $455 per week ($132 million). In subsequent years, the Department estimates that small business employers may experience a payroll increase of as much as $132 million per year.

TABLE 6–8.—ESTIMATED FIRST YEAR SMALL BUSINESS COSTS BY INDUSTRY

| Industry division | Revise OT policies | Reexamine jobs | Payroll costs | Total first year costs |
|---|---|---|---|---|
| Agricultural Services, Forestry, and Fishing | $9,526,490 | $257,068 | $551,210 | $10,334,767 |
| Mining | 2,448,307 | 186,899 | 33,573 | 2,668,779 |
| Construction | 62,211,980 | 2,909,511 | 10,372,500 | 75,493,991 |
| Manufacturing | 63,018,228 | 6,780,618 | 11,861,795 | 81,660,641 |
| Transportation and Public Utilities | 18,847,292 | 2,030,442 | 6,078,954 | 26,956,687 |
| Wholesale Trade | 43,256,973 | 3,588,155 | 3,742,053 | 50,587,181 |
| Retail Trade | 82,691,664 | 4,747,985 | 38,950,220 | 126,389,869 |
| Finance, Insurance, and Real Estate | 31,071,344 | 3,470,904 | 8,751,397 | 43,293,645 |
| Services | 192,096,082 | 14,850,972 | 51,786,758 | 258,733,812 |
| All Private Sector Industries | 505,168,359 | 38,822,554 | 132,128,461 | 676,119,373 |

Source: CONSAD and the U.S. Department of Labor.

Total first-year costs for state and local governments are approximately $21 million. This is equal to the sum of the implementation costs related to reviewing the regulation and revising agency policies ($6 million), the implementation costs related to reviewing the jobs ($5 million), and the increased payroll costs related to raising the salary level to $455 per week ($10 million). In subsequent years, the Department estimates that state and local governments may experience a payroll increase of as much as $10 million per year.

Chapter 7: Economic Impacts

7.1 Typical Impacts

The impacts on the typical entity in each of the nine major private sector industry divisions and in state and local governments were examined using the ratios of the first-year costs to payrolls, revenue and profits. This approach was based on the assumption that if the first-year costs were manageable, so too would be the lower costs in subsequent years.

As shown in Table 7–1, the ratio of total first-year costs to payrolls averaged 0.04 percent nationwide in the private sector. The largest impact relative to payrolls was approximately 0.12 percent in agricultural services. The ratio of total first-year costs to revenue averaged less than 0.01 percent nationwide in the private sector. The largest impact relative to revenue was approximately 0.02 percent in agricultural services and the services industries. The ratio of total first-year costs to pre-tax profit averaged 0.19 percent nationwide in the private sector. The largest impact relative to pre-tax profit was approximately 0.64 percent in the retail industry. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

TABLE 7–1.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS BY INDUSTRY DIVISION, BASED ON FIRST-YEAR COSTS

| Industry division | Annual payroll ($1,000) | Sales, receipts, value of shipments ($1,000) | Pre-tax profits ($1,000) | First-year costs ($1,000) | First-year costs as a percentage of payroll | First-year costs as a percentage of sales, receipts, value of shipments | First-year costs as a percentage of pre-tax profit |
|---|---|---|---|---|---|---|---|
| Agricultural services | $9,324,346 | $63,936,121 | $2,357,130 | $11,022 | 0.12 | 0.02 | 0.47 |
| Mining | 24,173,512 | 195,841,349 | 25,488,881 | 3,606 | 0.01 | 0.00 | 0.01 |
| Construction | 197,673,938 | 936,785,456 | 28,628,686 | 82,051 | 0.04 | 0.01 | 0.29 |
| Manufacturing | 682,333,069 | 4,399,057,890 | 94,604,018 | 115,311 | 0.02 | 0.00 | 0.12 |
| Trans., Comm., & Public Utilities | 277,130,334 | 1,336,692,223 | 76,411,219 | 62,547 | 0.02 | 0.00 | 0.08 |
| Wholesale trade | 271,158,976 | 4,752,857,521 | 86,688,186 | 67,785 | 0.02 | 0.00 | 0.08 |
| Retail trade | 300,952,012 | 2,679,002,338 | 37,467,739 | 240,698 | 0.08 | 0.01 | 0.64 |
| Finance, Insurance, and Real Estate | 306,679,061 | 2,452,102,212 | 156,048,617 | 103,568 | 0.03 | 0.00 | 0.07 |
| Services | 1,052,894,811 | 2,682,451,513 | 71,969,249 | 405,452 | 0.04 | 0.02 | 0.56 |
| All Industries | 2,785,616,284 | 17,897,921,102 | 579,663,726 | 1,092,039 | 0.04 | 0.01 | 0.19 |

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5–1. Payrolls were adjusted from 1997 values using the CPI–U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).

First-Year Costs in 2002 dollars are from Table 6–7.

The total first-year costs for state and local governments (also presented in Table 6–7) were allocated among census regions on the basis of data on the numbers of local governments, special districts, and school districts in each state. These were then aggregated to produce data on total numbers of local government entities by census region. The estimated 2,500 state government entities were allocated among the census regions on the basis of the numbers of local government entities in the census regions.

As shown in Table 7–2, the ratio of total first-year costs to both payrolls and revenue were less than one-hundredth of one-percent nationwide in the public sector. The highest impact was in the West North Central Census Division, where the ratio of first-year costs to payrolls was 0.014 percent and the ratio of first-year costs to revenue was 0.004 percent. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical state and local governments.

Thus, the Department concludes that the Part 541 revisions will not have a significant impact on typical entities in either the public or private sectors.

TABLE 7–2.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS ON STATE AND LOCAL GOVERNMENTS BY CENSUS DIVISION BASED ON FIRST-YEAR COSTS

| Census division | Total payroll ($1,000) | Total revenue ($1,000) | First-year costs ($1,000) | First-year costs as a percentage of payroll | First-year costs as a percentage of revenue |
|---|---|---|---|---|---|
| New England Division | $26,957,401 | $91,341,625 | $894 | 0.003 | 0.001 |
| Mid Atlantic Division | 90,834,619 | 283,277,080 | 2,424 | 0.003 | 0.001 |
| East North Central Division | 85,066,491 | 261,654,955 | 4,729 | 0.006 | 0.002 |
| West North Central Division | 35,501,295 | 110,917,845 | 4,882 | 0.014 | 0.004 |
| South Atlantic Division | 87,925,145 | 284,249,249 | 1,506 | 0.002 | 0.001 |
| East South Central Division | 26,855,986 | 85,901,118 | 1,070 | 0.004 | 0.001 |
| West South Central Division | 52,201,373 | 158,144,715 | 2,074 | 0.004 | 0.001 |
| Mountain Division | 30,747,313 | 99,845,252 | 1,756 | 0.006 | 0.002 |
| Pacific Division | 94,016,081 | 303,847,856 | 1,995 | 0.002 | 0.001 |
| All Census Divisions | 530,105,704 | 1,679,179,695 | 21,330 | 0.004 | 0.001 |

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5–3. Payrolls were adjusted from 1997 values using the CPI–U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).

First-Year Costs (in 2002 dollars) are based on Table 6–7 (allocated amongst the Census divisions according to the procedure described in the text).

7.2 Small Business Impacts

As is shown in Table 7–3, the ratio of first-year costs to payrolls averaged 0.07 percent for private sector small businesses nationwide. The largest impact relative to payrolls was approximately 0.19 percent for small businesses in agricultural services. The ratio of first-year costs to revenue averaged approximately 0.01 percent for private sector small businesses nationwide. The largest impact relative to revenues was approximately 0.06 percent for small businesses in agricultural services. The ratio of first-year costs to pre-tax profit averaged 0.37 percent for private sector small businesses nationwide. The largest impact relative to pre-tax profit was approximately 1.75 percent for small businesses in agricultural services.

Particular concern over such impacts was expressed by the National Restaurant Association, which stated, "Since salary levels have not been changed in over a quarter century, the Association agrees that the existing salary levels are out of date. However, it is important to emphasize that the substantial increase proposed by DOL will have a major impact on employers in the restaurant industry, particularly those who are located in areas of the country with lower general wage rates. In addition, restaurants generally have very small profit-to-loss ('P + L') margins each year."

The NFIB expressed concern that under the proposed rule two industries, general merchandise stores and private educational services, would suffer payroll cost increases of more than two percent of pretax profit. See Table 5.4 of Final Report, Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541, prepared by CONSAD Research Corporation, February 10, 2003, p. 75–76, incorporated by reference at 68 FR 15573; March 31, 2003 (estimated 4.5 percent increase for general merchandise stores and 2.03 percent increase for educational services). The NFIB noted that given the "large percentage of our members" in the general merchandise category, the estimated 4.5 percent increased payroll cost "would be a significant burden," particularly for a small business owner struggling with economic conditions. The NFIB also expressed similar concern regarding a "significant burden" for its members in the private educational services sector and urged the Department to carefully review any payroll increases resulting from updating the rule. The Department has given these comments serious consideration. Under the final rule, as noted in Table 7–3, first-year costs are estimated to be less than four-tenths of a percent of pre-tax profit for all SBREFA-covered small businesses, and approximately seven-tenths of a percent for all small business retail trade and services industries.

As discussed throughout the preamble, the Department maintains it has taken a prudent course of action in revising Part 541. First-year costs of the magnitude estimated in Table 7–3 are clearly affordable and will not result in significant disruptions to small businesses in any of the major industry sectors. Moreover, these impacts do not include the possible decrease in payroll impacts due to the highly compensated test, and the benefits of the rule in the form of lower litigation costs, which accrue to the same groups of employers as the costs of the rule. The Department chose to look at the per-firm impacts to employers without netting out these advantages in order to look at what may accrue to firms that are not under current litigation risk and do not employ highly compensated employees who may be reclassified as exempt.

Therefore these averages likely overstate the true impact of the rule on businesses and small businesses.

TABLE 7–3.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS ON SMALL BUSINESSES COVERED BY SBREFA, BY INDUSTRY DIVISION BASED ON FIRST-YEAR COSTS

| Industry division | Annual payroll ($1,000) | Sales, receipts, value of shipments ($1,000) | Pre-tax profits ($1,000) | First-year costs ($1,000) | First-year costs as a percentage of payroll | First-year costs as a percentage of sales, receipts, value of shipments | First-year costs as a percentage of pre-tax profit |
|---|---|---|---|---|---|---|---|
| Agricultural services | $5,471,482 | $17,815,411 | $591,216 | $10,335 | 0.19 | 0.06 | 1.75 |
| Mining | 7,636,807 | 67,006,719 | 6,505,730 | 2,669 | 0.03 | 0.00 | 0.04 |
| Construction | 123,823,709 | 590,050,028 | 21,109,308 | 75,494 | 0.06 | 0.01 | 0.36 |
| Manufacturing | 231,071,360 | 1,145,575,629 | 27,723,186 | 81,661 | 0.04 | 0.01 | 0.29 |
| Trans., Comm., & Public Utilities | 47,637,196 | 204,533,244 | 6,210,156 | 26,957 | 0.06 | 0.01 | 0.43 |
| Wholesale trade | 124,135,798 | 2,181,380,935 | 40,071,557 | 50,587 | 0.04 | 0.00 | 0.13 |
| Retail trade | 95,460,106 | 732,497,854 | 17,360,512 | 126,390 | 0.13 | 0.02 | 0.73 |
| Finance, Insurance, and Real Estate | 54,743,849 | 309,348,483 | 22,193,420 | 43,294 | 0.08 | 0.01 | 0.20 |
| Services | 363,299,958 | 950,997,033 | 38,694,702 | 258,734 | 0.07 | 0.03 | 0.67 |
| All Industries | 939,696,957 | 5,690,263,273 | 180,459,786 | 676,119 | 0.07 | 0.01 | 0.37 |

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5–2. Payrolls were adjusted from 1997 values using the CPI–U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).
First-Year Costs (in 2002 Dollars) are from Table 6–8.

Chapter 8: Estimating the Benefits

The Department has determined that the final rule provides a variety of benefits to both workers and employers. Although some benefits can be estimated, data limitations require the Department to discuss other benefits only qualitatively. For example, 2.8 million salaried workers in blue-collar occupations who earn $155 or more and less than $455 per week will benefit from increased overtime protection because their nonexempt status, which is based on the duties tests under the current rules, will be guaranteed and unambiguous under the final rule. The final rule also makes it more difficult to exempt workers from overtime as executive employees. Although the final rule will plainly benefit workers, data limitations prevent the Department from estimating the dollar value of these benefits. Moreover, salaried workers will also benefit from more equitable treatment in disciplinary actions (*i.e.*, under the current rule an employer would have to suspend an exempt manager for a full week for a Title VII violation in order to preserve the employee's exempt status even if the company's policy called for just a three-day suspension without pay; under the final rule salaried employees would lose only three days of pay).

One of the largest benefits to workers comes from having clearer rules that are easier to understand and enforce. Workers will better know their rights and whether they are being paid correctly (instead of going years without knowing whether they should be paid overtime). Fewer workers will be unintentionally misclassified, and they will not have to go to court and possibly wait years to recover back pay. Clearer, more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately. The safe harbor provision in the final rule will also continue to ensure that employees whose pay is reduced in violation of the salary basis test are made whole and will encourage employers to adopt and communicate employment policies prohibiting improper pay deductions to their workers.

Employers will also benefit in a variety of ways from the final rule. As estimated in Chapter 4, the highly compensated test in the final rule could result in approximately 107,000 currently nonexempt white-collar workers earning $100,000 or more per year being converted to exempt salaried status. Some employers could experience a reduction in their payroll costs related to this change in status. However, neither the record in this rulemaking nor the economic literature provides a means for quantifying the amount of this reduction. The highly compensated test does not require employers to change the exemption status of their workers who earn $100,000 or more per year, so the effect of this provision is far less certain than the impact of the raising the salary level test. Moreover, as discussed in Chapter 4, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, tradition, and culture. Although the Department has tried to account for these incentives when estimating the number of workers who could be affected, these estimates do not completely account for all of the effects, particularly the market power of these highly skilled workers.

As noted earlier, data limitations and the uncertainty that remains with the updated RIA methodology reduces the ability to precisely estimate the impact of the highly compensated test. Specifically, the RIA is based on a methodology that was originally designed to produce reasonable estimates of the number of exempt workers at the national level across all incomes. It was not designed to measure changes in payroll costs for a small group of workers at the very upper end of the income distribution. Nor can it be adapted or updated to generate these types of estimates without a number of simplifying assumptions that are inconsistent with high-wage labor

markets. For example, to estimate the change in payroll costs from the highly compensated test requires the assumption that employers would no longer pay a premium for overtime hours when, in fact, 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn $100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties. The Department expects that most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital, and are likely to continue to pay many highly compensated workers by the hour. Although the Department could have assumed that some portion of the overtime hours would not be paid, there is nothing in the record, the economic literature, or the WHD's enforcement experience on which to base the assumption.

One benefit to employers that can be quantified based on the record is the benefit of having clearer rules that are easier to understand. Several commenters offered evidence that clearer, up-to-date rules are likely to reduce costly litigation. For example, Verizon noted that the current rule "offers little assistance to employers * * * who have to make challenging exemption classification decisions in the high technology environment of the twenty-first century. And the importance of making correct exemption classification decisions has never been higher. In recent years, employers have increasingly found themselves the target of large-scale class actions with multi-million dollar exposures challenging various exemption classification decisions that were based on good faith attempts to comply with the law." The National Association of Federal Wage Hour Consultants stated, "The business community has faced numerous unnecessary 'class inclusion type' law suits in the past few years and some of these have been brought in part as the result of a lack of proper interpretation of various parts of the regulations or regulations that are difficult to comprehend * * * Secondly, the legal community appears likewise to have problems when it comes to providing guidance to its clients as enforcement through interpretations and litigation have rendered varying results." Finally, Edward Potter, on behalf of the Employment Policy Foundation (EPF) noted that "[s]implification of rules may reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL's analysis." EPF also suggested that "[c]ost savings for reduced litigation would include reductions in total cases filed—including both those cases found to have merit and those without merit."

Other commenters noted that the proposed rule, particularly the proposed administrative duties test, "is somewhat vague and subjective" and that it "appears to invite another generation of court litigation to clarify the meaning of its key terms." For example, the National Association of Manufacturers stated that "like the language in the current regulations, the proposed 'position of responsibility' language is subjective, ambiguous, and, if adopted, could be the subject of a flood of litigation." And the International Foodservice Distributors Association noted, "The proposal must not merely substitute one subjective phrase for another. If the rule is to succeed in its goal of providing clarity to employers, it must make clear the distinctions between exempt and nonexempt activity. While IFDA recognizes the difficulty of this task across the entire economy, unless it is accomplished the new rule will only result in increased litigation as court battles are waged to delineate key terms of the new rule."

As explained elsewhere in the preamble, the Department recognizes the benefit of retaining relevant portions of the current standard so as not to completely jettison decades of federal court decisions and agency opinion letters and has made significant changes to the final rule that are intended to clarify the existing regulation, to make the rule easier to understand and apply to the 21st Century workplace, and to better reflect existing federal case law. The Department believes that the final rule accomplishes these objectives and will result in some reduction in litigation, particularly in the long term.

Another benefit to workers and employers is enhanced compliance with the FLSA. Updating Part 541 will be a catalyst for employers to review the exemption classifications of their workforce and will result in greater levels of compliance with the law. More employers will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced. Reducing regulatory red tape and litigation costs will free up resources and stimulate economic growth. The updated safe harbor provision in the final rule encourages employers to adopt proactive management practices, enables them to reimburse employees for overtime errors, and take meaningful measures to prevent improper deductions. The benefit for employers of clearer rules and the safe harbor provision comes from the lower liquidated damage awards that are associated with having fewer Part 541 overtime and salary basis violations (see Table 8–1). These proactive management practices will also reduce costly and lengthy litigation expenses.

The recent increase in large-scale class action overtime lawsuits in recent years illustrates the significant cost to the economy as that has resulted from the ambiguities in the current rule (a fact noted by a number of commenters such as Verizon, the National Association of Federal Wage Hour Consultants, and EPF). This increase in overtime litigation has been widely reported. For example, the Washington Post reported on April 10, 2004 that the number of Federal lawsuits involving overtime "held steady" at approximately 1,500 per year in the 1990s but increased to 3,904 in 2002 and 2,751 in 2003, and the National Law Journal, Vol. 26, No. 30, March 29, 2004, reported that since July 2001, "wage-and-hour class actions have skyrocketed."

To estimate the benefit of clearer rules and the safe harbor provision, the Department used data from a Minimum Wage Study Commission report that estimated overtime violation rates by industry (Report of the Minimum Wage Study Commission, Volume 1, May 1981, p.154) and assumed that these rates still apply today. The Department applied these rates to the number of white-collar salaried employees who worked overtime, the overtime hours that they worked, and their estimated earnings from those hours, from the Current Population Survey (CPS) Outgoing Rotation Group dataset, and then reduced these estimates by three-quarters (based on WHD investigation experience) to account for the other types of overtime violations, such as off-the-clock-work and straight time for all hours, that occur in addition to violations of the "white collar" exemptions. The benefit estimates are derived from the assumption, reflected in the comments, that clarifying the rule and the safe harbor provision will reduce the number of Part 541 violations. Specifically, the Department assumed that clarifying the rule and the safe harbor provision would reduce overtime violations by 25 percent (the low-range estimate used in the PRIA). The actual calculation is: "Total

Overtime × Hours for these Workers" × "FLSA Overtime Violation Rate" × "Share Overtime Violations – 541 Related" × "Reduction in 541 Violations" × "Average Hourly Earnings per Worker" × "the overtime premium or 0.50" (see Table 8–1).

The Department currently estimates the benefits from updating and clarifying the Part 541 rule that are associated with reduced liquidated damages to be at least $252.2 million. The services industry is estimated to have the largest quantifiable benefits, followed by retail trade and the finance, insurance, and real estate industry (see Table 8–1). However, based on comments in the record, the Department believes that the estimates presented in Table 8–1 may understate the actual benefits of the final rule that are associated with liquidated damages. For example, EPF commented that "[s]implification of rules may reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL's [PRIA] analysis." Using EPF's one-third to one-half reduction rates instead of the Department's more conservative 25 percent assumption would increase the estimated benefits to $336.3 million to $504.5 million.

However, liquidated damages are only one part of the costs associated with Part 541 litigation. There are many other significant benefits that cannot be quantified in this analysis because although there is anecdotal evidence of other Part 541 related costs, data limitations preclude the Department from developing other quantitative estimates. Thus, the estimates presented in Table 8–1 do not include benefits such as reduced litigation-related costs including plaintiffs' attorneys fees, defense costs, and court related expenses that can be substantial; reduced back wage liability due to the safe harbor provision; the lower costs associated with determining the exempt status of employees including conducting expensive time-and-motion studies and other outside human resource expenses; and improved management productivity from reduced WHD investigations and private litigation. Consequently, the Department believes that the benefits due to clarifying the rules and the safe harbor provision are significantly higher than the quantified amount of $252.2 million.

## TABLE 8–1.—ESTIMATED BENEFITS OF REVISED FLSA REGULATIONS AT 29 CFR 541

| | Agricultural services | Mining | Construction | Manufacturing | Transportation, communication, and Public utilities | Wholesale trade | Retail trade | Finance, insurance, and real estate | Services | State and local government | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Total white-collar workers who worked overtime | 48,761 | 63,989 | 410,010 | 1,988,986 | 794,799 | 861,156 | 1,754,428 | 1,445,543 | 2,889,213 | 201,997 | 10,458,882 |
| Total overtime hours for these workers | 34,395,423 | 66,031,880 | 279,597,133 | 1,193,109,481 | 471,925,654 | 544,699,007 | 1,155,081,280 | 872,722,033 | 1,772,769,183 | 117,693,406 | 6,508,024,479 |
| Average annual overtime per worker | 705 | 1,032 | 682 | 600 | 594 | 633 | 658 | 604 | 614 | 583 | 622 |
| Total annual earnings for these workers | $2,398,158,778 | $4,509,404,749 | $26,221,165,904 | $143,621,959,659 | $54,632,035,944 | $54,371,706,153 | $90,225,585,058 | $105,911,687,622 | $188,027,119,347 | $11,904,722,482 | $681,823,545,696 |
| Average annual earnings per worker | $49,182 | $70,471 | $63,952 | $72,209 | $68,737 | $63,138 | $51,427 | $73,268 | $65,079 | $58,935 | $65,191 |
| Average hourly earnings per worker | $17.66 | $22.65 | $23.16 | $26.94 | $25.71 | $23.28 | $18.78 | $27.30 | $24.16 | $22.13 | $24.12 |
| FLSA overtime violation rate [1] | 8.8% | 3.1% | 4.9% | 1.5% | 3.2% | 5.6% | 8.1% | 5.3% | 7.1% | 0.5% | 5.3% |
| Share overtime violations—541 related [2] | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% |
| Adjusted 541 violation rate | 2.2% | 0.8% | 1.2% | 0.4% | 0.8% | 1.4% | 2.0% | 1.3% | 1.8% | 0.1% | 1.3% |
| Number of 541 violations | 1,073 | 496 | 5,023 | 7,459 | 6,358 | 12,056 | 35,527 | 19,153 | 51,284 | 252 | 138,681 |
| Reduction in 541 violations [3] | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% | 25.0% |
| Benefit from clarifying rule & safe harbor [4] | $1,670,145 | $1,448,601 | $9,913,431 | $15,069,504 | $12,132,214 | $22,187,719 | $54,909,560 | $39,461,662 | $95,032,301 | $407,036 | $252,232,174 |

[1] Overtime Violation Rates from 1981 Minimum Wage Commission Report, Vol. 1.
[2] Percentage from Wage and Hour Division enforcement experience.
[3] This reduction is associated with clarifying the rule and the safe harbor provision.
[4] These benefits are liquidated damages that are not incurred.

## VII. Other Regulatory Analysis

*Unfunded Mandates Reform*

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, requires agencies to prepare a written statement that identifies the: (1) Authorizing legislation; (2) cost-benefit analysis; (3) macro-economic effects; (4) summary of state, local, and tribal government input; and (5) identification of reasonable alternatives and selection, or explanation of non-selection, of the least costly, most cost-effective or least burdensome alternative; for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $118 million or more in any one year.

(1) Authorizing Legislation

This rule is issued pursuant to Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)." The requirements of the exemption provided by this section of the Act are contained in this rule, 29 CFR Part 541.

Section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e) defines "employee" to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x), also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

(2) Cost-Benefit Analysis

For purposes of the Unfunded Mandates Reform Act of 1995, this rule includes a Federal mandate that might result in increased expenditures by the private sector of more than $118 million in any one year, but the rule will not result in increased expenditures by State, local and tribal governments, in the aggregate, of $118 million or more in any one year. Based on the Regulatory Impact Analysis (RIA), the Department has determined that the final rule will result in first-year costs for state and local governments of approximately $21 million. In subsequent years, the Department estimates that state and local governments may experience a payroll increase of as much as $10 million per year.

The benefits accruing to state and local governments will be similar to those accruing to other employers. Like other employers, state and local governments will benefit from having clearer rules that are easier to understand. State and local governments will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced. Reducing regulatory red tape and litigation costs will free up resources.

(3) Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product, or in the range of $1.5 billion to $3.0 billion. A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's RIA estimates that the total first-year impacts on employers of the final rule will be approximately $1.1 billion. However, given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy.

The ratio of total first-year costs to private sector payrolls averaged 0.04 percent nationwide, the ratio of total first-year costs to private sector revenue averaged less than 0.01 percent nationwide, and the ratio of total first-year costs to private sector pre-tax profit averaged 0.19 percent nationwide in the private sector. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

The ratio of total first-year state and local government costs were less than one-hundredth of one-percent of both state and local government payrolls and revenue. Impacts of this magnitude will not result in significant disruptions to typical state and local governments.

(4) Summary of State, Local, and Tribal Government Input

Many state and local public employers and employees commented on specific aspects of the proposed rule. These have been addressed above in the preamble and, where appropriate, changes have been made to the final rule. In addition, many of the comments from state and local governments concerned the ability of these entities to absorb the costs related to the proposed revisions. For example, the Public Sector FLSA Coalition stated, "The result of adopting proposed Section 541.100(a)(4) could be that state and local governments would be forced to reclassify many of their currently exempt executive managers and supervisors as non-exempt. This possible limitation on the use of the executive exemption in the public sector was apparently not contemplated or intended by the Department. The * * * Department's statements concerning the methods by which resulting increased payroll costs could be ameliorated by employers may be of no assistance to the public sector." The preamble to the final rule clarifies how the executive exemption applies in the public sector and the impact of section 541.100(a)(4), which requires that an employee either have authority to hire or fire employees or that the employee's recommendations regarding the change in status of other employees be given particular weight. The Department also added a definition of "particular weight."

The preamble of the proposed rule contains (at 68 FR 15583) a brief summary and history of this rule and its impact on state, local and tribal governments. As noted therein, Congress amended the FLSA in 1985 following the Garcia decision to readjust how the Act would apply to public sector employers by allowing (1) compensatory time off in lieu of cash overtime pay, (2) partial overtime exemptions for police and fire departments, (3) the use of unpaid volunteers in certain circumstances, and (4) a temporary phase-in period for meeting FLSA compliance obligations. *Garcia* v. *San Antonio Metropolitan*

*Transit Authority*, 469 U.S. 528 (1985). However, Congress enacted no special provisions for public agencies related to the section 13(a)(1) exemptions or the 541 regulations. As a result, the same rules for determining 541-exempt employees in the private sector were initially applied to the public sector following the 1985 amendments.

When first confronted with the requirements of the FLSA, many state and local governments attempted to classify nearly all of their non-supervisory "white-collar" workers as exempt administrative employees without regard to whether their primary duty related directly to agency management policies or general business operations, or whether they met the existing discretion and independent judgment test. In the late 1980s, several Governors and state and local government agencies urged the Department to exempt many public sector classifications (including social workers, detectives, probation officers, and others) to avoid having the overtime requirements (either through increased costs or reduced hours of service) disrupt the level of public services they need to provide. In 1989, following a review of the concerns expressed, former Labor Secretary Elizabeth Dole responded by confirming what was required to meet the administrative exemption's duties test as applied to public sector employees, but also solicited specific input with accompanying rationale to support requested changes. Responses were limited but argued generally that government services should be considered unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee's job duties included important decision-making authority on how the government agency is internally operated or managed. In effect, the suggestions essentially overlooked the focus on "management or general business operations" that has always been an essential foundation to the administrative employee exemption, but without explaining why that result was consistent with the intent of the FLSA and the exemptions provided by section 13(a)(1) as applied to the public sector. They also urged that the DOL redefine the professional exemption to recognize a broader contemporary use of that term in government employment, again without regard to the historical application of the professional exemption to only the recognized professions in particular fields of science or learning in which specialized intellectual instruction and specific academic training were prerequisites for entry into those particular professions. No supporting justifications were provided to explain how this broader application of the exemption would be in accord with the purposes of the FLSA or the exemptions in Section 13(a)(1).

During a growing wave of private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were issued that sharply limited public employers' ability to successfully claim exemption under the "salary basis" rule. This prompted the Department to modify the "salary basis" rule to provide specific relief to public employers based on principles of public accountability in a final rule establishing 29 CFR § 541.5d issued in August 1992 (57 FR 37666; Aug. 19, 1992). Under this special rule, the fact that a public sector pay and leave system included partial-day deductions from pay for absences not covered by accrued paid leave became irrelevant to determining a public sector employee's eligibility for exemption. This particular provision was carried over into the Department's recent proposed rule, at § 541.709 (68 FR 15597; March 31, 2003) and is included in the final rule at § 541.710.

Public sector employers have become less vocal over FLSA issues since the Department's 1992 rulemaking on the "salary basis" issue. The U.S. Supreme Court's 1997 decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997), a public sector case involving the City of St. Louis Police Department and disciplinary deductions from pay, may also have relieved many public agencies' concerns over pay-docking for discipline.

Although public agency organizations were invited to the Department's stakeholder meetings in 2002 to address concerns over the Part 541 regulations, most did not respond to the invitations. The International Personnel Management Association, accompanied by the National Public Employers Labor Relations Association and the U.S. Conference of Mayors, suggested that progressive discipline systems are common in the public sector (some collectively bargained) and the "salary basis" rule for exempt workers, which prohibits disciplinary deductions except for major safety rules, conflicts with such systems. Representatives of the Interstate Labor Standards Association (ILSA) submitted written views suggesting that the salary threshold be indexed to the current minimum wage or some multiple thereof (*i.e.*, three times the minimum wage for a 40-hour workweek or $618 per week). One additional idea was to relate the salary levels to those of the supervised employees. No other input was provided.

The proposed rule intended to clarify and thus simplify the exemptions' duties tests, but would continue to apply the same basic duties tests in both the public and private sectors. The public sector has been regulated under a different set of pay-docking rules since 1992, and additional revisions included in the final rule would broaden permissible disciplinary deductions to include partial-week suspensions for infractions of certain workplace conduct rules such as sexual harassment and work-place violence. The Department is not persuaded, however, by the comments seeking a separate, less-stringent duties test rule applicable solely to the public sector.

As discussed above in the RIA, the estimated first-year costs for state and local government are approximately $21 million, approximately half of which are one-time implementation costs. This $21 million constitutes an average of less than $250 for each of the approximately 90,000 state and local entities. The Department considers impacts of this magnitude to be quite small both in absolute terms and in relation to payrolls and revenue.

(5) Least Burdensome Option or Explanation Required

The Department's consideration of various options has been described throughout the preamble. The Department believes that it has chosen the least burdensome option that updates, clarifies, and simplifies the rule. One alternative option would have set the exemptions' salary level at a rate lower than $455 per week, which might impose lower direct payroll costs on employers, but may not necessarily be the most cost-effective or least burdensome alternative for employers. A lower salary level could result in a less effective "bright-line" test that separates exempt workers from those nonexempt workers whom Congress intended to cover by the Act. Greater ambiguity regarding who is exempt and nonexempt increases the potential legal liability from unintentionally misclassifying workers, and thus the ultimate cost of the regulation.

*Executive Order 13132 (Federalism)*

This rule will not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." As noted previously, the FLSA explicitly applies to states, political subdivisions of states, and interstate governmental entities, 29 U.S.C. 203(e), (x). To the extent necessary, the final rule addresses effects on state and local government employers, including retaining the previous rule's specific exception to the salary basis requirement for public employees (now at section 541.710) that was promulgated in 1992 (57 FR 37677 (August 19, 1992)) to address state constitutional or statutory public accountability requirements in the funding of state and local governments. As described above, the Department considers the estimated cost impacts of the rule on state and local governments to be quite small both in absolute terms and in relation to payrolls and revenues. State and local governments will also accrue benefits from this final rule like other employers in the form of clearer rules and reduced litigation.

In addition, the FLSA specifies that employers must comply with any state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum work week than those established under the Act, 29 U.S.C. 218(a). Section 541.4 in the final regulations clarifies in the rule itself that state laws providing additional worker protections are not preempted and that employers must continue to comply with those laws. Consequently, under the terms of section 6 of E.O. 13132, it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.*, requires agencies to prepare regulatory flexibility analyses, and make them available for public comment, when promulgating regulations that will have "a significant economic impact on a substantial number of small entities." Accordingly, the following analysis assesses the impact of these regulations on small entities as defined by the applicable SBA size standards.

In accordance with E.O. 13272, "Proper Consideration of Small Entities in Agency Rulemaking," this rule has been reviewed to assess its potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Regulatory Flexibility Act. The Department gave the notice of proposed rulemaking and the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration for review.

The County Attorney for the County of Culpeper, Virginia, asserted that the DOL has never reviewed the effects of Part 541 on state and local governments or sought to minimize its burdens. This, according to the County Attorney, is a failure by the DOL to meet its obligations under the RFA and Executive Order 13272. This commenter cited as the most obvious example the "salary basis" test and the flood of litigation against public employers in the aftermath of the U.S. Supreme Court's 1985 decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The County Attorney suggested that the Department should confer with state and local officials and jointly prepare proposed rules designed specifically for government employers that recognize the differences between urban and rural governments and between large and small government jurisdictions, and which minimize the burden on these employers while still conforming to Congressional intent. (The crux of this issue in the Department's view, of course, is how best to minimize the burden on these employers while still conforming to Congressional intent.)

The Department disagrees with this comment. The Department has, in fact, reviewed the impact of these regulations on state and local governments and sought to minimize burdens on state and local governments and on small entities to the extent permitted by Congressional intent and the statutory objectives of the FLSA. A case simply has not been made for creating separate, less-stringent exemption criteria under special rules for state and local governments that bypass Congressional intent or the statutory objectives of the FLSA and the exemptions provided in section 13(a)(1).

*Final Regulatory Flexibility Analysis*

(1) Succinct Statement of Need For, and Objectives of, Rule

Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1), directs the Secretary of Labor to issue regulations "from time to time" (subject to the Administrative Procedure Act) to define and delimit the terms "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman * * *" Employees who meet the specified regulatory criteria are completely exempt from minimum wage and overtime pay under the FLSA. The existing regulations require payment "on a salary basis," at not less than specified minimum amounts, and certain additional tests must be met related to an employee's primary job duties and responsibilities. The duties tests were last modified in 1949 and have remained essentially unchanged since. The salary levels required for exemption were last updated in 1975 on an interim basis. In 1999, the U.S. General Accounting Office reviewed these regulations and recommended that the Secretary of Labor comprehensively review and update them, and make necessary changes to better meet the needs of both employers and employees in the modern work place. These regulations were also recommended for reform in public comments submitted on OMB's 2001 and 2002 Reports to Congress on the Costs and Benefits of Regulations. The Department proposed revisions to these regulations in response to the concerns that have been raised over the years, to update, clarify and simplify them for the 21st Century workplace. The objectives of the revised rule are to provide clear and concise regulatory guidance to implement the statutory exemption, in plain language, to assist employers and employees in determining whether an employee is exempt from the FLSA as a bona fide executive, administrative, professional, or outside sales employee.

(2) Summary of Significant Issues Raised in Comments and Responses Thereto

Many of the issues raised by small businesses in the public comments received on the proposed rule are described in the preamble above. The significant issues raised by representatives of small businesses and the U.S. Small Business Administration's Office of Advocacy ("Advocacy") are repeated here to meet the guidelines under the Regulatory Flexibility Act.

Advocacy commended the Department for its outreach to small entities in developing the proposed rule and encouraged those efforts to continue, including the development of small entity compliance assistance materials for the final rule. The Department will continue to expand its

available compliance assistance materials related to these regulations for small entities.

*Primary duty test:* Small business representatives informed Advocacy that the proposed movement away from a percentage-of-time primary duty test was an important development in reducing the regulation's compliance burden on small businesses. Advocacy recommended that the Department incorporate the proposed primary duty test in the final rule. The final rule includes the proposed primary duty test, with minor and clarifying modifications.

*Salary test:* Small businesses told Advocacy that, because of regional differences in salaries and industry characteristics, they will face disproportionate burdens if the Department adopts the $425 per week minimum salary test. Advocacy stated that, in different regions of the country, small business employees enjoy the same or similar living standards with very different salaries. Further, some small business industries, such as retail stores and restaurants, operate on thin margins with labor costs constituting a significant portion of their expenses. Many of these small businesses rely heavily on small numbers of management-level employees who would no longer be exempt from overtime. Advocacy encouraged the Department to provide flexibility to small businesses under the salary test, such as lower minimum salary levels for small businesses, to alleviate the disproportionate effects. At a minimum, Advocacy urged the Department not to adopt a minimum salary test for small businesses above $425 per week.

The National Small Business Association (NSBA) (formerly National Small Business United) commented in general support of the proposal and asserted overall that the benefits of the changes would outweigh the potentially negative impacts of the changes on its members. However, NSBA also commented that lower salary tests (both the standard tests and the highly compensated test) would be more desirable for small businesses.

The National Federation of Independent Business (NFIB) observed that DOL's analysis showed two industries in which incremental payroll costs rise by more than two percent of pretax profit—general merchandise stores (SIC 53) and private educational services (SIC 82)—when employees are reclassified according to the proposed new FLSA rules (based on 2001 data). NFIB suggested that any agency proffering rule changes that cause potential losses in small firm profits ought to give careful consideration to ameliorating those particular circumstances.

The Department carefully considered the FLSA's statutory purposes and the context for its exemption of "white-collar" employees under section 13(a)(1), and studied its extensive regulatory history. Employees who qualify under these exemptions are exempt from the Act's minimum wage and overtime requirements. They are assumed to enjoy a certain prestige, status, and importance within their employer's organization commensurate with the exempt level accorded their position, as well as other compensatory privileges in exchange for not being covered by the Act. Consequently, to achieve its intended purpose, the salary level adopted for exemption should help to accurately distinguish exempt from nonexempt workers under these principles, and without inviting evasion of the FLSA's minimum wage and overtime requirements for large numbers of workers for whom the Act's basic protections were intended. At the same time, the level selected should not operate to exclude large numbers of employees whose jobs were intended to be within the exemption. Accordingly, in arriving at the salary level, the Department's methodology specifically considered salary levels actually being paid by small business industries (such as retail stores and restaurants), and in lower-wage regions (such as the South). Therefore, the Department concluded these commenters have not fully understood the true effects of the Department's methodology in setting the exemption's salary level.

Although the analysis does not include precise data delineating the salary levels paid by small businesses to their exempt employees in each exemption category (due to data limitations), the Department applied a reasonable proxy that takes into account lower-wage industries that include many small businesses, specifically by looking to the salary levels actually being paid in the retail and service sectors and in the South. This approach is based on and entirely consistent with previous revisions of these regulations. It tries to approximate the lower portion of the range of prevailing salaries already being paid to employees intended for exemption (thus mitigating actual impacts in retail stores and restaurants and in lower-wage regions of the country). For example, when the Department revised the regulations in 1958, it looked at the salaries paid to exempt employees and set rates "at about the levels at which no more than about 10 percent of those in the lowest-range region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." In the 1958 Kantor Report (at 5–7) and the 1940 Stein Report (at 32), it was noted that "* * * these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude." Moreover, the 1949 Weiss Report (at 11–15) stated "To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary. By and large, however, if the salary levels are selected carefully and if they approximate the prevailing minimum salaries for this type of personnel and are above the generally prevailing levels for nonexempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the Divisions as to the exempt status of the particular individuals." DOL set a salary level at that time at a "figure slightly lower than might be indicated by the data" because of concerns regarding the impact of the salary level increases on small businesses: "The salary test for bona fide executives must not be set so high as to exclude large numbers of the executives of small establishments from the exemption."

The Department's current approach was similar, and thus already specifically considered the lower salary levels paid by smaller businesses in the retail and service sectors and in the South, which the data confirm pay lower wages. The Department's approach is designed specifically to achieve a careful and delicate balance: Mitigate the adverse impacts of raising the salary threshold on smaller businesses covered by the law while staying consistent with the objectives of the statute to clearly define and delimit which workers qualify for exemption as Congress intended, and at the same time helping to prevent the misclassification of obviously nonexempt employees. Adopting an even lower minimum salary level for small businesses, when the methodology has already given special consideration to lower salaries being paid in the retail and service sectors and in the South (two cohorts in which small businesses are prevalent), would result in a rule that fails to effectuate its statutory purposes.

The FLSA itself does provide special treatment for small entities under some of its exemptions, *e.g.*, smaller farms

and small newspapers are specifically exempt and enterprises with annual dollar volumes of business less than $500,000 per year are not covered under the enterprise coverage test. Small businesses that have as their only regular employees the owner or parent, spouse, child or other member of the immediate family of the owner are also specifically excluded from the FLSA's enterprise coverage test. However, the FLSA's statutory exemption for white-collar employees in section 13(a)(1) contains no special provision based on size of business.

Regional and population-based salary differentials were also previously considered and rejected in prior revisions of these regulations. They were considered unworkable because they would increase enormously the difficulties of administration and enforcement, and were questionably beyond the Administrator's authority under the Act (perceived as comparable to setting different minimum wages for a class of workers that Congress specifically exempted). See 1940 Stein Report at 5–6 and 32. While the Department did once again reconsider these possible options in response to suggestions from commenters, no new arguments or rationales were advanced during this rulemaking that would overcome the same shortcomings and previously-reached conclusions. Setting multiple minimum salary levels according to SBA size standards industry-by-industry would present the same insurmountable challenges.

As described under the Unfunded Mandates Reform Act section in the preamble of the proposed rule (see 68 FR 15584), the Department considered as an alternative option setting the salary level even lower than the proposed $425 per week and concluded that, while it might appear to impose lower direct payroll costs on employers, it may not necessarily be the most cost-effective or least burdensome alternative for employers. A lower salary level that is not above the generally prevailing levels for nonexempt occupations fails to adequately distinguish bona fide exempt workers from those nonexempt workers whom Congress intended to protect. It provides a less effective "bright-line" test under the exemption, which invites misclassification. Greater ambiguity over who is and who is not exempt increases the potential legal liability for employers from unintentionally misclassifying workers, and thus the ultimate cost of the regulation. Reducing the needless ambiguity of the existing regulations is one of the principal objectives of the final rule. Setting the exemption salary level at or near the wage levels paid to large numbers of nonexempt workers would fail the objectives of these regulations and the purposes of the statute.

The law provides considerable built-in flexibility to small businesses to enable them to respond to the regulations in the most cost-effective manner that best suits their individual needs. The FLSA requires that covered employers comply with its basic minimum wage and overtime pay requirements unless a particular exemption applies. Unless it chooses to do so, no employer is required to claim an exemption from the law or to pay an employee the salary level required for the "white-collar" exemptions. The law therefore provides a measure of maximum flexibility to employers in this respect for meeting their compliance obligations.

Employers affected by the final rule could respond in a variety of ways. For example, they could adhere to a 40-hour work week (by spreading available work to more employees, and limiting each to no more than 40 hours of work per week, consistent with the statutory objective of the FLSA's overtime requirements); pay the statutory overtime premiums to affected employees who work more than 40 hours per week; or raise exempt employees' salaries to the new level required under the final rule. Given the range of responses employers may take when confronted with paying overtime to an employee previously treated as exempt, and in light of the Department's methodology that specifically considered lower salary levels actually being paid by small businesses in the retail sector and in the South, the Department believes that it has properly considered the available options that are consistent with the purposes of the statute and has selected a regulatory approach that alleviates the perceived disproportionate effects that small businesses have suggested would occur under the rule.

*Enforcement flexibility:* Advocacy noted that SBREFA requires Federal agencies to establish policies which reduce or waive civil penalties for small businesses in appropriate cases. Advocacy encouraged the Department to consider civil penalty flexibility where appropriate, noting that flexibility in dealing with small businesses will encourage such entities to work more closely with the Department to voluntarily achieve compliance. The Department's policies under the FLSA for reducing or waiving civil money penalties for small businesses under appropriate circumstances are fully consistent with SBREFA requirements and principles. However, there is a distinction between civil money penalties and statutory wages due under the FLSA. Violations of the FLSA's minimum wage or overtime provisions create an employer liability directly to its employees who were not paid their statutory wages due. The Department has no authority under the FLSA or SBREFA to reduce or waive an employer's liability to employees for statutory minimum wages or overtime pay legally due. The Department will continue to expand its compliance assistance efforts to promote voluntary employer compliance with these regulations, especially for smaller businesses.

Small business representatives and Advocacy commented that the safe harbor's requirement for a pre-existing "written policy" may exclude some small businesses which do not produce written compliance materials in the ordinary course of their business. Understanding that the purpose of this requirement is to encourage regulated entities to better understand the law's requirements, Advocacy still believed that the Department should not exclude small businesses from the proposed safe harbor, while offering it to large businesses that are more able to dedicate resources to drafting comprehensive written employment policies. While Advocacy commended the DOL for including a safe harbor provision, it encouraged the Department to consider alternatives to the written policy requirement proposed at § 541.603.

After carefully considering all the comments on the proposal and pertinent case law on the current rule's "window of correction," the Department modified the proposed rule's safe harbor requirement. The final rule does not require employers to adopt and communicate a written employment policy in order to utilize the rule's safe harbor. While an employer must still have a policy prohibiting improper pay deductions, and clearly communicate it to its employees, a written policy is no longer required. In addition, the clearly communicated policy must also now include a complaint mechanism. Communication to employees in some form is important so that employees will also benefit from this notification of their rights under the FLSA. As other commenters (*e.g.*, the American Health Care Association, American Corporate Counsel Association, and National Association of Manufacturers) have stated, adopting a written policy is the best evidence of the employer's good faith efforts to comply. Further, this

particular requirement is narrowly focused on an employer's policy prohibiting improper pay deductions, which includes a complaint mechanism, for salaried-exempt workers; it does not suggest the adoption of "comprehensive written employment policies" covering other matters.

*Small entity compliance guide:* Advocacy noted that the Department has historically made compliance materials available to small businesses via its Web site. Advocacy encouraged the Department to update and revise these compliance assistance materials for small entity use with the new rule, as well as to distribute these materials to small businesses that do not have access to the Internet. The Department is revising all pertinent compliance assistance materials for small entities' use with the new rule and will distribute printed versions of the materials for employers that do not have access to the Internet. The Department has also planned a comprehensive compliance assistance effort on the changes in the regulations so that employers will better understand their compliance responsibilities and employees will better understand their rights under the new rules.

The American Hotel & Lodging Association and the International Franchise Association both commented that, for the lodging industry, entities with annual receipts of less than $6 million are considered "small" according to SBA size standards. They asserted that the FLSA's statutory exemption for firms with annual revenues less that $500,000 does not relieve the Department of the requirement in the Regulatory Flexibility Act to address the disproportionate impact on smaller firms. The impact of the dramatically increased salary threshold on an owner of a single, limited-service hotel in a rural area could be quite significant, they maintained, and they urged the Department to more carefully explore regulatory alternatives for reducing significant economic impact on small entities. For the reasons discussed more fully above, the Department disagrees that it has not carefully explored the available regulatory alternatives consistent with the purposes of the statute in ways that address the disproportionate impact on smaller firms. The Department believes that it has properly considered the available options and has selected a regulatory approach that appropriately considers the lower salary levels being paid by smaller businesses in the retail sector and in the South, thereby mitigating the perceived disproportionate effects that would otherwise occur to small businesses. In so doing, the Department has not, contrary to the assertions of these commenters, assumed that the FLSA's statutory coverage test relieves the DOL of its obligations under the Regulatory Flexibility Act.

(3) Number of Small Entities Covered by the Rule

The Department based its small firm estimates on the same data sources used for the private sector as a whole. Based on SBA's size standards for small business entities, the Department estimates more than 5.2 million establishments impacted by the final standard are considered to be small businesses. These small firms employ approximately 38.7 million workers with an annual payroll of $940 billion. Their total annual sales are estimated to be $5.7 trillion and their annual pre-tax profits are estimated to be $180 billion. Approximately 80 percent of the affected establishments are considered to be small businesses and they account for 39 percent of the employment, 35 percent of the payroll, 32 percent of the annual sales, and 31 percent of the annual pre-tax profits.

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

Although an employer claiming an exemption from the FLSA under 29 CFR Part 541 must be prepared to establish affirmatively that all required conditions for the exemption are met, this rule contains no reporting or recordkeeping requirements as a condition for the exemption. However, the recordkeeping requirements for employers claiming exemptions from the FLSA under 29 CFR Part 541 for particular employees are contained in the general FLSA recordkeeping regulations, applicable to all employers covered by the FLSA (codified at 29 CFR Part 516; see 29 CFR § 516.0 and 516.3) and have been approved by the Office of Management and Budget Control Number 1215–0017. There are no other compliance requirements under the final rule.

(5) Steps Taken To Minimize Significant Impact on Small Entities Consistent With Objectives of Applicable Statutes

The FLSA generally requires employers to pay covered nonexempt employees at least the federal minimum wage of $5.15 per hour, and time-and-one-half overtime premium pay for hours worked over 40 per week. Under the terms of the statute, Congress excluded some smaller businesses (those with annual revenues less than $500,000) from the definition of covered "enterprises" (although individual workers who are engaged in interstate commerce or who produce goods for such commerce may be individually covered by the FLSA). This rule clarifies and updates the criteria for the statutory exemption from the FLSA for executive, administrative, professional, and outside sales employees for all employers covered by the FLSA.

The factual, policy and legal reasons for selecting the regulatory alternatives adopted in the final rule are set out in full detail above in section (2) of this Final Regulatory Flexibility Analysis and elsewhere in the preceding sections of the preamble discussing the public comments received on specific sections of the proposal and our responses thereto, and include the statutory objectives of the FLSA and the purposes of the section 13(a)(1) exemptions; the extensive regulatory history and procedures followed during prior updates of these regulations; extensive public commentary over the years on the current rules as recently documented by the GAO and others; available data for determining the scope and impact of making changes to the current rule; and the regulatory principles embodied in the Paperwork Reduction Act, the Regulatory Flexibility Act, and the various Executive Orders applicable to the rulemaking process.

The Department considered a number of alternatives to the rule that would impact small entities. One alternative is not to change the existing regulations. This alternative was rejected because the Department has determined the existing salary tests, which have not been raised in more than 28 years, no longer distinguish between bona fide executive, administrative, and professional employees and those who should not be considered for exemption. Also, the duties tests, which were last modified in 1949, are viewed in the regulated community as too complicated, confusing, and outdated for the modern workplace.

Two other alternatives are to raise the salary levels and not update the duties tests, or conversely to update the duties tests without raising the salary levels. However, the Department rejected these alternatives and concluded that raising the salary levels is necessary to reestablish a clear, relevant bright-line test between exempt and nonexempt workers. Moreover, the duties tests were last revised in 1949 and have remained essentially unchanged since that time, and the salary levels were last updated in 1975. The Department has determined that updating both the salary level and duties tests is necessary

to better meet the needs of both employees and employers in the modern workplace and to anticipate future workplace trends.

Another alternative is to adjust the salary levels for the standard test for inflation. However, the Department has never relied solely on inflation adjustments to determine the appropriate salary levels, and has decided to continue its long-standing regulatory practice to reject such mechanical adjustments for inflation and base the salary levels for exemption on wage levels actually being paid in the economy with appropriate consideration given to low-wage regions and low-wage industries and the effects on smaller businesses, as explained above.

*Assessment of the Impact on Families*

A number of commenters, including numerous individuals who submitted form letters, expressed concerns that the proposed rule would have an adverse impact on families.

Many of these comments were based upon the erroneous assertion that the proposed rule would have made millions of workers exempt from overtime and, as a result, would have deprived families of a significant source of income. As discussed more fully above (see Chapters 2 and 4 of the RIA), many of these allegations were based upon misleading and inappropriate comparisons between the existing "long" duties tests and the standard tests in the final regulation. The "long" duties tests, under which some employees are exempt and others nonexempt, have been replaced in the final rule by guaranteed overtime protection. Accordingly, the Department concludes that no worker who earns less than $455 per week will lose their overtime protection under the final rule.

The Department estimates that 1.3 million white-collar workers earning less than $455 per week ($23,660 per year) are Part 541-exempt under the current rule. These workers are likely to benefit under the final rule in the form of increased compensation of approximately $375 million per year in the form of either paid overtime or higher salaries. According to the CPS data, many of these workers are married women and minorities with less than a college degree. Another 5.4 million salaried workers who earn between $155 and $455 per week will have their overtime protection strengthened because their protection, which is based on the duties tests under the current regulation, will be guaranteed under the final rule.

The Department also has determined that the final rule is as protective as the current regulation for workers who earn between $23,660 and $100,000 per year. On the whole, employees will gain overtime protection because some revisions are more protective than the existing short duties tests. For example, the executive duties test in the final rule is more protective than the current short duties test and the final rule is more protective for police officers, fire fighters, paramedics, emergency medical technicians, and other first responders, and the highly compensated test does not apply to them. The Part 541 exemptions also do not apply to manual laborers or other non-management blue-collar workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

Additionally, clearer more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately. Fewer workers will be unintentionally misclassified; therefore they will not have to go to court and wait years for their back pay. This will have a positive impact on workers, especially low-wage, vulnerable workers and their families.

An estimated 107,000 workers who earn $100,000 or more per year could lose their overtime protection due to the new highly compensated test. However, as discussed in Chapters 4 and 8 of the RIA, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, and tradition and culture. Moreover, it would be incorrect to assume that employers would no longer pay a premium for overtime hours to these workers when 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn $100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties. The Department expects that most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital, and are unlikely to reduce the compensation of many highly paid workers, even if they could theoretically be made exempt under the new highly compensated tests.

Therefore, the Department has determined that the final rule will have an overall positive impact on families, and: (1) Is unlikely to affect the stability or safety of the family, particularly the marital commitment; (2) has no affect on the authority and rights of parents in the education, nurture, and supervision of their children; (3) is likely to help the family perform its functions; (4) is likely to increase the disposable income of families and children and help reduce poverty; (5) can not be carried out by State or local government or by the family; and (6) does not establish an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society. Accordingly, this rule has been assessed under section 654 of the Treasury and General Government Appropriations Act, 1999, for its effect on family well-being and the undersigned hereby certifies that the rule will not adversely affect the well-being of families.

*Executive Order 13045, Protection of Children*

In accordance with Executive Order 13045, the Department has evaluated this rule and determined that it has no environmental health risk or safety risk that may disproportionately affect children.

**Appendix A—Detailed Coverage Estimates**

TABLE A–1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS

| OCC code | Occupation title | Paid hourly | Nonhourly |
|---|---|---|---|
| 403 | Launderers and ironers | 0 | 3,239 |
| 404 | Cooks, private household | 9,448 | 2,052 |
| 405 | Housekeepers and butlers | 6,892 | 3,275 |
| 406 | Child care workers, private household | 265,010 | 213,825 |
| 407 | Private household cleaners and servants | 451,534 | 506,876 |

TABLE A–1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

| OCC code | Occupation title | Paid hourly | Nonhourly |
|---|---|---|---|
| 416 | Fire inspection and fire prevention occupations | 10,707 | 1,748 |
| 417 | Firefighting occupations | 98,804 | 129,880 |
| 418 | Police and detectives, public service | 301,015 | 250,539 |
| 423 | Sheriffs, bailiffs, and other law enforcement officers | 72,306 | 72,512 |
| 424 | Correctional institution officers | 171,867 | 129,503 |
| 425 | Crossing guards | 30,947 | 4,612 |
| 426 | Guards and police, except public service | 681,655 | 134,843 |
| 427 | Protective service occupations, not elsewhere classified (n.e.c.) | 86,808 | 9,192 |
| 434 | Bartenders | 272,490 | 37,341 |
| 435 | Waiters and waitresses | 1,289,086 | 144,701 |
| 436 | Cooks | 1,821,259 | 251,916 |
| 438 | Food counter, fountain and related occupations | 394,989 | 8,887 |
| 439 | Kitchen workers, food preparation | 309,683 | 26,521 |
| 443 | Waiters'/waitresses' assistants | 617,109 | 56,396 |
| 444 | Miscellaneous food preparation occupations | 582,667 | 56,533 |
| 445 | Dental assistants | 176,900 | 31,036 |
| 446 | Health aides, except nursing | 300,666 | 45,918 |
| 447 | Nursing aides, orderlies, and attendants | 1,905,597 | 254,413 |
| 449 | Maids and housemen | 548,780 | 71,577 |
| 453 | Janitors and cleaners | 1,616,839 | 404,414 |
| 454 | Elevator operators | 5,635 | 771 |
| 455 | Pest control occupations | 30,692 | 24,887 |
| 457 | Barbers | 12,811 | 25,388 |
| 458 | Hairdressers and cosmetologists | 214,791 | 330,329 |
| 459 | Attendants, amusement and recreation facilities | 210,873 | 33,786 |
| 461 | Guides | 23,487 | 8,556 |
| 462 | Ushers | 34,419 | 3,724 |
| 463 | Public transportation attendants | 79,221 | 43,725 |
| 464 | Baggage porters and bellhops | 38,447 | 3,765 |
| 465 | Welfare service aides | 78,519 | 28,057 |
| 466 | Family child care providers | 7,676 | 13,031 |
| 467 | Early childhood teacher's assistants | 400,055 | 105,253 |
| 468 | Child care workers, n.e.c. | 164,678 | 45,236 |
| 469 | Personal service occupations, n.e.c. | 167,870 | 61,095 |
| 473 | Farmers, except horticultural | 1,233 | 304 |
| 479 | Farm workers | 19,370 | 3,883 |
| 483 | Marine life cultivation workers | 767 | 0 |
| 484 | Nursery workers | 6,319 | 119 |
| 486 | Groundskeepers and gardeners, except farm | 628,009 | 163,202 |
| 487 | Animal caretakers, except farm | 83,895 | 21,766 |
| 488 | Grader and sorter, agricultural products | 38,938 | 5,673 |
| 489 | Inspectors, agricultural products | 1,946 | 1,214 |
| 495 | Forestry workers, except logging | 3,992 | 1,752 |
| 496 | Timber cutting and logging occupations | 22,039 | 12,078 |
| 497 | Captains and other officers, fishing vessels | 819 | 1,761 |
| 498 | Fishers | 4,933 | 15,923 |
| 505 | Automobile mechanics | 295,415 | 167,163 |
| 506 | Auto mechanic apprentices | 2,215 | 0 |
| 507 | Bus, truck, and stationary engine mechanics | 193,638 | 37,272 |
| 508 | Aircraft engine mechanics | 25,871 | 7,301 |
| 509 | Small engine repairers | 32,026 | 8,790 |
| 514 | Automobile body and related repairers | 95,820 | 49,978 |
| 515 | Aircraft mechanics, except engine | 10,919 | 652 |
| 516 | Heavy equipment mechanics | 134,978 | 25,158 |
| 517 | Farm equipment mechanics | 22,825 | 5,604 |
| 518 | Industrial machinery repairers | 373,093 | 56,377 |
| 519 | Machinery maintenance occupations | 13,041 | 1,085 |
| 523 | Electronic repairers, communications & industrial equip | 133,521 | 34,011 |
| 525 | Data processing equipment repairers | 152,554 | 105,323 |
| 526 | Household appliance and power tool repairers | 22,840 | 5,872 |
| 527 | Telephone line installers and repairers | 32,469 | 7,938 |
| 529 | Telephone installers and repairers | 177,639 | 49,190 |
| 533 | Misc electrical and electronic equipment repairers | 62,529 | 9,374 |
| 534 | Heating, air conditioning, and refrigeration mechanics | 240,044 | 44,067 |
| 535 | Camera, watch, and musical instrument repairers | 12,339 | 4,306 |
| 536 | Locksmiths and safe repairers | 12,211 | 3,458 |
| 538 | Office machine repairers | 30,822 | 14,624 |
| 539 | Mechanical controls and valve repairers | 15,324 | 713 |
| 543 | Elevator installers and repairers | 19,960 | 6,189 |
| 544 | Millwrights | 57,777 | 4,543 |
| 547 | Specified mechanics and repairers, n.e.c. | 300,199 | 87,967 |

TABLE A–1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

| OCC code | Occupation title | Paid hourly | Nonhourly |
|---|---|---|---|
| 549 | Not specified mechanics and repairers | 222,588 | 64,692 |
| 563 | Brickmasons and stonemasons | 142,889 | 28,805 |
| 564 | Brickmason and stonemason apprentices | 75 | 0 |
| 565 | Tile setters, hard and soft | 46,051 | 24,579 |
| 566 | Carpet installers | 48,699 | 33,509 |
| 567 | Carpenters | 912,769 | 201,178 |
| 569 | Carpenter apprentices | 8,875 | 0 |
| 573 | Drywall installers | 85,860 | 28,609 |
| 575 | Electricians | 597,557 | 113,341 |
| 576 | Electrician apprentices | 43,746 | 1,183 |
| 577 | Electrical power installers and repairers | 98,532 | 16,873 |
| 579 | Painters, construction and maintenance | 333,738 | 75,698 |
| 583 | Paperhangers | 4,407 | 1,037 |
| 584 | Plasterers | 32,335 | 10,035 |
| 585 | Plumbers, pipefitters, and steamfitters | 371,718 | 72,324 |
| 587 | Plumber, pipefitter, and steamfitter apprentices | 13,377 | 0 |
| 588 | Concrete and terrazzo finishers | 81,316 | 12,391 |
| 589 | Glaziers | 33,148 | 5,472 |
| 593 | Insulation workers | 46,275 | 5,649 |
| 594 | Paving, surfacing, and tamping equipment operators | 9,194 | 80 |
| 595 | Roofers | 129,010 | 21,411 |
| 596 | Sheetmetal duct installers | 39,013 | 1,057 |
| 597 | Structural metal workers | 61,917 | 1,904 |
| 598 | Drillers, earth | 9,141 | 1,776 |
| 599 | Construction trades, n.e.c. | 187,340 | 39,904 |
| 614 | Drillers, oil well | 17,924 | 3,243 |
| 615 | Explosives workers | 3,178 | 1,183 |
| 616 | Mining machine operators | 22,315 | 4,121 |
| 617 | Mining occupations, n.e.c. | 19,104 | 3,636 |
| 634 | Tool and die makers | 80,616 | 12,172 |
| 635 | Tool and die maker apprentices | 2,859 | 0 |
| 636 | Precision assemblers, metal | 23,659 | 1,136 |
| 637 | Machinists | 386,873 | 51,058 |
| 643 | Boilermakers | 19,509 | 776 |
| 644 | Precision grinders, filers, and tool sharpeners | 8,516 | 1,707 |
| 645 | Patternmakers and model makers, metal | 4,683 | 0 |
| 646 | Lay-out workers | 5,255 | 635 |
| 647 | Precious stones and metals workers | 29,041 | 6,328 |
| 649 | Engravers, metal | 7,338 | 1,551 |
| 653 | Sheet metal workers | 92,387 | 15,576 |
| 654 | Sheet metal worker apprentices | 1,381 | 0 |
| 656 | Patternmakers and model makers, wood | 839 | 0 |
| 657 | Cabinet makers and bench carpenters | 44,767 | 7,285 |
| 658 | Furniture and wood finishers | 13,123 | 3,757 |
| 659 | Misc precision woodworkers | 0 | 725 |
| 666 | Dressmakers | 36,301 | 7,723 |
| 667 | Tailors | 12,153 | 15,389 |
| 668 | Upholsterers | 28,643 | 12,756 |
| 669 | Shoe repairers | 2,501 | 2,396 |
| 674 | Misc precision apparel and fabric workers | 1,800 | 4,664 |
| 675 | Hand molders and shapers, except jewelers | 12,376 | 2,561 |
| 676 | Patternmakers, lay-out workers, and cutters | 3,466 | 1,486 |
| 677 | Optical goods workers | 56,957 | 12,550 |
| 678 | Dental laboratory and medical appliance technicians | 39,047 | 14,883 |
| 679 | Bookbinders | 21,558 | 823 |
| 683 | Electrical/electronic equipment assemblers | 195,790 | 26,801 |
| 684 | MIsc precision workers, n.e.c. | 20,615 | 2,864 |
| 686 | Butchers and meat cutters | 186,712 | 22,176 |
| 687 | Bakers | 106,414 | 20,607 |
| 688 | Food batchmakers | 52,048 | 808 |
| 689 | Inspectors, testers, and graders | 105,805 | 45,156 |
| 693 | Adjusters and calibrators | 2,428 | 1,243 |
| 694 | Water and sewage treatment plant operators | 67,078 | 14,568 |
| 695 | Power plant operators | 33,157 | 9,373 |
| 696 | Stationary engineers | 89,271 | 36,207 |
| 699 | Miscellaneous plant and system operators | 31,904 | 6,416 |
| 703 | Set-up operators, lathe and turning machine | 10,097 | 0 |
| 704 | Operators, lathe and turning machine | 20,200 | 725 |
| 705 | Milling and planing machine operators | 5,203 | 754 |
| 706 | Punching and stamping press machine operators | 65,301 | 1,990 |
| 707 | Rolling machine operators | 6,821 | 1,090 |

TABLE A–1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

| OCC code | Occupation title | Paid hourly | Nonhourly |
|---|---|---|---|
| 708 | Drilling and boring machine operators | 6,431 | 0 |
| 709 | Grinding, abrading, buffing, & polishing machine operators | 78,620 | 8,005 |
| 713 | Forging machine operators | 12,998 | 0 |
| 714 | Numerical control machine operators | 31,734 | 1,992 |
| 715 | Misc metal plastic stone & glass working mach operators | 24,559 | 1,398 |
| 717 | Fabricating machine operators, n.e.c. | 10,165 | 2,159 |
| 719 | Molding and casting machine operators | 77,105 | 5,147 |
| 723 | Metal plating machine operators | 17,160 | 1,108 |
| 724 | Heat treating equipment operators | 9,526 | 688 |
| 725 | Misc metal and plastic processing machine operators | 19,318 | 209 |
| 726 | Wood lathe, routing, and planing machine operators | 6,929 | 0 |
| 727 | Sawing machine operators | 65,134 | 5,919 |
| 728 | Shaping and joining machine operators | 3,918 | 0 |
| 729 | Nailing and tacking machine operators | 830 | 0 |
| 733 | Miscellaneous woodworking machine operators | 19,125 | 2,170 |
| 734 | Printing press operators | 212,969 | 40,073 |
| 735 | Photoengravers and lithographers | 21,890 | 0 |
| 736 | Typesetters and compositors | 10,799 | 7,777 |
| 737 | Miscellaneous printing machine operators | 25,667 | 5,677 |
| 738 | Winding and twisting machine operators | 35,208 | 0 |
| 739 | Knitting, looping, taping, and weaving machine operators | 28,864 | 1,849 |
| 743 | Textile cutting machine operators | 7,841 | 2,060 |
| 744 | Textile sewing machine operators | 263,639 | 62,550 |
| 745 | Shoe machine operators | 7,011 | 1,163 |
| 747 | Pressing machine operators | 62,228 | 10,349 |
| 748 | Laundering and dry cleaning machine operators | 153,071 | 26,466 |
| 749 | Miscellaneous textile machine operators | 27,920 | 1,030 |
| 753 | Cementing and gluing machine operators | 18,824 | 0 |
| 754 | Packaging and filling machine operators | 245,604 | 17,916 |
| 755 | Extruding and forming machine operators | 25,335 | 2,570 |
| 756 | Mixing and blending machine operators | 95,832 | 6,349 |
| 757 | Separating, filtering, and clarifying machine operators | 55,133 | 12,234 |
| 758 | Compressing and compacting machine operators | 16,170 | 1,115 |
| 759 | Painting and paint spraying machine operators | 117,753 | 12,971 |
| 763 | Roasting and baking machine operators, food | 1,670 | 0 |
| 764 | Washing, cleaning, and pickling machine operators | 7,693 | 0 |
| 765 | Folding machine operators | 9,730 | 1,081 |
| 766 | Furnace, kiln, and oven operators, except food | 41,021 | 4,617 |
| 768 | Crushing and grinding machine operators | 33,990 | 3,233 |
| 769 | Slicing and cutting machine operators | 121,141 | 8,195 |
| 773 | Motion picture projectionists | 8,832 | 0 |
| 774 | Photographic process machine operators | 74,174 | 13,386 |
| 777 | Miscellaneous machine operators, n.e.c. | 882,925 | 76,713 |
| 779 | Machine operators, not specified | 329,240 | 39,598 |
| 783 | Welders and cutters | 416,948 | 30,243 |
| 784 | Solderers and brazers | 11,415 | 0 |
| 785 | Assemblers | 940,542 | 110,419 |
| 786 | Hand cutting and trimming occupations | 6,998 | 0 |
| 787 | Hand molding, casting, and forming occupations | 12,481 | 1,496 |
| 789 | Hand painting, coating, and decorating occupations | 18,227 | 0 |
| 793 | Hand engraving and printing occupations | 5,887 | 309 |
| 795 | Miscellaneous hand working occupations | 34,894 | 15,860 |
| 796 | Production inspectors, checkers, and examiners | 377,166 | 63,000 |
| 797 | Production testers | 42,433 | 7,419 |
| 798 | Production samplers and weighers | 2,789 | 466 |
| 799 | Graders and sorters, except agricultural | 103,271 | 11,534 |
| 804 | Truck drivers | 1,257,626 | 361,681 |
| 806 | Driver-sales workers | 57,728 | 70,691 |
| 808 | Bus drivers | 451,774 | 134,867 |
| 809 | Taxicab drivers and chauffeurs | 140,630 | 121,002 |
| 813 | Parking lot attendants | 43,783 | 6,349 |
| 814 | Motor transportation occupations, n.e.c. | 6,029 | 536 |
| 823 | Railroad conductors and yardmasters | 0 | 98 |
| 824 | Locomotive operating occupations | 16,157 | 789 |
| 825 | Railroad brake, signal, and switch operators | 1,977 | 0 |
| 828 | Ship captains and mates, except fishing boats | 3,014 | 3,098 |
| 829 | Sailors and deckhands | 644 | 762 |
| 833 | Marine engineers | 144 | 147 |
| 834 | Bridge, lock, and lighthouse tenders | 836 | 803 |
| 844 | Operating engineers | 207,133 | 41,129 |
| 845 | Longshore equipment operators | 2,950 | 0 |

TABLE A–1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

| OCC code | Occupation title | Paid hourly | Nonhourly |
|---|---|---|---|
| 848 | Hoist and winch operators | 14,914 | 923 |
| 849 | Crane and tower operators | 59,531 | 7,474 |
| 853 | Excavating and loading machine operators | 72,226 | 5,875 |
| 855 | Grader, dozer, and scraper operators | 40,091 | 5,440 |
| 856 | Industrial truck and tractor equipment operators | 493,407 | 43,160 |
| 859 | Misc material moving equipment operators | 56,887 | 6,768 |
| 865 | Helpers, mechanics, and repairers | 25,150 | 3,270 |
| 866 | Helpers, construction trades | 107,065 | 6,016 |
| 867 | Helpers, surveyor | 3,080 | 791 |
| 868 | Helpers, extractive occupations | 4,282 | 0 |
| 869 | Construction laborers | 842,685 | 148,765 |
| 874 | Production helpers | 60,632 | 3,457 |
| 875 | Garbage collectors | 38,478 | 12,855 |
| 876 | Stevedores | 10,544 | 2,342 |
| 877 | Stock handlers and baggers | 1,022,741 | 57,619 |
| 878 | Machine feeders and offbearers | 57,112 | 1,302 |
| 883 | Freight, stock, and material handlers, n.e.c. | 637,494 | 73,143 |
| 885 | Garage and service station related occupations | 153,955 | 13,631 |
| 887 | Vehicle washers and equipment cleaners | 255,171 | 25,212 |
| 888 | Hand packers and packagers | 366,936 | 23,410 |
| 889 | Laborers, except construction | 1,066,097 | 123,495 |
| | Total | 35,208,824 | 7,621,800 |

Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

TABLE A–2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST

| OCC code | Occupation title | Exempt status code (1) | Hourly paid workers | Salaried workers |
|---|---|---|---|---|
| 4 | Chief executives & general administrators, public admin | 1 | 6,437 | 16,284 |
| 5 | Administrators & officials, public administration | 1 | 133,691 | 275,701 |
| 6 | Administrators, protective services | 1 | 16,367 | 33,128 |
| 7 | Financial managers | 1 | 119,763 | 625,039 |
| 8 | Personnel & labor relations managers | 1 | 30,326 | 180,553 |
| 9 | Purchasing managers | 1 | 29,311 | 102,247 |
| 13 | Managers, marketing, advertising, & public relations | 1 | 83,850 | 605,262 |
| 14 | Admin, education & related fields | 1 | 45,618 | 85,111 |
| 15 | Managers, medicine & health | 1 | 278,599 | 498,011 |
| 17 | Managers, food serving & lodging establishments | 3 | 423,699 | 706,689 |
| 18 | Managers, properties & real estate | 3 | 114,633 | 308,022 |
| 19 | Funeral directors | 2 | 10,388 | 32,306 |
| 21 | Managers, service organizations, n.e.c. (2) | 1 | 188,874 | 479,990 |
| 22 | Managers & administrators, n.e.c. | 1 | 1,203,610 | 4,778,194 |
| 23 | Accountants & auditors | 1 | 443,659 | 1,020,879 |
| 24 | Underwriters | 1 | 35,944 | 59,503 |
| 25 | Other financial officers | 2 | 163,865 | 591,312 |
| 26 | Management analysts | 2 | 62,981 | 244,104 |
| 27 | Personnel, training, & labor relations specialists | 2 | 202,064 | 365,268 |
| 28 | Purchasing agents & buyers, farm products | 2 | 4,155 | 4,800 |
| 29 | Buyers, wholesale & retail trade except farm products | 2 | 105,708 | 105,447 |
| 33 | Purchase agents & buyers, n.e.c. | 2 | 83,157 | 126,564 |
| 34 | Business & promotion agents | 2 | 4,849 | 30,822 |
| 35 | Construction inspectors | 3 | 36,718 | 28,236 |
| 36 | Inspectors & compliance officers, except construction | 3 | 64,857 | 109,744 |
| 37 | Management related occupations, n.e.c. | 2 | 249,125 | 223,981 |
| 43 | Architects | 1 | 29,545 | 106,161 |
| 44 | Aerospace engineers | 1 | 17,473 | 55,016 |
| 45 | Metallurgical & materials engineers | 1 | 5,286 | 16,242 |
| 46 | Mining engineers | 1 | 1,077 | 4,528 |
| 47 | Petroleum engineers | 1 | 666 | 12,768 |
| 48 | Chemical engineers | 1 | 9,965 | 67,074 |
| 49 | Nuclear engineers | 1 | 1,607 | 828 |
| 53 | Civil engineers | 1 | 67,305 | 155,453 |
| 54 | Agricultural engineers | 1 | 350 | 1,408 |
| 55 | Engineers, electrical & electronic | 1 | 115,616 | 499,179 |
| 56 | Engineers, industrial | 1 | 55,812 | 169,410 |
| 57 | Engineers, mechanical | 1 | 54,395 | 229,289 |

TABLE A–2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

| OCC code | Occupation title | Exempt status code (1) | Hourly paid workers | Salaried workers |
|---|---|---|---|---|
| 58 | Marine & naval architects | 1 | 3,943 | 7,187 |
| 59 | Engineers, n.e.c. | 1 | 59,412 | 204,684 |
| 63 | Surveyors & mapping scientists | 2 | 8,286 | 6,771 |
| 64 | Computer systems analysts & scientists | 1 | 300,404 | 1,182,634 |
| 65 | Operations & systems researchers & analysts | 1 | 70,749 | 154,890 |
| 66 | Actuaries | 1 | 0 | 15,038 |
| 67 | Statisticians | 1 | 4,485 | 18,483 |
| 68 | Mathematical scientists, n.e.c. | 1 | 0 | 3,314 |
| 69 | Physicists & astronomers | 1 | 2,128 | 14,535 |
| 73 | Chemists, except biochemists | 1 | 23,469 | 95,037 |
| 74 | Atmospheric & space scientists | 1 | 2,031 | 3,595 |
| 75 | Geologists & geodesists | 1 | 7,934 | 30,534 |
| 76 | Physical scientists, n.e.c. | 1 | 11,719 | 24,178 |
| 77 | Agricultural & food scientists | 1 | 10,103 | 20,486 |
| 78 | Biological & life scientists | 1 | 18,383 | 67,745 |
| 79 | Forestry & conservation scientists | 1 | 2,742 | 9,085 |
| 83 | Medical scientists | 1 | 18,769 | 54,452 |
| 84 | Physicians | 1 | 0 | 0 |
| 85 | Dentists | 1 | 0 | 0 |
| 86 | Veterinarians | 1 | 1,037 | 16,267 |
| 87 | Optometrists | 1 | 0 | 0 |
| 88 | Podiatrists | 1 | 0 | 0 |
| 89 | Health diagnosing practitioners, n.e.c. | 1 | 0 | 0 |
| 95 | Registered nurses | 1 | 1,627,489 | 567,191 |
| 96 | Pharmacists | 1 | 122,210 | 78,029 |
| 97 | Dietitians | 3 | 45,172 | 23,771 |
| 98 | Respiratory therapists | 3 | 75,024 | 22,684 |
| 99 | Occupational therapists | 3 | 33,605 | 32,130 |
| 103 | Physical therapists | 2 | 80,964 | 72,325 |
| 104 | Speech therapists | 2 | 29,295 | 77,446 |
| 105 | Therapists, n.e.c. | 2 | 46,667 | 43,329 |
| 106 | Physicians' assistants | 1 | 53,420 | 34,053 |
| 113 | Earth, environmental, & marine science teachers | 1 | 0 | 0 |
| 114 | Biological science teachers | 1 | 0 | 0 |
| 115 | Chemistry teachers | 1 | 0 | 0 |
| 116 | Physics teachers | 1 | 0 | 0 |
| 117 | Natural science teachers, n.e.c. | 1 | 0 | 719 |
| 118 | Psychology teachers | 1 | 0 | 580 |
| 119 | Economics teachers | 1 | 0 | 0 |
| 123 | History teachers | 1 | 0 | 0 |
| 124 | Political science teachers | 1 | 0 | 0 |
| 125 | Sociology teachers | 1 | 0 | 0 |
| 126 | Social science teachers, n.e.c. | 1 | 0 | 0 |
| 127 | Engineering teachers | 1 | 0 | 0 |
| 128 | Math. science teachers | 1 | 0 | 0 |
| 129 | Computer science teachers | 1 | 0 | 840 |
| 133 | Medical science teachers | 1 | 0 | 0 |
| 134 | Health specialties teachers | 1 | 0 | 0 |
| 135 | Business, commerce, & marketing teachers | 1 | 0 | 0 |
| 136 | Agriculture & forestry teachers | 1 | 0 | 0 |
| 137 | Art, drama, & music teachers | 1 | 0 | 0 |
| 138 | Physical education teachers | 1 | 0 | 0 |
| 139 | Education teachers | 1 | 0 | 0 |
| 143 | English teachers | 1 | 0 | 1,221 |
| 144 | Foreign language teachers | 1 | 0 | 0 |
| 145 | Law teachers | 1 | 0 | 0 |
| 146 | Social work teachers | 1 | 0 | 0 |
| 147 | Theology teachers | 1 | 0 | 0 |
| 148 | Trade & industrial teachers | 1 | 0 | 0 |
| 153 | Teachers, postsecondary, n.e.c. | 1 | 0 | 0 |
| 154 | Postsecondary teachers, subject not specified | 1 | 1,230 | 5,885 |
| 155 | Teachers, prekindergarten & kindergarten | 2 | 270,615 | 90,593 |
| 156 | Teachers, elementary school | 1 | 0 | 0 |
| 157 | Teachers, secondary school | 1 | 0 | 0 |
| 158 | Teachers, special education | 1 | 5,755 | 9,028 |
| 159 | Teachers, n.e.c. | 1 | 356,988 | 334,426 |
| 163 | Counselors, Educational & Vocational | 2 | 15,448 | 30,107 |
| 164 | Librarians | 1 | 83,000 | 111,753 |
| 165 | Archivists & curators | 1 | 9,744 | 14,922 |
| 166 | Economists | 2 | 24,240 | 72,828 |

TABLE A–2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

| OCC code | Occupation title | Exempt status code (1) | Hourly paid workers | Salaried workers |
|---|---|---|---|---|
| 167 | Psychologists | 1 | 65,812 | 129,335 |
| 168 | Sociologists | 2 | 0 | 384 |
| 169 | Social scientists, n.e.c. | 2 | 11,574 | 14,821 |
| 173 | Urban planners | 2 | 3,676 | 11,002 |
| 174 | Social workers | 3 | 338,352 | 460,604 |
| 175 | Recreation workers | 3 | 94,737 | 34,825 |
| 178 | Lawyers & Judges | 1 | 0 | 0 |
| 183 | Authors | 2 | 16,392 | 35,455 |
| 184 | Technical writers | 3 | 19,907 | 37,555 |
| 185 | Designers | 1 | 246,100 | 297,869 |
| 186 | Musicians & composers | 1 | 14,771 | 79,138 |
| 187 | Actors & directors | 1 | 27,520 | 83,834 |
| 188 | Painters, sculptors, craft-artists, & artist printmakers | 1 | 70,319 | 42,485 |
| 189 | Photographers | 1 | 65,293 | 36,661 |
| 193 | Dancers | 1 | 8,941 | 15,053 |
| 194 | Artists, performers, & related workers, n.e.c. | 1 | 41,483 | 37,539 |
| 195 | Editors & reporters | 3 | 91,740 | 166,068 |
| 197 | Public relations specialists | 3 | 45,106 | 126,849 |
| 198 | Announcers | 2 | 13,544 | 21,290 |
| 199 | Athletes | 4 | 27,688 | 48,316 |
| 203 | Clinical laboratory technologists & technicians | 3 | 296,794 | 63,229 |
| 204 | Dental hygienists | 3 | 92,852 | 35,461 |
| 205 | Health record technologists & technicians | 3 | 17,001 | 3,783 |
| 206 | Radiologic technicians | 3 | 140,955 | 30,201 |
| 207 | Licensed practical nurses | 3 | 325,853 | 45,359 |
| 208 | Health technologists & technicians, n.e.c. | 3 | 632,527 | 108,100 |
| 213 | Electrical & electronic technicians | 4 | 249,019 | 140,988 |
| 214 | Industrial engineering technicians | 4 | 5,952 | 765 |
| 215 | Mechanical engineering technicians | 4 | 11,789 | 5,626 |
| 216 | Engineering technicians, n.e.c. | 4 | 129,531 | 51,567 |
| 217 | Drafting occupations | 4 | 148,837 | 76,029 |
| 218 | Surveying & mapping technicians | 4 | 40,315 | 12,458 |
| 223 | Biological technicians | 4 | 88,414 | 36,733 |
| 224 | Chemical technicians | 4 | 49,811 | 13,038 |
| 225 | Science technicians, n.e.c. | 4 | 71,249 | 23,561 |
| 226 | Airplane pilots & navigators | 4 | 5,647 | 11,943 |
| 227 | Air traffic controllers | 4 | 3,037 | 7,013 |
| 228 | Broadcast equipment operators | 4 | 24,496 | 20,545 |
| 229 | Computer programmers | 2 | 122,757 | 421,040 |
| 233 | Tool programmers, numerical control | 4 | 6,099 | 2,917 |
| 234 | Legal assistants | 4 | 144,284 | 210,917 |
| 235 | Technicians, n.e.c. | 4 | 54,139 | 60,414 |
| 243 | Supervisors & Proprietors, Sales Occupations | 2 | 1,323,873 | 2,148,481 |
| 253 | Insurance sales occupations | 2 | 101,531 | 346,959 |
| 254 | Real estate sales occupations | 3 | 55,261 | 423,875 |
| 255 | Securities & financial services sales occupations | 2 | 61,157 | 396,030 |
| 256 | Advertising & related sales occupations | 2 | 42,796 | 126,558 |
| 257 | Sales occupations, other business services | 3 | 261,085 | 416,743 |
| 258 | Sales engineers | 3 | 2,475 | 31,762 |
| 259 | Sales representatives, mining, manufact, & wholesale | 3 | 294,010 | 1,099,707 |
| 263 | Sales workers, motor vehicles & boats | 4 | 30,391 | 33,687 |
| 264 | Sales workers, apparel | 4 | 336,383 | 37,347 |
| 265 | Sales workers, shoes | 4 | 79,014 | 12,018 |
| 266 | Sales workers, furniture & home furnishings | 4 | 85,411 | 89,456 |
| 267 | Sales workers, radio, Tv, hi-fi, & appliances | 4 | 198,369 | 115,694 |
| 268 | Sales workers, hardware & building supplies | 4 | 201,525 | 79,240 |
| 269 | Sales workers, parts | 4 | 78,297 | 35,749 |
| 274 | Sales workers, other commodities | 4 | 1,107,970 | 243,311 |
| 275 | Sales counter clerks | 4 | 140,467 | 29,730 |
| 276 | Cashiers | 4 | 2,703,603 | 190,465 |
| 277 | Street & door-to-door sales workers | 4 | 0 | 0 |
| 278 | News vendors | 4 | 36,633 | 52,989 |
| 283 | Demonstrators, promoters & models, sales | 4 | 62,402 | 8,814 |
| 284 | Auctioneers | 4 | 1,003 | 3,083 |
| 285 | Sales support occupations, n.e.c. | 4 | 10,446 | 9,115 |
| 303 | Supervisors, general office | 1 | 160,230 | 212,649 |
| 304 | Supervisors, computer equipment operators | 1 | 3,280 | 12,961 |
| 305 | Supervisors, financial records processing | 1 | 44,084 | 61,890 |
| 306 | Chief communications operators | 1 | 2,343 | 3,105 |
| 307 | Supervisors, distribution, scheduling, & adjusting clerks | 1 | 74,454 | 84,487 |

TABLE A–2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

| OCC code | Occupation title | Exempt status code (1) | Hourly paid workers | Salaried workers |
|---|---|---|---|---|
| 308 | Computer operators | 4 | 183,860 | 97,773 |
| 309 | Peripheral equipment operators | 4 | 4,681 | 0 |
| 313 | Secretaries | 4 | 1,320,713 | 779,365 |
| 314 | Stenographers | 4 | 64,749 | 43,868 |
| 315 | Typists | 4 | 342,925 | 182,082 |
| 316 | Interviewers | 4 | 109,971 | 38,015 |
| 317 | Hotel clerks | 4 | 115,438 | 15,670 |
| 318 | Transportation ticket & reservation agents | 4 | 134,226 | 83,940 |
| 319 | Receptionists | 4 | 843,415 | 174,717 |
| 323 | Information clerks, n.e.c. | 4 | 310,301 | 101,956 |
| 325 | Classified-ad clerks | 4 | 1,394 | 912 |
| 326 | Correspondence clerks | 4 | 4,826 | 3,215 |
| 327 | Order clerks | 4 | 212,118 | 68,155 |
| 328 | Personnel clerks, except payroll & timekeeping | 4 | 43,039 | 15,127 |
| 329 | Library clerks | 4 | 107,372 | 19,863 |
| 335 | File clerks | 4 | 234,692 | 48,289 |
| 336 | Records clerks | 4 | 136,166 | 59,547 |
| 337 | Bookkeepers, accounting, & auditing clerks | 4 | 845,993 | 456,374 |
| 338 | Payroll & timekeeping clerks | 4 | 106,358 | 54,940 |
| 339 | Billing clerks | 4 | 152,019 | 52,185 |
| 343 | Cost & rate clerks | 4 | 33,709 | 15,380 |
| 344 | Billing, posting, & calculating machine operators | 4 | 120,303 | 32,171 |
| 345 | Duplicating machine operators | 4 | 25,214 | 3,785 |
| 346 | Mail preparing & paper handling machine operators | 4 | 2,978 | 1,311 |
| 347 | Office mach. operators, n.e.c. | 4 | 12,459 | 6,940 |
| 348 | Telephone operators | 4 | 99,426 | 19,448 |
| 353 | Communications equipment operators, n.e.c. | 4 | 14,637 | 5,031 |
| 354 | Postal clerks, except mail carriers | 4 | 224,732 | 50,333 |
| 355 | Mail carriers, postal service | 4 | 250,642 | 85,477 |
| 356 | Mail clerks, except postal service | 4 | 124,113 | 20,708 |
| 357 | Messengers | 4 | 98,258 | 25,407 |
| 359 | Dispatchers | 4 | 172,039 | 76,155 |
| 363 | Production coordinators | 4 | 118,886 | 97,632 |
| 364 | Traffic, shipping, & receiving clerks | 4 | 537,884 | 66,810 |
| 365 | Stock & inventory clerks | 4 | 345,187 | 77,301 |
| 366 | Meter readers | 4 | 38,823 | 7,657 |
| 368 | Weighers, measurers, checkers, & samplers | 4 | 41,663 | 2,906 |
| 373 | Expediters | 4 | 268,885 | 37,551 |
| 374 | Material recording, scheduling, & distrib. clerks, n.e.c. | 4 | 9,301 | 2,445 |
| 375 | Insurance adjusters, examiners, & investigators | 2 | 249,632 | 242,454 |
| 376 | Investigators & adjusters, except insurance | 2 | 733,381 | 337,862 |
| 377 | Eligibility clerks, social welfare | 4 | 57,835 | 29,759 |
| 378 | Bill & account collectors | 4 | 159,577 | 47,047 |
| 379 | General office clerks | 4 | 558,808 | 196,513 |
| 383 | Bank tellers | 4 | 389,140 | 73,812 |
| 384 | Proofreaders | 4 | 10,630 | 1,213 |
| 385 | Data-entry keyers | 4 | 420,358 | 137,486 |
| 386 | Statistical clerks | 4 | 71,842 | 23,091 |
| 387 | Teachers' aides | 4 | 538,233 | 254,634 |
| 389 | Administrative support occupations, n.e.c. | 4 | 590,574 | 390,186 |
| 413 | Supervisors, firefighting & fire prevention occupations | 3 | 17,820 | 26,194 |
| 414 | Supervisors, police & detectives | 3 | 55,659 | 58,505 |
| 415 | Supervisors, guards | 4 | 38,215 | 22,766 |
| 433 | Supervisors, food preparation & service occupations | 3 | 415,710 | 75,847 |
| 448 | Supervisors, cleaning & building service workers | 4 | 121,660 | 55,974 |
| 456 | Supervisors, personal service occupations | 4 | 43,608 | 28,049 |
| 475 | Managers, farms, except horticultural | 3 | 1,640 | 1,184 |
| 476 | Managers, horticultural specialty farms | 3 | 4,224 | 125 |
| 477 | Supervisors, farm workers | 4 | 734 | 0 |
| 485 | Supervisors, related agricultural occupations | 4 | 54,229 | 39,120 |
| 494 | Supervisors, forestry & logging workers | 4 | 2,794 | 6,109 |
| 503 | Supervisors, mechanics & repairers | 3 | 91,019 | 123,140 |
| 553 | Supervisors, brickmasons, stonemasons, & tile setters | 4 | 1,204 | 1,260 |
| 554 | Supervisors, carpenters & related workers | 4 | 12,875 | 1,646 |
| 555 | Supervisors, electricians & power transmission installers | 4 | 20,131 | 9,715 |
| 556 | Supervisors, painters, paperhangers, & plasterers | 4 | 7,584 | 4,577 |
| 557 | Supervisors, plumbers, pipefitters, & steamfitters | 4 | 15,965 | 573 |
| 558 | Supervisors, construction, n.e.c. | 4 | 297,676 | 183,104 |
| 613 | Supervisors, extractive occupations | 3 | 13,961 | 16,199 |
| 628 | Supervisors, production occupations | 3 | 542,035 | 431,574 |

TABLE A–2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

| OCC code | Occupation title | Exempt status code (1) | Hourly paid workers | Salaried workers |
|---|---|---|---|---|
| 803 | Supervisors, motor vehicle operators | 4 | 37,310 | 55,345 |
| 843 | Supervisors, material moving equipment operators | 4 | 6,006 | 1,054 |
| 864 | Supervisors, handlers, equip cleaners, & laborers, n.e.c. | 4 | 7,992 | 5,735 |
| | Total | | 32,694,067 | 31,686,296 |

(1) See Table 3–2.
(2) Not elsewhere classified (n.e.c.)
Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

TABLE A–3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN $155 PER WEEK

| OCC code | Occupational title | Exempt status code[1] | Subject to salary tests | Total nonexempt | Total exempt |
|---|---|---|---|---|---|
| 4 | Chief executives and general administrators, public admin | 1 | 14,668 | 716 | 13,952 |
| 5 | Administrators & officials, public administration | 1 | 269,143 | 16,033 | 253,110 |
| 6 | Administrators, protective services | 1 | 32,316 | 1,666 | 30,650 |
| 7 | Financial managers | 1 | 623,191 | 28,750 | 594,441 |
| 8 | Personnel & labor relations managers | 1 | 180,553 | 8,868 | 171,685 |
| 9 | Purchasing managers | 1 | 102,247 | 4,269 | 97,978 |
| 13 | Managers, marketing, advertising, & public relations | 1 | 602,720 | 24,853 | 577,867 |
| 14 | Admin, education & related fields | 1 | 83,791 | 6,004 | 77,788 |
| 15 | Managers, medicine & health | 1 | 491,118 | 28,208 | 462,910 |
| 17 | Managers, food serving & lodging establishments | 3 | 685,704 | 497,115 | 188,589 |
| 18 | Managers, properties & real estate | 3 | 287,864 | 203,605 | 84,259 |
| 19 | Funeral directors | 2 | 29,867 | 8,024 | 21,843 |
| 21 | Managers, service organizations, n.e.c.(2) | 1 | 469,483 | 28,098 | 441,385 |
| 22 | Managers & administrators, n.e.c. | 1 | 4,727,919 | 201,405 | 4,526,514 |
| 23 | Accountants & auditors | 1 | 1,007,059 | 56,089 | 950,970 |
| 24 | Underwriters | 1 | 59,503 | 3,536 | 55,967 |
| 25 | Other financial officers | 2 | 582,440 | 153,454 | 428,986 |
| 26 | Management analysts | 2 | 237,587 | 56,734 | 180,853 |
| 27 | Personnel, training, & labor relations specialists | 2 | 359,471 | 104,951 | 254,520 |
| 28 | Purchasing agents & buyers, farm products | 2 | 4,800 | 1,149 | 3,651 |
| 29 | Buyers, wholesale & retail trade except farm products | 2 | 103,738 | 30,285 | 73,453 |
| 33 | Purchase agents & buyers, n.e.c. | 2 | 125,570 | 39,014 | 86,556 |
| 34 | Business & promotion agents | 2 | 30,822 | 9,936 | 20,886 |
| 35 | Construction inspectors | 3 | 27,939 | 19,074 | 8,865 |
| 36 | Inspectors & compliance officers, except construction | 3 | 107,722 | 71,768 | 35,954 |
| 37 | Management related occupations, n.e.c. | 2 | 220,371 | 76,347 | 144,024 |
| 43 | Architects | 1 | 106,161 | 5,138 | 101,023 |
| 44 | Aerospace engineers | 1 | 55,015 | 1,669 | 53,346 |
| 45 | Metallurgical & materials engineers | 1 | 16,242 | 613 | 15,629 |
| 46 | Mining engineers | 1 | 4,528 | 137 | 4,391 |
| 47 | Petroleum engineers | 1 | 12,768 | 503 | 12,265 |
| 48 | Chemical engineers | 1 | 67,075 | 2,168 | 64,907 |
| 49 | Nuclear engineers | 1 | 828 | 65 | 763 |
| 53 | Civil engineers | 1 | 155,242 | 6,787 | 148,455 |
| 54 | Agricultural engineers | 1 | 1,408 | 60 | 1,348 |
| 55 | Engineers, electrical & electronic | 1 | 496,379 | 18,953 | 477,426 |
| 56 | Engineers, industrial | 1 | 169,410 | 7,803 | 161,607 |
| 57 | Engineers, mechanical | 1 | 229,289 | 9,176 | 220,113 |
| 58 | Marine & naval architects | 1 | 7,187 | 418 | 6,769 |
| 59 | Engineers, n.e.c. | 1 | 204,685 | 9,158 | 195,527 |
| 63 | Surveyors & mapping scientists | 2 | 6,771 | 1,920 | 4,851 |
| 64 | Computer systems analysts & scientists | 1 | 1,176,238 | 50,415 | 1,125,823 |
| 65 | Operations & systems researchers & analysts | 1 | 153,985 | 7,753 | 146,232 |
| 66 | Actuaries | 1 | 15,038 | 573 | 14,465 |
| 67 | Statisticians | 1 | 17,607 | 909 | 16,698 |
| 68 | Mathematical scientists, n.e.c. | 1 | 3,315 | 170 | 3,145 |
| 69 | Physicists & astronomers | 1 | 14,534 | 375 | 14,159 |
| 73 | Chemists, except biochemists | 1 | 94,243 | 4,316 | 89,927 |
| 74 | Atmospheric & space scientists | 1 | 3,294 | 150 | 3,144 |
| 75 | Geologists & geodesists | 1 | 30,535 | 1,624 | 28,911 |
| 76 | Physical scientists, n.e.c. | 1 | 24,178 | 1,301 | 22,877 |
| 77 | Agricultural & food scientists | 1 | 19,592 | 1,097 | 18,495 |
| 78 | Biological & life scientists | 1 | 67,745 | 3,638 | 64,107 |

TABLE A–3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN $155 PER WEEK—Continued

| OCC code | Occupational title | Exempt status code[1] | Subject to salary tests | Total nonexempt | Total exempt |
|---|---|---|---|---|---|
| 79 | Forestry & conservation scientists | 1 | 9,086 | 521 | 8,565 |
| 83 | Medical scientists | 1 | 53,678 | 2,817 | 50,861 |
| 84 | Physicians | 1 | 0 | 0 | 0 |
| 85 | Dentists | 1 | 0 | 0 | 0 |
| 86 | Veterinarians | 1 | 16,267 | 925 | 15,342 |
| 87 | Optometrists | 1 | 0 | 0 | 0 |
| 88 | Podiatrists | 1 | 0 | 0 | 0 |
| 89 | Health diagnosing practitioners, n.e.c. | 1 | 0 | 0 | 0 |
| 95 | Registered nurses | 1 | 555,307 | 33,950 | 521,357 |
| 96 | Pharmacists | 1 | 78,029 | 3,413 | 74,616 |
| 97 | Dietitians | 3 | 19,933 | 14,570 | 5,363 |
| 98 | Respiratory therapists | 3 | 22,683 | 16,353 | 6,330 |
| 99 | Occupational therapists | 3 | 30,448 | 20,984 | 9,464 |
| 103 | Physical therapists | 2 | 71,231 | 19,999 | 51,232 |
| 104 | Speech therapists | 2 | 75,935 | 23,298 | 52,637 |
| 105 | Therapists, n.e.c. | 2 | 42,330 | 14,038 | 28,292 |
| 106 | Physicians' assistants | 1 | 33,962 | 1,714 | 32,248 |
| 113 | Earth, environmental, & marine science teachers | 1 | 0 | 0 | 0 |
| 114 | Biological science teachers | 1 | 0 | 0 | 0 |
| 115 | Chemistry teachers | 1 | 0 | 0 | 0 |
| 116 | Physics teachers | 1 | 0 | 0 | 0 |
| 117 | Natural science teachers, n.e.c. | 1 | 719 | 53 | 666 |
| 118 | Psychology teachers | 1 | 579 | 23 | 556 |
| 119 | Economics teachers | 1 | 0 | 0 | 0 |
| 123 | History teachers | 1 | 0 | 0 | 0 |
| 124 | Political science teachers | 1 | 0 | 0 | 0 |
| 125 | Sociology teachers | 1 | 0 | 0 | 0 |
| 126 | Social science teachers, n.e.c. | 1 | 0 | 0 | 0 |
| 127 | Engineering teachers | 1 | 0 | 0 | 0 |
| 128 | Math. science teachers | 1 | 0 | 0 | 0 |
| 129 | Computer science teachers | 1 | 840 | 78 | 762 |
| 133 | Medical science teachers | 1 | 0 | 0 | 0 |
| 134 | Health specialties teachers | 1 | 0 | 0 | 0 |
| 135 | Business, commerce, & marketing teachers | 1 | 0 | 0 | 0 |
| 136 | Agriculture & forestry teachers | 1 | 0 | 0 | 0 |
| 137 | Art, drama, & music teachers | 1 | 0 | 0 | 0 |
| 138 | Physical education teachers | 1 | 0 | 0 | 0 |
| 139 | Education teachers | 1 | 0 | 0 | 0 |
| 143 | English teachers | 1 | 1,221 | 112 | 1,109 |
| 144 | Foreign language teachers | 1 | 0 | 0 | 0 |
| 145 | Law teachers | 1 | 0 | 0 | 0 |
| 146 | Social work teachers | 1 | 0 | 0 | 0 |
| 147 | Theology teachers | 1 | 0 | 0 | 0 |
| 148 | Trade & industrial teachers | 1 | 0 | 0 | 0 |
| 153 | Teachers, postsecondary, n.e.c. | 1 | 0 | 0 | 0 |
| 154 | Postsecondary teachers, subject not specified | 1 | 5,076 | 267 | 4,809 |
| 155 | Teachers, prekindergarten & kindergarten | 2 | 76,066 | 30,609 | 45,457 |
| 156 | Teachers, elementary school | 1 | 0 | 0 | 0 |
| 157 | Teachers, secondary school | 1 | 0 | 0 | 0 |
| 158 | Teachers, special education | 1 | 9,028 | 687 | 8,341 |
| 159 | Teachers, n.e.c. | 1 | 310,873 | 20,692 | 290,181 |
| 163 | Counselors, Educational & Vocational | 2 | 27,863 | 8,566 | 19,297 |
| 164 | Librarians | 1 | 107,389 | 6,701 | 100,688 |
| 165 | Archivists & curators | 1 | 14,923 | 843 | 14,080 |
| 166 | Economists | 2 | 70,746 | 19,706 | 51,040 |
| 167 | Psychologists | 1 | 128,495 | 7,890 | 120,605 |
| 168 | Sociologists | 2 | 384 | 64 | 320 |
| 169 | Social scientists, n.e.c. | 2 | 14,053 | 4,105 | 9,948 |
| 173 | Urban planners | 2 | 11,002 | 2,952 | 8,050 |
| 174 | Social workers | 3 | 451,756 | 334,732 | 117,024 |
| 175 | Recreation workers | 3 | 32,037 | 25,091 | 6,946 |
| 178 | Lawyers & Judges | 1 | 0 | 0 | 0 |
| 183 | Authors | 2 | 34,782 | 10,031 | 24,751 |
| 184 | Technical writers | 3 | 37,555 | 24,974 | 12,581 |
| 185 | Designers | 1 | 288,719 | 17,193 | 271,526 |
| 186 | Musicians & composers | 1 | 56,491 | 4,179 | 52,312 |
| 187 | Actors & directors | 1 | 79,236 | 4,050 | 75,186 |
| 188 | Painters, sculptors, craft-artists, & artist printmakers | 1 | 41,755 | 2,804 | 38,951 |
| 189 | Photographers | 1 | 34,892 | 2,523 | 32,369 |
| 193 | Dancers | 1 | 13,353 | 1,170 | 12,183 |

TABLE A–3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN $155 PER WEEK—Continued

| OCC code | Occupational title | Exempt status code[1] | Subject to salary tests | Total nonexempt | Total exempt |
|---|---|---|---|---|---|
| 194 | Artists, performers, & related workers, n.e.c. | 1 | 34,090 | 2,557 | 31,533 |
| 195 | Editors & reporters | 3 | 157,150 | 108,308 | 48,842 |
| 197 | Public relations specialists | 3 | 123,346 | 85,253 | 38,093 |
| 198 | Announcers | 2 | 20,866 | 7,653 | 13,213 |
| 199 | Athletes | 4 | 42,674 | 40,167 | 2,507 |
| 203 | Clinical laboratory technologists & technicians | 3 | 61,577 | 45,016 | 16,561 |
| 204 | Dental hygienists | 3 | 35,460 | 25,944 | 9,516 |
| 205 | Health record technologists & technicians | 3 | 3,784 | 2,745 | 1,039 |
| 206 | Radiologic technicians | 3 | 28,006 | 20,200 | 7,806 |
| 207 | Licensed practical nurses | 3 | 43,258 | 33,490 | 9,768 |
| 208 | Health technologists & technicians, n.e.c. | 3 | 106,209 | 82,319 | 23,890 |
| 213 | Electrical & electronic technicians | 4 | 138,664 | 128,529 | 10,135 |
| 214 | Industrial engineering technicians | 4 | 765 | 694 | 71 |
| 215 | Mechanical engineering technicians | 4 | 5,626 | 5,186 | 440 |
| 216 | Engineering technicians, n.e.c. | 4 | 51,567 | 48,131 | 3,436 |
| 217 | Drafting occupations | 4 | 75,759 | 70,934 | 4,825 |
| 218 | Surveying & mapping technicians | 4 | 12,459 | 11,812 | 647 |
| 223 | Biological technicians | 4 | 36,520 | 34,477 | 2,043 |
| 224 | Chemical technicians | 4 | 13,038 | 12,151 | 887 |
| 225 | Science technicians, n.e.c. | 4 | 22,813 | 21,248 | 1,565 |
| 226 | Airplane pilots & navigators | 4 | 11,942 | 10,899 | 1,043 |
| 227 | Air traffic controllers | 4 | 7,013 | 6,476 | 537 |
| 228 | Broadcast equipment operators | 4 | 17,606 | 16,514 | 1,092 |
| 229 | Computer programmers | 2 | 419,594 | 106,640 | 312,954 |
| 233 | Tool programmers, numerical control | 4 | 2,917 | 2,818 | 99 |
| 234 | Legal assistants | 4 | 210,484 | 197,927 | 12,557 |
| 235 | Technicians, n.e.c. | 4 | 58,809 | 54,794 | 4,015 |
| 243 | Supervisors & Proprietors, Sales Occupations | 2 | 2,110,973 | 639,504 | 1,471,469 |
| 253 | Insurance sales occupations | 2 | 338,111 | 104,906 | 233,205 |
| 254 | Real estate sales occupations | 3 | 397,214 | 274,422 | 122,792 |
| 255 | Securities & financial services sales occupations | 2 | 389,500 | 94,325 | 295,175 |
| 256 | Advertising & related sales occupations | 2 | 124,299 | 38,599 | 85,700 |
| 257 | Sales occupations, other business services | 3 | 406,506 | 274,454 | 132,052 |
| 258 | Sales engineers | 3 | 31,762 | 19,486 | 12,276 |
| 259 | Sales representatives, mining, manufact, & wholesale | 3 | 1,083,546 | 719,374 | 364,172 |
| 263 | Sales workers, motor vehicles & boats | 4 | 33,687 | 31,744 | 1,943 |
| 264 | Sales workers, apparel | 4 | 32,719 | 31,061 | 1,658 |
| 265 | Sales workers, shoes | 4 | 10,726 | 10,400 | 326 |
| 266 | Sales workers, furniture & home furnishings | 4 | 81,247 | 76,908 | 4,339 |
| 267 | Sales workers, radio, Tv, hi-fi, & appliances | 4 | 110,822 | 103,629 | 7,193 |
| 268 | Sales workers, hardware & building supplies | 4 | 76,624 | 71,853 | 4,771 |
| 269 | Sales workers, parts | 4 | 34,874 | 32,885 | 1,989 |
| 274 | Sales workers, other commodities | 4 | 218,581 | 206,150 | 12,431 |
| 275 | Sales counter clerks | 4 | 26,317 | 24,997 | 1,320 |
| 276 | Cashiers | 4 | 166,023 | 159,718 | 6,305 |
| 277 | Street & door-to-door sales workers | 4 | 0 | 0 | 0 |
| 278 | News vendors | 4 | 31,236 | 30,207 | 1,029 |
| 283 | Demonstrators, promoters & models, sales | 4 | 4,717 | 4,385 | 332 |
| 284 | Auctioneers | 4 | 3,083 | 2,863 | 220 |
| 285 | Sales support occupations, n.e.c. | 4 | 5,922 | 5,641 | 281 |
| 303 | Supervisors, general office | 1 | 209,218 | 15,033 | 194,185 |
| 304 | Supervisors, computer equipment operators | 1 | 12,650 | 761 | 11,889 |
| 305 | Supervisors, financial records processing | 1 | 61,890 | 3,713 | 58,177 |
| 306 | Chief communications operators | 1 | 3,105 | 200 | 2,905 |
| 307 | Supervisors, distribution, scheduling, & adjusting clerks | 1 | 82,713 | 5,465 | 77,248 |
| 308 | Computer operators | 4 | 95,419 | 89,818 | 5,601 |
| 309 | Peripheral equipment operators | 4 | 0 | 0 | 0 |
| 313 | Secretaries | 4 | 732,456 | 700,875 | 31,581 |
| 314 | Stenographers | 4 | 41,427 | 39,303 | 2,124 |
| 315 | Typists | 4 | 173,573 | 165,891 | 7,682 |
| 316 | Interviewers | 4 | 34,809 | 33,181 | 1,628 |
| 317 | Hotel clerks | 4 | 15,560 | 14,859 | 701 |
| 318 | Transportation ticket & reservation agents | 4 | 83,940 | 79,540 | 4,400 |
| 319 | Receptionists | 4 | 159,035 | 152,899 | 6,136 |
| 323 | Information clerks, n.e.c. | 4 | 91,913 | 88,119 | 3,794 |
| 325 | Classified-ad clerks | 4 | 912 | 894 | 18 |
| 326 | Correspondence clerks | 4 | 3,215 | 3,000 | 215 |
| 327 | Order clerks | 4 | 66,907 | 63,590 | 3,317 |
| 328 | Personnel clerks, except payroll & timekeeping | 4 | 15,127 | 14,429 | 698 |
| 329 | Library clerks | 4 | 19,863 | 18,989 | 874 |

TABLE A–3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN $155 PER WEEK—Continued

| OCC code | Occupational title | Exempt status code[1] | Subject to salary tests | Total nonexempt | Total exempt |
|---|---|---|---|---|---|
| 335 | File clerks | 4 | 43,795 | 42,138 | 1,657 |
| 336 | Records clerks | 4 | 55,612 | 52,888 | 2,724 |
| 337 | Bookkeepers, accounting, & auditing clerks | 4 | 418,533 | 400,568 | 17,965 |
| 338 | Payroll & timekeeping clerks | 4 | 52,725 | 50,180 | 2,545 |
| 339 | Billing clerks | 4 | 51,114 | 48,834 | 2,280 |
| 343 | Cost & rate clerks | 4 | 15,380 | 14,589 | 791 |
| 344 | Billing, posting, & calculating machine operators | 4 | 32,171 | 30,724 | 1,447 |
| 345 | Duplicating machine operators | 4 | 3,479 | 3,249 | 230 |
| 346 | Mail preparing & paper handling machine operators | 4 | 1,310 | 1,277 | 33 |
| 347 | Office mach. operators, n.e.c. | 4 | 6,940 | 6,656 | 284 |
| 348 | Telephone operators | 4 | 18,620 | 17,753 | 867 |
| 353 | Communications equipment operators, n.e.c. | 4 | 5,030 | 4,854 | 176 |
| 354 | Postal clerks, except mail carriers | 4 | 48,045 | 45,012 | 3,033 |
| 355 | Mail carriers, postal service | 4 | 83,867 | 78,774 | 5,093 |
| 356 | Mail clerks, except postal service | 4 | 20,309 | 19,526 | 783 |
| 357 | Messengers | 4 | 19,617 | 18,875 | 742 |
| 359 | Dispatchers | 4 | 76,155 | 72,302 | 3,853 |
| 363 | Production coordinators | 4 | 96,876 | 91,080 | 5,796 |
| 364 | Traffic, shipping, & receiving clerks | 4 | 64,564 | 61,118 | 3,446 |
| 365 | Stock & inventory clerks | 4 | 74,641 | 70,701 | 3,940 |
| 366 | Meter readers | 4 | 7,657 | 7,253 | 404 |
| 368 | Weighers, measurers, checkers, & samplers | 4 | 2,610 | 2,453 | 157 |
| 373 | Expediters | 4 | 36,606 | 34,866 | 1,740 |
| 374 | Material recording, scheduling, & distrib. clerks, n.e.c. | 4 | 2,445 | 2,256 | 189 |
| 375 | Insurance adjusters, examiners, & investigators | 2 | 241,764 | 80,980 | 160,784 |
| 376 | Investigators & adjusters, except insurance | 2 | 331,895 | 120,907 | 210,988 |
| 377 | Eligibility clerks, social welfare | 4 | 28,952 | 27,659 | 1,293 |
| 378 | Bill & account collectors | 4 | 47,047 | 44,833 | 2,214 |
| 379 | General office clerks | 4 | 184,737 | 176,255 | 8,482 |
| 383 | Bank tellers | 4 | 69,136 | 66,580 | 2,556 |
| 384 | Proofreaders | 4 | 1,213 | 1,126 | 87 |
| 385 | Data-entry keyers | 4 | 130,882 | 124,925 | 5,957 |
| 386 | Statistical clerks | 4 | 22,689 | 21,461 | 1,228 |
| 387 | Teachers' aides | 4 | 233,796 | 227,718 | 6,078 |
| 389 | Administrative support occupations, n.e.c. | 4 | 376,525 | 355,756 | 20,769 |
| 413 | Supervisors, firefighting & fire prevention occupations | 3 | 26,194 | 16,772 | 9,422 |
| 414 | Supervisors, police & detectives | 3 | 58,504 | 40,386 | 18,118 |
| 415 | Supervisors, guards | 4 | 22,766 | 21,276 | 1,490 |
| 433 | Supervisors, food preparation & service occupations | 3 | 70,106 | 55,774 | 14,332 |
| 448 | Supervisors, cleaning & building service workers | 4 | 54,408 | 51,853 | 2,555 |
| 456 | Supervisors, personal service occupations | 4 | 26,864 | 25,548 | 1,316 |
| 475 | Managers, farms, except horticultural | 3 | 1,184 | 874 | 310 |
| 476 | Managers, horticultural specialty farms | 3 | 125 | 107 | 18 |
| 477 | Supervisors, farm workers | 4 | 0 | 0 | 0 |
| 485 | Supervisors, related agricultural occupations | 4 | 38,427 | 36,355 | 2,072 |
| 494 | Supervisors, forestry & logging workers | 4 | 5,291 | 5,050 | 241 |
| 503 | Supervisors, mechanics & repairers | 3 | 121,639 | 83,730 | 37,909 |
| 553 | Supervisors, brickmasons, stonemasons, & tile setters | 4 | 1,260 | 1,229 | 31 |
| 554 | Supervisors, carpenters & related workers | 4 | 1,646 | 1,505 | 141 |
| 555 | Supervisors, electricians & power trans. installers | 4 | 9,715 | 8,922 | 793 |
| 556 | Supervisors, painters, paperhangers, & plasterers | 4 | 4,577 | 4,224 | 353 |
| 557 | Supervisors, plumbers, pipefitters, & steamfitters | 4 | 573 | 532 | 41 |
| 558 | Supervisors, construction, n.e.c. | 4 | 182,003 | 169,694 | 12,309 |
| 613 | Supervisors, extractive occupations | 3 | 16,199 | 10,366 | 5,833 |
| 628 | Supervisors, production occupations | 3 | 429,007 | 294,158 | 134,849 |
| 803 | Supervisors, motor vehicle operators | 4 | 55,346 | 52,412 | 2,934 |
| 843 | Supervisors, material moving equipment operators | 4 | 1,054 | 993 | 61 |
| 864 | Supervisors, handlers, equip cleaners, & laborers, n.e.c. | 4 | 5,736 | 5,449 | 287 |
| | Total | | 30,883,198 | 11,443,807 | 19,439,391 |

(1) See Table 3–2.
(2) Not elsewhere classified (n.e.c.)
Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

TABLE A–4.—NUMBER OF WHITE-COLLAR SALARIED WORKERS EARNING AT LEAST $155 BUT LESS THAN $455 PER WEEK WHO WILL MOST LIKELY GAIN COMPENSATION UNDER THE FINAL RULE

| OCC code | Occupation title | Number of exempt workers |
|---|---|---|
| 4 | Chief executives & general administrators, public admin | 734 |
| 5 | Administrators & officials, public administration | 21,133 |
| 6 | Administrators, protective services | 2,666 |
| 7 | Financial managers | 31,190 |
| 8 | Personnel & labor relations managers | 7,436 |
| 9 | Purchasing managers | 1,881 |
| 13 | Managers, marketing, advertising, & public relations | 24,677 |
| 14 | Admin, education & related fields | 17,564 |
| 15 | Managers, medicine & health | 45,404 |
| 17 | Managers, food serving & lodging establishments | 16,070 |
| 18 | Managers, properties & real estate | 7,086 |
| 19 | Funeral directors | 912 |
| 21 | Managers, service organizations, n.e.c. (*) | 45,865 |
| 22 | Managers & administrators, n.e.c. | 203,179 |
| 23 | Accountants & auditors | 51,848 |
| 24 | Underwriters | 4,624 |
| 25 | Other financial officers | 21,432 |
| 26 | Management analysts | 3,997 |
| 27 | Personnel, training, & labor relations specialists | 12,066 |
| 29 | Buyers, wholesale & retail trade except farm products | 4,393 |
| 33 | Purchase agents & buyers, n.e.c. | 5,287 |
| 34 | Business & promotion agents | 2,611 |
| 36 | Inspectors & compliance officers, except construction | 541 |
| 37 | Management related occupations, n.e.c. | 14,795 |
| | Other Executive, Administrative, & Managerial Occ's | 468 |
| 43 | Architects | 2,303 |
| 44 | Aerospace engineers | 1,107 |
| 45 | Metallurgical & materials engineers | 629 |
| 48 | Chemical engineers | 500 |
| 53 | Civil engineers | 2,929 |
| 55 | Engineers, electrical & electronic | 14,205 |
| 56 | Engineers, industrial | 2,699 |
| 57 | Engineers, mechanical | 5,691 |
| 59 | Engineers, n.e.c. | 6,233 |
| 64 | Computer systems analysts & scientists | 36,784 |
| 65 | Operations & systems researchers & analysts | 8,087 |
| 67 | Statisticians | 1,445 |
| 68 | Mathematical scientists, n.e.c. | 934 |
| 73 | Chemists, except biochemists | 4,740 |
| 75 | Geologists & geodesists | 672 |
| 76 | Physical scientists, n.e.c. | 790 |
| 77 | Agricultural & food scientists | 1,405 |
| 78 | Biological & life scientists | 4,710 |
| 83 | Medical scientists | 3,669 |
| 86 | Veterinarians | 594 |
| 95 | Registered nurses | 48,506 |
| 96 | Pharmacists | 4,541 |
| 97 | Dietitians | 561 |
| 103 | Physical therapists | 1,875 |
| 104 | Speech therapists | 1,183 |
| 105 | Therapists, n.e.c. | 4,420 |
| 106 | Physicians' assistants | 1,592 |
| 143 | English teachers | 1,109 |
| 155 | Teachers, prekindergarten & kindergarten | 19,966 |
| 158 | Teachers, special education | 768 |
| 159 | Teachers, n.e.c. | 48,451 |
| 163 | Counselors, Educational & Vocational | 1,719 |
| 164 | Librarians | 7,439 |
| 166 | Economists | 2,167 |
| 167 | Psychologists | 13,839 |
| 169 | Social scientists, n.e.c. | 990 |
| 174 | Social workers | 8,776 |
| 175 | Recreation workers | 1,632 |
| 183 | Authors | 1,829 |
| 185 | Designers | 32,399 |
| 186 | Musicians & composers | 19,399 |
| 187 | Actors & directors | 8,568 |
| 188 | Painters, sculptors, craft-artists, & artist printmakers | 4,895 |
| 189 | Photographers | 8,397 |
| 193 | Dancers | 6,811 |

TABLE A–4.—NUMBER OF WHITE-COLLAR SALARIED WORKERS EARNING AT LEAST $155 BUT LESS THAN $455 PER WEEK WHO WILL MOST LIKELY GAIN COMPENSATION UNDER THE FINAL RULE—Continued

| OCC code | Occupation title | Number of exempt workers |
|---|---|---|
| 194 | Artists, performers, & related workers, n.e.c. | 9,974 |
| 195 | Editors & reporters | 1,830 |
| 197 | Public relations specialists | 1,172 |
| 198 | Announcers | 2,822 |
| | Other Professional Specialty Occ's (1) | 2,754 |
| 203 | Clinical laboratory technologists & technicians | 1,199 |
| 204 | Dental hygienists | 752 |
| 206 | Radiologic technicians | 619 |
| 207 | Licensed practical nurses | 1,245 |
| 208 | Health technologists & technicians, n.e.c. | 5,563 |
| 229 | Computer programmers | 12,603 |
| | Other Technicians & Related Support Occ's (2) | 1,551 |
| 243 | Supervisors & Proprietors, Sales Occupations | 143,856 |
| 253 | Insurance sales occupations | 29,218 |
| 254 | Real estate sales occupations | 8,715 |
| 255 | Securities & financial services sales occupations | 12,588 |
| 256 | Advertising & related sales occupations | 9,836 |
| 257 | Sales occupations, other business services | 7,263 |
| 259 | Sales representatives, mining, manufact, & wholesale | 13,161 |
| 274 | Sales workers, other commodities | 954 |
| 276 | Cashiers | 1,107 |
| | Other Sales Occ's (3) | 2,342 |
| 303 | Supervisors, general office | 27,243 |
| 305 | Supervisors, financial records processing | 1,870 |
| 307 | Supervisors, distribution, scheduling, & adjusting clerks | 10,172 |
| 313 | Secretaries | 4,825 |
| 315 | Typists | 874 |
| 319 | Receptionists | 1,220 |
| 323 | Information clerks, n.e.c. | 727 |
| 337 | Bookkeepers, accounting, & auditing clerks | 2,685 |
| 375 | Insurance adjusters, examiners, & investigators | 16,705 |
| 376 | Investigators & adjusters, except insurance | 36,422 |
| 379 | General office clerks | 1,095 |
| 383 | Bank tellers | 688 |
| 385 | Data-entry keyers | 749 |
| 387 | Teachers' aides | 2,203 |
| 389 | Administrative support occupations, n.e.c. | 1,387 |
| | Other Administrative Support Occ's (4) | 5,969 |
| 628 | Supervisors, production occupations | 4,334 |
| 433 | Supervisors, food preparation & service occupations | 3,664 |
| 503 | Supervisors, mechanics & repairers | 1,424 |
| 414 | Supervisors, police & detectives | 1,144 |
| | All Other White-Collar Occ's (5) | 1,514 |
| | Total | 1,297,855 |

(*) Not elsewhere classified (n.e.c.)

(1) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Urban Planners, Nuclear Engineers, Actuaries, and Archivists.

(2) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Legal Assistants, Drafting Occ's, Electrical Technicians, Engineering Technicians, and Biological Technicians.

(3) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Sales Workers Furniture, Sales Workers Radio TV, Sales Engineers, Sales Workers Hardware, and News Vendors.

(4) All of the occupations included in this group have less than 450 workers who will become nonexempt such as Order Clerks, Computer Operators, Dispatchers, Transportation Ticket Agents, Stock Clerks, Stenographers, and Billing Clerks.

(5) All of the occupations included in this group have less than 400 workers who will become nonexempt such as supervisors for cleaning & building service, construction, motor vehicle operators, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONSAD and the U.S. Department of Labor.

TABLE A–5.—NUMBER OF EXEMPT WHITE-COLLAR SALARIED WORKERS UNDER THE HIGHLY COMPENSATED TEST

| OCC code | Occupational title | Total exempt under standard duties test | Total exempt under highly compensated test | Newly exempt under highly compensated test |
|---|---|---|---|---|
| 17 | Managers, food serving & lodging establishments | 15,163 | 18,195 | 3,031 |
| 18 | Managers, properties & real estate | 12,993 | 15,599 | 2,606 |
| 22 | Managers & administrators, n.e.c. (*) | 751,160 | 752,900 | 1,740 |
| 25 | Other financial officers | 58,462 | 62,303 | 3,841 |
| 26 | Management analysts | 28,086 | 29,883 | 1,797 |

TABLE A–5.—NUMBER OF EXEMPT WHITE-COLLAR SALARIED WORKERS UNDER THE HIGHLY COMPENSATED TEST—Continued

| OCC code | Occupational title | Total exempt under standard duties test | Total exempt under highly compensated test | Newly exempt under highly compensated test |
|---|---|---|---|---|
| 27 | Personnel, training, & labor relations specialists | 19,012 | 20,239 | 1,227 |
| | Other Executive, Administrative, & Managerial Occ's | 358,867 | 361,087 | 2,216 |
| 174 | Social workers | 3,747 | 4,492 | 745 |
| 195 | Editors & reporters | 5,305 | 6,369 | 1,064 |
| 197 | Public relations specialists | 2,979 | 3,571 | 592 |
| | Other Professional Specialty Occ's (2) | 247,644 | 250,238 | 2,600 |
| | Technicians & Related Support Occ's (3) | 2,858 | 4,011 | 1,151 |
| 243 | Supervisors & Proprietors, Sales Occupations | 122,665 | 130,626 | 7,961 |
| 253 | Insurance sales occupations | 26,647 | 28,365 | 1,719 |
| 254 | Real estate sales occupations | 17,449 | 20,945 | 3,496 |
| 255 | Securities & financial services sales occupations | 72,297 | 77,083 | 4,786 |
| 257 | Sales occupations, other business services | 19,824 | 23,767 | 3,943 |
| 258 | Sales engineers | 3,232 | 3,866 | 633 |
| 259 | Sales representatives, mining, manufact, & wholesale | 40,365 | 48,394 | 8,029 |
| | Other Sales Occ's (4) | 9,865 | 11,711 | 1,847 |
| | Administrative Support Occ's (5) | 18,332 | 20,554 | 2,102 |
| 628 | Supervisors, production occupations | 6,444 | 7,724 | 1,281 |
| | All Other White-Collar Occ's (6) | 4,642 | 5,813 | 1,170 |
| | Total | 1,848,038 | 1,907,735 | 59,577 |

(*) Not elsewhere classified (n.e.c.).

(1) Computer system analysts and scientists (occupation 64), registered nurses (occupation 95), pharmacists (occupation 96) and computer programmers (occupation 229) were removed from the analysis (see Section 4–3).

(2) All of the occupations included in this group have less than 300 workers who could become exempt such as Dietitians, Athletes, Economists and Electrical Engineers.

(3) All of the occupations included in this group have less than 350 workers who could become exempt such as Legal Assistants, Electrical Technicians, Engineering Technicians and Airplane Pilots.

(4) All of the occupations included in this group have less than 500 workers who could become exempt such as Advertising & Related Sales and Sales Workers Radio TV.

(5) All of the occupations included in this group have less than 400 workers who could become exempt such as supervisory Investigators & Adjusters, Administrative Support Occ's, and Secretaries.

(6) All of the occupations included in this group have less than 300 workers who could become exempt such as supervisors for mechanics & repairers, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONSAD Research Corporation and U.S. Department of Labor.

TABLE A–6.—NUMBER OF WHITE-COLLAR PAID HOURLY WORKERS WHO COULD BECOME EXEMPT UNDER THE HIGHLY COMPENSATED TEST

| OCC code | Occupational title | Total number of paid hourly workers earning at least $100,000 per year | Estimated number who could become exempt under highly compensated test |
|---|---|---|---|
| 5 | Administrators & officials, public administration | 2,035 | 814 |
| 6 | Administrators, protective services | 1,949 | 779 |
| 7 | Financial managers | 2,576 | 1,031 |
| 13 | Managers, marketing, advertising, & public relations | 1,309 | 523 |
| 15 | Managers, medicine & health | 3,471 | 1,388 |
| 21 | Managers, service organizations, n.e.c. (*) | 3,591 | 1,436 |
| 22 | Managers & administrators, n.e.c. | 36,487 | 14,595 |
| 23 | Accountants & auditors | 6,737 | 2,695 |
| 26 | Management analysts | 4,879 | 976 |
| | Other Executive, Administrative, & Managerial Occ's | 9,031 | 1,875 |
| 43 | Architects | 1,379 | 552 |
| 44 | Aerospace engineers | 1,657 | 663 |
| 55 | Engineers, electrical & electronic | 5,762 | 2,305 |
| 56 | Engineers, industrial | 4,168 | 1,667 |
| 57 | Engineers, mechanical | 1,726 | 690 |
| 59 | Engineers, n.e.c. | 1,889 | 756 |
| 65 | Operations & systems researchers & analysts | 1,639 | 656 |
| 76 | Physical scientists, n.e.c. | 1,542 | 617 |
| 156 | Teachers, elementary school | 1,724 | 689 |
| 185 | Designers | 3,826 | 1,531 |
| 188 | Painters, sculptors, craft-artists, & artist printmakers | 2,401 | 960 |
| | Other Professional Specialty Occ's (2) | 18,048 | 4,099 |
| | Technicians & Related Support Occ's (3) | 19,294 | 1,231 |

TABLE A–6.—NUMBER OF WHITE-COLLAR PAID HOURLY WORKERS WHO COULD BECOME EXEMPT UNDER THE HIGHLY COMPENSATED TEST—Continued

| OCC code | Occupational title | Total number of paid hourly workers earning at least $100,000 per year | Estimated number who could become exempt under highly compensated test |
|---|---|---|---|
| 243 | Supervisors & Proprietors, Sales Occupations | 9,522 | 1,904 |
| | Other Sales Occ's (4) | 12,125 | 1,170 |
| | Administrative Support Occ's (5) | 11,618 | 631 |
| | All Other White-Collar Occ's (6) | 12,002 | 829 |
| | Total | 182,387 | 47,062 |

(*) Not elsewhere classified (n.e.c.).

(1) Computer system analysts and scientists (occupation 64), registered nurses (occupation 95), pharmacists (occupation 96) and computer programmers (occupation 229) were removed from the analysis (see Section 4–3).

(2) All of the occupations included in this group have less than 350 workers who could become exempt such as Actors & Directors, Nuclear Engineers, Chemical Engineers, Civil Engineers, Medical Scientists, etc.

(3) All of the occupations included in this group have less than 300 workers who could become exempt such as Health Technologists, Clinical Laboratory Technologists, Airplane Pilots, etc.

(4) All of the occupations included in this group have less than 450 workers who could become exempt such as Sales Representatives for Mining & Manufacturing, Advertising & Related Sales, etc.

(5) All of the occupations included in this group have less than 150 workers who could become exempt such as supervisory Secretaries and Mail Carriers for the Postal Service.

(6) All of the occupations included in this group have less than 300 workers who could become exempt such as supervisors for construction, production, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONSAD and the U.S. Department of Labor.

**Appendix B**

**Analysis of the 2003 Current Population Survey Outgoing Rotation Group Data**

The Department conducted an analysis of the recently released 2003 Current Population Survey (CPS) Outgoing Rotation Group data to determine if the updated data would have an impact on the conclusions reached in the regulatory impact analysis (RIA) using the 2002 data. Although it is not possible to completely update the RIA due to the significant changes made to the CPS in 2003, the following analysis indicates that using the 2003 data would not alter the Department's determination of the salary level test nor would using the 2003 data have a significant impact on the RIA conclusions.

**Impact of the Changes to the CPS**

In 2003, the industry and occupation classifications used in the CPS were significantly revised. The industry classification for workers was changed from the 1987 Standard Industrial Classification (SIC) system to the 2002 North American Industry Classification System (NAICS). Using the 2003 CPS data would require updating the data used to develop the profiles in Chapter 5 of the RIA, the cost estimates presented in Chapter 6 that are based upon the number of establishments in each industry, and the assessment of the impacts presented in Chapter 7. These revisions would also require a complicated conversion of the Dunn and Bradstreet profit data from the SIC system it uses to the NAICS system.

In 2003, the CPS changed its occupational classification of workers from the 1990 Standard Occupational Classification (SOC) system to the 2000 SOC system used in the 2000 Census. The significant changes that were made to the 2000 SOC make comparisons between 2002 CPS occupational categories and 2003 categories very difficult. The U.S. Census Bureau warns that "you cannot compare the categories directly across the two years. The wording of the categories is different, and, even when the words appear to be the same, the definitions of the categories are sometimes different." (U.S. Census Bureau, "Instructions for Creating 1990–2000 Occupation Crosswalks, Using the Occupation Crosswalk Template," April 30, 2003) The Census Bureau also notes that although "different crosswalks could be created based on many different variables, including geography, sex, and race * * * the crosswalk for occupational distributions is likely different in New York compared to Kansas, and for men compared to women. To create many different crosswalks depending on all characteristics, however, would require a very large sample controlled for all these variables. Neither financial nor human resources were available to create and analyze such a large sample."

The baseline estimates of the number of currently exempt and nonexempt workers (presented in Chapter 3) as well as the changes in the exemption status of workers resulting from the final rule (presented in Chapter 4) were based upon the exemption probability determinations made by the Wage and Hour Division staff in response to the GAO request in 1998 (see Chapter 3). These exemption probabilities were directly tied to the definitions of the 1990 SOC categories used in the 2002 CPS (and prior years) and not the definitions of the 2000 SOC categories used in the 2003 CPS. Further, many of the costs developed in Chapter 6 of the RIA were also developed on the basis of these determinations, particularly the determination of the occupations considered white-collar and blue-collar. After reviewing the 1990 SOC categories and the 2000 SOC categories, the Department has determined that it is not possible to accurately map the exemption probabilities developed for the 1990 SOC categories to the 2000 SOC categories, particularly given the Census Bureau warnings. Many of the 1990 categories are mapped to several 2000 categories and many of 2000 categories are mapped to several 1990 categories, and as noted above many of the underlying definitions have changed. There is also an increase in the number of management and service-related occupations; an increase in occupations formerly called "professional" and "technical," especially healthcare and computer-related occupations; and a decrease in the number of clerical, maintenance, and production occupations.

Although it is theoretically possible to develop a schema to apportion the probabilities developed for the 1990 SOC categories to the 2000 SOC categories, the Department has determined that doing so could significantly distort the WHD exemption probability determinations for many occupations in the 2003 CPS. For example, the probability exemptions for engineering and science technicians in the 2002 CPS range from zero to 10 percent. However, these 1990 CPS categories, that each have the lowest exemption probability (zero to 10 percent), would be mapped to computer specialists, architects, life and physical scientists, and art and design workers, among others that may or may not have a higher exemption probability. Simply apportioning the probabilities without completely understanding the definitions underlying the new occupation categories could lead to erroneous results. Moreover, because some of the definitions of the 2000 SOC categories are different than the 1990 categories it is not certain that an accurate exemption probability crosswalk could be developed.

Therefore, the Department determined that, given the judgments needed to apportion the probabilities used for the 1990 SOC categories, it would be more precise to develop an entirely new set of probabilities for the 2000 SOC categories before using them. The Department also concluded, however, that developing an entire new set of probabilities at this stage of the rulemaking would not be appropriate, because the resulting estimates would not have had the benefit of review by GAO and others. Thus, the Department concluded that the 2003 CPS should not be used in the RIA and has only compared descriptive statistics from the 2003 CPS to the 2002 CPS in this Appendix. This comparison, however, strongly suggests that the quantitative and qualitative conclusions reached in the RIA using the 2002 CPS data are still valid.

**Estimated Number of Workers Covered by the FLSA**

The 2003 CPS data estimates a total employment level of 137.7 million compared to 134.3 million in the RIA using the 2002 CPS data. As noted in the RIA, most of the difference (2.2 million, or 64.7 percent) is due to using weights adjusted for the 2000 Census counts in the 2003 CPS, and using weights based on the 1990 Census in the 2002 CPS does not significantly affect the accuracy or quality of the results. The remaining difference (1.2 million or 35.3 percent) is due to employment growth as the economy expanded.

Following the procedure discussed in Chapter 3 of the RIA, the Department excluded workers who are specifically exempt from the FLSA's overtime provisions. A description of each group excluded, along with the specific CPS categories and codes used are presented in Table B–1. A total of 21.2 million workers were excluded compared to 19.5 million in the RIA using the 2002 CPS data.

TABLE B–1.—WORKERS EXEMPT FROM THE FLSA'S OVERTIME PROVISIONS

| Occupation | CPS categories/codes | Number of workers (1,000's) |
|---|---|---|
| Self-Employed or Unpaid Volunteers | (PEIO1COW = 6, 7 & 8) and not (PEIO1OCD = 2040, 2050 & 2060) | 13,974 |
| Clergy and Religious | (PEIO1OCD = 2040, 2050 & 2060) not in (PEIO1COW = 1) | 555 |
| Employees of Carriers | | |
| Rail | (PEIO1OCD = 9240, 9200, 9260 & 9230) in (PEIO1ICD = 6080 & 6290) | 101 |
| Highway | (PEIO1OCD = 7110, 7200, 7210, 7220 & 9130) in (PEIO1ICD = 6170 & 6370) | 1,323 |
| Sea | (PEIO1OCD = 9310, 9300, 9520 & 9330) in (PEIO1ICD = 6090 & 6280) | 30 |
| Air | (PEIO1OCD = 9030, 7140 & 6070 | 147 |
| Agriculture | (PEIO1ICD = 170 & 180) | 1,879 |
| Partsmen, Salesmen & Mechanics at Auto Dealers. | (PEIO1OCD = 4700, 4760, 4850, 4750, 7110, 7200, 7210, 7220, 7150 & 7160) in (PEIO1ICD = 4670). | 830 |
| Federal Employees (Not postal, TVA and LC). | (PEIO1COW = 1) not in (PEIO1ICD = 6370), not in ((PEIO1ICD = 570) in (GESTFIPS = 21, 47, 28, 01, 13, 37 & 51)), and not in ((PEIO1ICD = 6770) in (GESTFIPS = 11)). | 2,381 |
| Total | | 21,222 |

Note: Equivalent to Table 3–1 and associated text in the RIA.
Source: U.S. Department of Labor.

After excluding the workers in occupations exempt from the FLSA's overtime provisions 116.5 million workers remain compared to an estimated 114.8 million using the 2002 CPS data (see Table B–2). In 2003, there were 70.3 million paid hourly workers and 46.2 million salaried workers compared to 69.0 million paid hourly workers and 45.8 million salaried workers in 2002. The difference between the total numbers of salaried employees is just 0.9 percent.

TABLE B–2.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA

| Year | Number of workers (1,000's) | | |
|---|---|---|---|
| | Hourly | Salary | Total |
| 2002 | 68,982 | 45,784 | 114,765 |
| 2003 | 70,300 | 46,202 | 116,514 |

Source: U.S. Department of Labor.
PEERNHRY = 1 for Hourly Workers and 2 for Salaried.

**Estimated Number of Workers Subject to the Part 541 Salary Test**

The Department also developed estimates of the number of workers subject to the Part 541 salary level tests using the 2003 CPS data. As was done in Chapter 3 of the RIA, the Department excluded workers in occupations not subject to the salary tests. Table B–3 presents a description of each group excluded, along with the specific codes used. In 2003, there were 7.6 million workers were covered by the FLSA's overtime provisions but not subject to the salary level test, the same number that was estimated in the RIA using 2002 CPS data.

TABLE B–3.—WORKERS NOT SUBJECT TO THE PART 541 SALARY LEVEL TEST IN 2003

| Occupation | CPS codes | Number of workers (1,000's) |
|---|---|---|
| Teachers & Academic Administrative Personnel in Education Establishments. | (PEIO1OCD = 230, 2000, 2200, 2300, 2310, 2320, 2330, 2340 & 2550) in (PEIO1ICD = 7860 & 7870). | 6,157 |
| Doctors | (PEIO1OCD = 3060, 3010, 3040, 3120 & 3260) | 643 |
| Lawyers & Judges | (PEIO1OCD = 2100 & 2110) | 632 |
| Street & Door-to-Door Sales | (PEIO1OCD = 4950) | 151 |
| Total | | 7,583 |

Note: Equivalent to Table 3–3 and the associated text in the RIA.
Source: U.S. Department of Labor.

In 2003, 108.9 million workers were covered by the FLSA's overtime provisions and subject to the salary level test compared to 107.2 million workers in 2002 (see Table B–4). In 2003, 69.2 million of these workers were paid by the hour and 39.7 million were salaried employees compared to 67.9 million paid hourly workers and 39.3 million salaried workers in 2002.

TABLE B–4.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE SALARY LEVEL TEST

| Year | Number of Workers (1,000's) | | |
|---|---|---|---|
| | Hourly | Salary | Total |
| 2002 ..... | 67,903 | 39,308 | 107,211 |

TABLE B–4.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE SALARY LEVEL TEST—Continued

| Year | Number of Workers (1,000's) | | |
|---|---|---|---|
| | Hourly | Salary | Total |
| 2003 ..... | 69,247 | 39,683 | 108,930 |

Source: U.S. Department of Labor.

The distribution of workers by income who are covered by the FLSA and subject to the Part 541 salary level tests in 2002 and 2003 are presented in tables B–5 and B–6. Based upon the 2003 CPS data, the Department estimates that 6.7 million salaried workers who earn between $155 and $455 per week would have their overtime protection strengthened by raising the salary level test in the final rule. This is similar to the 6.7 million based on the 2002 CPS data that was estimated in the RIA. Therefore, the Department concludes that using the 2003 CPS data would not change its estimate of the number of salaried workers who earn between $155 and $455 per week who will have their overtime protection strengthened by the final rule.

Based upon the 2003 CPS data, the Department estimates there are 2.9 million workers who earn $1,923 or more per week compared to 2.7 million in 2002. Most of the difference, 82.5 percent, is from the increase in salaried workers, the vast majority of whom (as estimated in the RIA) are probably exempt under the current regulation. However, it is not possible to estimate the number of exempt and nonexempt workers because of the changes to the occupation categories discussed above.

TABLE B–5.—WORKERS SUBJECT TO THE 541 SALARY LEVEL TESTS IN 2002

| Weekly earnings | Covered workers (1,000's) | | |
|---|---|---|---|
| | Hourly | Salary | Total |
| Less than $155 | 7,700 | 1,767 | 9,467 |
| $155 to $454.99 | 31,351 | 6,749 | 38,100 |
| $455 to $1,923.07 | 28,506 | 28,472 | 56,978 |
| $1,923.08 or more | 345 | 2,321 | 2,666 |
| Total | 67,902 | 39,309 | 107,211 |

Source: U.S. Department of Labor.

TABLE B–6.—WORKERS SUBJECT TO THE 541 SALARY LEVEL TESTS IN 2003

| Weekly earnings | Covered workers (1,000's) | | |
|---|---|---|---|
| | Hourly | Salary | Total |
| Less than $155 | 7,470 | 1,537 | 9,007 |
| $155 to $454.99 | 30,920 | 6,692 | 37,612 |
| $455 to $1,923.07 | 30,463 | 28,902 | 59,365 |
| $1,923.08 or more | 394 | 2,552 | 2,946 |
| Total | 69,247 | 39,683 | 108,930 |

Source: U.S. Department of Labor.

**The 2003 CPS Data and the Salary Level Test**

As discussed in the preamble, the Department based its determination of the $455 weekly salary level requirement in the Part 541 duties tests, in part, on preamble Tables 3, 4 and 5. Although it is not possible to update preamble Table 4 (Likely Exempt Workers) because of the changes to the occupation categories (see discussion above), updates of the other two tables using the 2003 CPS data are presented below.

Although the median weekly earnings for all full-time salary workers covered by the overtime provisions of the FLSA increased from $800 in 2002 to $808 in 2003, Table B–7 suggests that salaries declined in retail in 2003 compared to 2002. The 20th percentile in retail was just under $450 in 2003 (see Table B–7) compared to $455 in 2002 (see Preamble Table 3). Thus, the choice of the $455 salary level is valid whether it is based upon the 2002 or the 2003 CPS data. The Department also notes that the lack of salary growth in retail appears to be consistent with many of the comments that were received on behalf of small businesses and summarized in the preamble (see the Regulatory Flexibility Analysis).

**Summary**

Although it is not possible to completely update the RIA due to the significant changes made to the occupation categories that were used in the 2002 CPS, an analysis of descriptive statistics from the 2003 CPS indicates that using the 2003 data would not alter the Department's determination of the salary level test nor would using the 2003 data have a significant impact on the RIA conclusions. The number of workers, 6.7 million, who earn between $155 and $455 per week and will have their overtime protection strengthened by the final rule is unchanged using the 2003 data, and the number of workers who earn more than $100,000 per year and could have their exemption status changed is not significantly higher.

TABLE B–7.—FULL-TIME SALARIED EMPLOYEES COVERED BY THE FLSA IN 2003

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| $155 | $8,060 | 1.5 | 1.4 | 2.2 |
| 255 | 13,260 | 4.1 | 4.6 | 5.9 |
| 355 | 18,460 | 9.2 | 10.8 | 12.2 |
| 380 | 19,760 | 10.1 | 11.9 | 13.5 |
| 405 | 21,060 | 12.8 | 15.1 | 17.4 |
| 425 | 22,100 | 13.8 | 16.3 | 18.5 |
| 450 | 23,400 | 15.2 | 18.0 | 20.3 |
| 455 | 23,660 | 15.3 | 18.0 | 20.3 |
| 460 | 23,920 | 15.4 | 18.1 | 20.4 |
| 465 | 24,180 | 16.6 | 19.5 | 21.9 |
| 470 | 24,440 | 16.7 | 19.5 | 22.0 |
| 475 | 24,700 | 16.8 | 19.7 | 22.2 |
| 480 | 24,960 | 17.3 | 20.2 | 22.8 |
| 485 | 25,220 | 18.2 | 21.3 | 24.2 |
| 490 | 25,480 | 18.3 | 21.4 | 24.4 |
| 495 | 25,740 | 18.4 | 21.5 | 24.4 |
| 500 | 26,000 | 20.5 | 23.8 | 27.3 |
| 550 | 28,600 | 23.6 | 27.7 | 30.6 |
| 600 | 31,200 | 29.7 | 35.0 | 37.5 |
| 650 | 33,800 | 33.3 | 39.2 | 41.9 |
| 700 | 36,400 | 39.2 | 45.6 | 49.5 |
| 750 | 39,000 | 43.0 | 50.1 | 52.9 |
| 800 | 41,600 | 48.2 | 55.1 | 58.8 |
| 850 | 44,200 | 51.8 | 58.5 | 61.9 |
| 900 | 46,800 | 55.8 | 62.3 | 66.1 |
| 950 | 49,400 | 58.6 | 64.9 | 68.2 |
| 1,000 | 52,000 | 64.4 | 70.4 | 74.3 |
| 1,100 | 57,200 | 68.8 | 74.3 | 77.6 |
| 1,200 | 62,400 | 74.2 | 79.1 | 81.9 |
| 1,300 | 67,600 | 77.5 | 82.0 | 84.5 |
| 1,400 | 72,800 | 81.2 | 84.8 | 86.7 |
| 1,500 | 78,000 | 84.4 | 87.5 | 89.1 |
| 1,600 | 83,200 | 86.7 | 89.3 | 90.6 |
| 1,700 | 88,400 | 88.3 | 90.7 | 92.0 |
| 1,800 | 93,600 | 90.0 | 92.0 | 93.3 |
| 1,900 | 98,800 | 91.1 | 92.8 | 93.8 |
| 1,925 | 100,100 | 92.8 | 94.2 | 95.2 |
| 1,950 | 101,400 | 92.9 | 94.3 | 95.2 |
| 1,975 | 102,700 | 93.0 | 94.3 | 95.5 |
| 2,000 | 104,000 | 93.3 | 94.5 | 95.7 |
| 2,100 | 109,200 | 93.8 | 94.9 | 96.3 |
| 2,200 | 114,400 | 94.6 | 95.6 | 96.6 |
| 2,300 | 119,600 | 94.9 | 95.8 | 97.3 |
| 2,400 | 124,800 | 95.8 | 96.5 | 97.8 |
| 2,500 | 130,000 | 96.6 | 97.2 | 100.0 |

Note: Equivalent to Table 3 in the Preamble.
Source: U.S. Department of Labor.

TABLE B–8.—FULL-TIME HOURLY WORKERS COVERED BY THE FLSA IN 2003

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| $155 | $8,060 | 1.1 | 1.2 | 1.8 |
| 255 | 13,260 | 6.8 | 8.6 | 12.1 |
| 355 | 18,460 | 23.8 | 28.1 | 38.3 |
| 380 | 19,760 | 29.2 | 34.2 | 45.1 |
| 405 | 21,060 | 36.1 | 41.7 | 52.6 |
| 425 | 22,100 | 38.9 | 44.7 | 55.6 |
| 450 | 23,400 | 43.4 | 49.5 | 60.4 |
| 455 | 23,660 | 43.8 | 49.8 | 60.8 |
| 460 | 23,920 | 44.6 | 50.6 | 61.7 |
| 465 | 24,180 | 45.2 | 51.3 | 62.3 |
| 470 | 24,440 | 45.6 | 51.8 | 62.8 |
| 475 | 24,700 | 46.0 | 52.2 | 63.2 |
| 480 | 24,960 | 49.0 | 55.3 | 66.2 |
| 485 | 25,220 | 49.5 | 55.8 | 66.8 |
| 490 | 25,480 | 50.0 | 56.4 | 67.1 |
| 495 | 25,740 | 50.4 | 56.8 | 67.5 |

TABLE B–8.—FULL-TIME HOURLY WORKERS COVERED BY THE FLSA IN 2003—Continued

| Earnings | | Percentile | | |
|---|---|---|---|---|
| Weekly | Annual | All | South | Retail |
| 500 | 26,000 | 52.2 | 58.7 | 69.1 |
| 550 | 28,600 | 58.2 | 64.5 | 74.6 |
| 600 | 31,200 | 66.1 | 71.6 | 81.2 |
| 650 | 33,800 | 70.2 | 75.3 | 84.4 |
| 700 | 36,400 | 74.7 | 79.3 | 87.5 |
| 750 | 39,000 | 78.0 | 82.1 | 89.4 |
| 800 | 41,600 | 82.0 | 85.7 | 91.9 |
| 850 | 44,200 | 84.3 | 87.5 | 93.2 |
| 900 | 46,800 | 86.6 | 89.5 | 94.3 |
| 950 | 49,400 | 88.2 | 90.9 | 95.2 |
| 1,000 | 52,000 | 90.7 | 93.0 | 96.3 |
| 1,100 | 57,200 | 93.1 | 94.9 | 97.2 |
| 1,200 | 62,400 | 95.1 | 96.3 | 98.1 |
| 1,300 | 67,600 | 96.3 | 97.1 | 98.5 |
| 1,400 | 72,800 | 97.2 | 97.8 | 98.9 |
| 1,500 | 78,000 | 97.9 | 98.4 | 99.1 |
| 1,600 | 83,200 | 98.4 | 98.8 | 99.2 |
| 1,700 | 88,400 | 98.7 | 99.0 | 99.4 |
| 1,800 | 93,600 | 99.0 | 99.2 | 99.6 |
| 1,900 | 98,800 | 99.1 | 99.3 | 99.6 |
| 1,925 | 100,100 | 99.2 | 99.4 | 99.6 |
| 1,950 | 101,400 | 99.3 | 99.4 | 99.6 |
| 1,975 | 102,700 | 99.3 | 99.4 | 99.6 |
| 2,000 | 104,000 | 99.3 | 99.4 | 99.7 |
| 2,100 | 109,200 | 99.4 | 99.5 | 99.7 |
| 2,200 | 114,400 | 99.5 | 99.6 | 99.8 |
| 2,300 | 119,600 | 99.6 | 99.6 | 99.8 |
| 2,400 | 124,800 | 99.7 | 99.7 | 99.8 |
| 2,500 | 130,000 | 99.7 | 99.7 | 99.8 |

Note: Equivalent to Table 5 in the Preamble.
Source: U.S. Department of Labor.

## Appendix C—List of References


Report of the Minimum Wage Study Commission, Volume 1, May 1981

Office of Management and Budget, "Reports to Congress on the Costs and Benefits of Regulations", 2001 and 2002.

"Executive, Administrative, Professional * * * Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("Stein Report").

Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report").

Report and Recommendations on Proposed Revisions of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("Kantor Report").

U.S. General Accounting Office, Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place, Report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, GAO/HEHS–99–164, September 30, 1999.

Cohen, Malcom S. and Donal R. Grimes, "The 'New Economy' and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)," prepared for the University of Tennessee under a contract with the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. Ann Arbor, MI: Employment Research Corporation, January 2001.

CONSAD Research Corporation, "Final Report, Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541," February 10, 2003.

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Opinion Letter, WH–363, November 10, 1975 (opinion letter regarding dental hygienists).

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Field Operations Handbook, http://www.dol.gov/esa/whd/foh/index.htm

U.S. Department of Labor, Bureau of Labor Statistics and U.S. Department of Commerce, Bureau of the Census. 2002 Current Population Survey (CPS) Outgoing Rotation Group http://www.bls.census.gov/cps/cpsmain.htm

U.S. Department of Commerce, Bureau of the Census Web site, CPS Appendix, http://www.census.gov/apsd/techdoc/cps/sep97/det-occ.html

U.S. Department of Commerce, Bureau of the Census (USDOC, 2001a), 1997 Economic Census: Comparative Statistics, http://www.census.gov/epcd/ec97sic/index.html#download

U.S. Department of Commerce, Bureau of the Census (USDOC, 1999), 1997 County Business Patterns.

U.S. Department of the Treasury, Internal Revenue Service (IRS, 2000), Corporate Tax Returns for Active Corporations for 1997.

U.S. Postal Service (USPS, 1997), 1997 Annual Report.

U.S. Department of Labor, Bureau of Labor Statistics, 1998 Standard Occupational Classification (SOC) system, http://www.bls.gov/soc/home.htm

O*NET, the Occupational Information Network, http://www.onetcenter.org/whatsnew.html

U.S. Small Business Administration, Table of Small Business Size Standards, http://www.sba.gov/size/indextableofsize.html

U.S. Department of Commerce, Bureau of Census (USDOC, 2002a), 1997 Census of Governments.

U.S. Department of Commerce, Bureau of Census (USDOC, 2002c), State and Local Government Employment and Payroll Data (Revised June 2001), by State and Function: March 1999.

U.S. Department of Commerce, Bureau of Census (USDOC, 2002c), State and Local Government Finances, by Level of Government and by State: 1999–2000.

U.S. Department of Labor, Bureau of Labor Statistics, National Compensation Survey.

U.S. Department of Commerce (2002), Statistics of U.S. Businesses 1996.

U.S. Department of Labor, Bureau of Labor Statistics, Work Experience of the Population in 2002, Press Release.

Dun & Bradstreet (D&B, 2001a), National Profile of Businesses Database for Fiscal Year 2000.

Dun & Bradstreet (D&B, 2001b), Industry Norms and Key Business Ratios for Fiscal Year 2000/2001.

Dun & Bradstreet (D&B, 2002), Industry Norms and Key Business Ratios for Fiscal Year 2001/2002.

Bell and Hart; "Unpaid Work"; Economica, 66: 271–290, 1999

Bell, Hart, Hubler, and Schwerdt, "Paid and Unpaid Overtime Working in Germany and the UK," IZA Discussion Paper Number 133, Bonn, Germany: The Institute for the Study of Labor, March 2000,

Lena M. Bottos and Christopher J. Fusco; "Competitive Pay Policy"; SPHR 2002; Salary.com, Inc.

**List of Subjects in 29 CFR Part 541**

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Signed at Washington, DC, this 16th day of April 2004.

**Victoria A. Lipnic,**

*Assistant Secretary for Employment Standards.*

**Tammy D. McCutchen,**

*Administrator, Wage and Hour Division.*

■ For the reasons set forth above, 29 CFR part 541 is revised to read as follows:

## PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

### Subpart A—General Regulations

Sec.

541.0 Introductory statement.
541.1 Terms used in regulations.
541.2 Job titles insufficient.
541.3 Scope of the section 13(a)(1) exemptions.
541.4 Other laws and collective bargaining agreements.

### Subpart B—Executive Employees

541.100 General rule for executive employees.
541.101 Business owner.
541.102 Management.
541.103 Department or subdivision.
541.104 Two or more other employees.
541.105 Particular weight.
541.106 Concurrent duties.

### Subpart C—Administrative Employees

541.200 General rule for administrative employees.
541.201 Directly related to management or general business operations.
541.202 Discretion and independent judgment.
541.203 Administrative exemption examples.
541.204 Educational establishments.

### Subpart D—Professional Employees

541.300 General rule for professional employees.
541.301 Learned professionals.
541.302 Creative professionals.
541.303 Teachers.
541.304 Practice of law or medicine.

### Subpart E—Computer Employees

541.400 General rule for computer employees.
541.401 Computer manufacture and repair.
541.402 Executive and administrative computer employees.

### Subpart F—Outside Sales Employees

541.500 General rule for outside sales employees.
541.501 Making sales or obtaining orders.
541.502 Away from employer's place of business.
541.503 Promotion work.
541.504 Drivers who sell.

### Subpart G—Salary Requirements

541.600 Amount of salary required.
541.601 Highly compensated employees.
541.602 Salary basis.
541.603 Effect of improper deductions from salary.
541.604 Minimum guarantee plus extras.
541.605 Fee basis.
541.606 Board, lodging or other facilities.

### Subpart H—Definitions And Miscellaneous Provisions

541.700 Primary duty.
541.701 Customarily and regularly.
541.702 Exempt and nonexempt work.
541.703 Directly and closely related.
541.704 Use of manuals.
541.705 Trainees.
541.706 Emergencies.
541.707 Occasional tasks.
541.708 Combination exemptions.
541.709 Motion picture producing industry.
541.710 Employees of public agencies.

**Authority:** 29 U.S.C. 213; Public Law 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 (66 FR 29656).

## Subpart A—General Regulations

### § 541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee, as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act. Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees.

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

(c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee under section 13(a)(1) of the Act. The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the United States Equal Employment Opportunity Commission.

### § 541.1 Terms used in regulations.

*Act* means the Fair Labor Standards Act of 1938, as amended.

*Administrator* means the Administrator of the Wage and Hour Division, United States Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in the Secretary under sections 13(a)(1) and 13(a)(17) of the Fair Labor Standards Act.

### § 541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

### § 541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt "blue collar" employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged

course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

### § 541.4 Other laws and collective bargaining agreements.

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

## Subpart B—Executive Employees

### § 541.100 General rule for executive employees.

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

### § 541.101 Business owner.

The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management. The term "management" is defined in § 541.102. The requirements of Subpart G (salary requirements) of this part do not apply to the business owners described in this section.

### § 541.102 Management.

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

### § 541.103 Department or subdivision.

(a) The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a

large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.

(c) A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

**§ 541.104 Two or more other employees.**

(a) To qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase "two or more other employees" means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

**§ 541.105 Particular weight.**

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

**§ 541.106 Concurrent duties.**

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

## Subpart C—Administrative Employees

**§ 541.200 General rule for administrative employees.**

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

**§ 541.201 Directly related to management or general business operations.**

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work

performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

**§ 541.202 Discretion and independent judgment.**

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

**§ 541.203 Administrative exemption examples.**

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial

products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquirés sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

**§ 541.204 Educational establishments.**

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not

within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, *etc.*; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

## Subpart D—Professional Employees

### § 541.300 General rule for professional employees.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

### § 541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e) (1) *Registered or certified medical technologists.* Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(2) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) *Dental hygienists.* Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the

duties requirements for the learned professional exemption.

(5) *Accountants.* Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) *Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) *Athletic trainers.* Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) *Funeral directors or embalmers.* Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

### § 541.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be "in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

### § 541.303 Teachers.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term "educational establishment" is defined in § 541.204(b).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental

music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (*e.g.*, permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of § 541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

**§ 541.304 Practice of law or medicine.**

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act also shall mean:

(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section.

## Subpart E—Computer Employees

**§ 541.400 General rule for computer employees.**

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, and the section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

**§ 541.401 Computer manufacture and repair.**

The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in § 541.400(b), are also not exempt computer professionals.

**§ 541.402 Executive and administrative computer employees.**

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

## Subpart F—Outside Sales Employees

**§ 541.500 General rule for outside sales employees.**

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for

which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

**§ 541.501 Making sales or obtaining orders.**

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

**§ 541.502 Away from employer's place of business.**

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's place of business.

**§ 541.503 Promotion work.**

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

**§ 541.504 Drivers who sell.**

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited, who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.

(4) A driver who calls on established customers along the route and

persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

## Subpart G—Salary Requirements

### § 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.204(a)(1).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

### § 541.601 Highly compensated employees.

(a) An employee with total annual compensation of at least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b) (1) "Total annual compensation" must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations

such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

**§ 541.602 Salary basis.**

(a) *General rule.* An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

**§ 541.603 Effect of improper deductions from salary.**

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of

making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

(e) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

**§ 541.604 Minimum guarantee plus extras.**

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

**§ 541.605 Fee basis.**

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a "fee basis" within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. Thus, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $500 if 40 hours were worked.

**§ 541.606 Board, lodging or other facilities.**

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in § 541.600, "exclusive of board, lodging or other facilities." The phrase "exclusive of board, lodging or other facilities" means "free and clear" or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) Regulations defining what constitutes "board, lodging, or other facilities" are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term "other facilities" refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished

to employees for ordinary commuting between their homes and work.

## Subpart H—Definitions and Miscellaneous Provisions

### § 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

### § 541.701 Customarily and regularly.

The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

### § 541.702 Exempt and nonexempt work.

The term "exempt work" means all work described in §§ 541.100, 541.101, 541.200, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities directly and closely related to such work. All other work is considered "nonexempt."

### § 541.703 Directly and closely related.

(a) Work that is "directly and closely related" to the performance of exempt work is also considered exempt work. The phrase "directly and closely related" means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, "directly and closely related" work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work "directly and closely related" to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not "directly and closely related" if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis,

and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

### § 541.704 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

### § 541.705 Trainees.

The executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.

### § 541.706 Emergencies.

(a) An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An "emergency" does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a bona fide executive.

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

### § 541.707 Occasional tasks.

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

### § 541.708 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

### § 541.709 Motion picture producing industry.

The requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $695 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C or D of this part, and who is employed at a base rate of at least $695 a week is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(a) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least $695 if 6 days were worked; or

(b) The employee is in a job category having a weekly base rate of at least $695 and the daily base rate is at least one-sixth of such weekly base rate.

### § 541.710 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because

of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[FR Doc. 04–9016 Filed 4–20–04; 10:40 am]

BILLING CODE 4510–27–P

Federal Register

Friday,
April 23, 2004

Part III

# Department of Health and Human Services

## Office of Refugee Resettlement

## Grants and Cooperative Agreements; Notice of Availability; Notice

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of Refugee Resettlement

### Grants and Cooperative Agreements; Notice of Availability

*Funding Agency Contact Name:* Administration for Children and Families, Office of Refugee Resettlement.

*Funding Opportunity Title:* Standing Announcement for Services to Recently Arrived Refugees.

*Announcement Type:* Modification. This Standing Announcement for Services to Recently Arrived Refugees replaces ORR's previous Standing Announcement published in the **Federal Register**, May 9, 2001 (66 FR 23705). Please note that Priority Area 3 (Services for Arriving Refugees with Special Conditions) has been discontinued. Priority Area 3 is now Ethnic Community Self-Help.

*Funding Opportunity Number:* HHS–2004–ACF–ORR–RE–0004.

*CFDA Number:* 93.576.

*Due Date for Applications:* The Director will observe February 28, 2005, as the first closing date for applications. Thereafter the Director will observe February 28 of each year as the closing date for applications.

*Executive Summary:* The Office of Refugee Resettlement (ORR) invites the submission of applications for funding, on a competitive basis, in three priority areas: Priority Area 1—Preferred Communities—to promote the increase of newly arrived refugees in preferred communities where they have ample opportunities for early employment and sustained economic independence and, to address special populations who need intensive case management, culturally and linguistically appropriate linkages and coordination with other service providers to improve their access to services; Priority Area 2—Unanticipated Arrivals—to provide services to arriving refugees or sudden large secondary migration of refugees where communities are not sufficiently prepared in terms of linguistic or culturally appropriate services; Priority Area 3—Ethnic Community Self-Help—to connect newcomer refugees and their communities with community resources.

### I. Funding Opportunity Description

*Legislative Authority:* This program is authorized by section 412(c)(1)(A) of the Immigration and Nationality Act (INA)(8 U.S.C. 1522(c)(1)(A), as amended, which authorizes the Director "to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(i) to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services; (ii) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and (iii) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services."

Please note that this announcement is divided into three priority areas: Priority Area 1 is on Preferred Communities. Priority Area 2 is on Unanticipated Arrivals immediately follows part VIII Other Information of the first priority area. Priority Area 3 is on Ethnic Community Self-Help and immediately follows part VIII Other Information of the second priority area. An applicant may submit more than one application under this announcement, but must apply separately for each priority area.

*Priority Area 1: Preferred Communities*

Description

*Purpose and Objectives.* The purpose and objectives of Priority Area 1, Preferred Communities, are to support resettlement of newly arriving refugees with the best opportunities for their assimilation into new communities, and to support refugees with special needs that require more intensive case management. Applicants may apply to support resettlement in new communities targeted to geographic sites or special populations agreed to in consultation with the Department of State/Bureau for Population, Refugees and Migration (PRM) and ORR.

This announcement retains the original purpose to support resettlement of newly arriving refugees with the best opportunities for their assimilation into new communities. This announcement is expanded to include services to special populations in communities where intensive case management needs can more appropriately be met through services that are both culturally and linguistically competent and promote access to mainstream services.

A preferred community should expect to receive a minimum of 100 new refugees annually or expect to receive a proposed number of cases that will need intensive case management. ORR will consider exceptions to this standard where the applicant provides substantial justification for the request and documents the community's history of arrivals, the period of time needed to reach a level of 100 new refugees, and the record of outcomes for achieving self-sufficiency soon after arrival.

Preferred community sites are those localities which support populations where refugees have excellent opportunities to achieve early employment and sustained economic independence without public assistance. Preferred communities should have a history of low welfare utilization by refugees. In addition, refugees should have the potential for earned income at a favorable level relative to the cost of living and to public assistance benefits. Characteristics of these communities include: (1) A moderate cost of living; (2) excellent employment opportunities in a strong, entry-level labor market; (3) affordable housing and transportation accessible for employment; (4) low secondary out-migration rates for refugees; (5) communities with churches, mosques and synagogues that meet the religious needs of arriving populations; (6) local community support and positive reception for the refugees; (7) receptive school environments; and (8) other related community features that contribute to a favorable quality of life for arriving refugees.

To achieve the original objective of improved opportunities for assimilation and self-sufficiency, the applicant should propose communities that have been approved by PRM in the Reception and Placement Cooperative Agreement. Communities should be selected where there have not been large numbers of recent arrivals, but the prospects for resettlement appear to be favorable for additional refugees. The selected sites may be those with a history of successful refugee placement or those where refugees have not previously been placed, but which have all the elements of a successful refugee resettlement community (as described above). ORR is interested in providing resources for national voluntary agencies to cover the costs of changing community placements so that refugees, including those with special needs, are placed in a particular site where they have the best chance for integration.

To support resettlement of refugees in communities where they will have the best opportunities for assimilation and to provide support for populations who have special needs, successful applicants may propose additional or alternative communities in consultation with PRM and ORR. ORR will grant

approval for these sites in writing following the consultation. With these funds, successful applicants will propose services that need to be enhanced or increased in light of arriving populations.

The application must, for the first budget period, specify one or more sites with a description of each site and the rationale for its selection, or describe a population with special needs requiring more intensive case management in a particular site. Applicants are encouraged to include activities that assess and plan services for the target populations to be resettled. For preferred community sites, such activities would also assess each specified community's appropriateness for additional arriving refugees and, if needed, continue to search for additional communities for future preferred placement. Additional sites and refugee populations with special conditions may be added by submitting the revised plan and the site descriptions in the continuation application.

ORR formula social service funds are awarded to States to provide services proportionate to the number of refugee arrivals during the previous three years. A year or more may lapse before newly arriving refugees are included in the formula count. To maintain working relationships and coordination with State governments, planning for the application and implementation of Preferred Community Programs should be done in consultation with the respective State Refugee Coordinator and documented to assure an orderly transition and complement of services until the proportion of new arrivals is accounted for in the ORR formula awards. Applicants should view the Preferred Community Program as a temporary solution to cover the costs of increased refugee placements. Applicants should describe their coordination and planning under the Approach review criteria.

If funding is requested in sites with alternative "Wilson/Fish" projects, applicants must demonstrate a strong rationale as to why additional funds are needed in this community and document consultation with the "Wilson/Fish" project.

In the last two Program Performance Reports, grantees will discuss the transition of services indicating whether the services are now supported by the State or Wilson/Fish project, other public or private resources, or are no longer needed. These reports must provide supporting information on the impact of the services on the target population.

Examples of special populations needing intensive case management may include, at a minimum, youth and young adults without parents or permanent guardians who have spent an unusually long period under refugee camp conditions; refugees experiencing social or psychological conditions including emotional trauma resulting from war; refugees who are HIV+; or other populations with physical disabilities or medical conditions identified and determined by PRM and ORR as needing intensive case management. Culturally and linguistically appropriate linkages and coordination with other service providers is necessary to improve access to services and enhance the likelihood of their assimilation into new communities.

*Allowable Activities.* Allowable activities for local affiliates include social services needed to achieve increased placements in the preferred communities. Allowable activities for the national voluntary agencies are those that assess the appropriateness of resettlement communities for targeted refugees. The result of the assessment should assure that the designated service providers in the preferred communities provide services that create excellent opportunities to assimilate the targeted groups of refugees and special populations.

As part of the application preparation, the applicant must: (1) Consult with ORR about prospective preferred sites and the appropriateness of those sites for the refugees; (2) coordinate with their affiliates and other voluntary agencies whose local affiliates place refugees in the same sites; (3) inform in writing and coordinate with State governments for site selection, adequate services, and program strategies to be developed; and (4) plan and coordinate locally with existing community resources, such as schools and public health agencies. In all instances, activities must be designed to supplement, rather than to supplant, the existing array of services available in the community for which refugees are eligible.

The additional services needed for special populations may include: special medical care; physical therapy for disabled refugees; independent living skills, social skills; and mental health services, such as coping with the traumatic experiences of war.

Applications under this section should indicate how the grantee will ensure that services are culturally and linguistically appropriate.

**II. Award Information**

*Funding Instrument Type:* Cooperative Agreement.

*Description of Federal Substantial Involvement With Cooperative Agreement*

ORR Responsibilities

a. ORR will consult with PRM and national voluntary agencies on arriving populations with special needs and appropriate resettlement sites for refugee populations. ORR will provide approval in writing to the grantee following PRM and national voluntary agency consultation on arriving populations with special needs.

b. ORR will provide written approval and funds to support the approved grantee's activities and budget both for increased opportunity and special needs.

National Voluntary Agency Responsibilities

a. Grantees will consult with PRM and ORR on appropriate resettlement sites for refugees with special needs.

b. Grantees will propose a specified amount of funds for each refugee with special needs.

c. Grantees will begin funding sites for special needs upon receipt of written approval from ORR. If this need arises in the middle of a budget year, the grantee will send a letter of request to ORR.

d. Grantees will consult with the State Refugee Coordinator in planning and coordination of services.

e. Grantees will discuss, in the last two Program Performance Reports, the transition of services indicating whether the services are now supported by the State or Wilson/Fish project, other public or private resources, or are no longer needed. These reports must provide supporting information on the impact of the services provided on the target population.

*Anticipated Total Priority Area Funding:* $960,000 per 12 months.

*Anticipated Number of Awards:* 10.

*Ceiling of Individual Awards:* $320,000 per 12 months.

The award amount is for planning purposes only.

*Floor on Amount of Individual Awards:* $50,000 per 12 months.

*Average Anticipated Award Amount:* $160,000 per 12 months.

*Project Periods for Awards:* Up to 36 months.

**III. Eligibility Information**

*III.1. Eligible Applicants*

County governments
City of township governments

Independent school districts
State controlled institutions of higher education
Native American tribal organizations (other Federally recognized tribal governments)
Nonprofits having a 501 (c)(3) status with the IRS, other than institutions of higher education
Nonprofits that do not have a 501 (c)(3) status with the IRS, other than institutions of higher education

Additional Information on Eligibility

Eligible applicants are ten national voluntary agencies that currently resettle refugees under a Reception and Placement Cooperative Agreement with the Department of State or with the Department of Homeland Security. Priority Area 1-Preferred Communities is restricted to these agencies because placements of new arrivals occur under the terms of the cooperative agreements, and no other agencies place new arrivals or participate in determining their resettlement sites.

*Non-Profit Status:* Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing (a) a reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate; (c) a statement from a State taxing body; State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; (e) or any of the items referenced above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

*Client Eligibility:* Eligibility for refugee social services includes: (1) Refugees; (2) asylees; (3) Cuban and Haitian entrants; (4) certain Amerasians from Vietnam; including U.S. citizens; (5) for eligibility for trafficking victims, refer to 45 CFR 400.43 and ORR State Letter #01–13, *http://www.acf.hhs.gov/programs/orr/policy/sl01–13.htm* as modified by ORR State Letter #02–01 *http://www.acf.hhs.gov/programs/orr/policy/sl02–01.htm* on trafficking victims. For convenience, the term "refugee" is used in this notice to encompass all such eligible persons.

There are no pre-award additional requirements.

*III.2. Cost-Sharing or Matching*

Cost sharing or matching funds are not required for applications submitted under this program announcement.

*III.3. Other*

There is no limit on the number of applications that an organization can submit for this announcement.

All applicants must have a DUNS number. On June 27, 2003, the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applications to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formal, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711, or you may request a number on-line at *http://www.dnb.com.*

Applications that fail to follow the required format described in section IV.2. Content and Form of Application Submission will be considered non-responsive and will not be eligible for funding under this announcement.

## IV. Application and Submission Information

*IV.1 Address To Request Application Package*

Sue Benjamin, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone—202–401–4851, E-mail: *sbenjamin@acf.hhs.gov.*

*IV.2 Content and Form of Application Submission*

The required application package will include the following:

Application Content

An original and two copies of the complete application are required. The original and 2 copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures. Each application must include the following components:

1. Table of Contents

(a) Abstract of the Proposed Project—very brief, not to exceed 250 words, that would be suitable for use in an announcement that the application has been selected for a grant award and which identifies the type of project, the target population and the major elements of the work plan.

(b) Completed Standard Form 424—that has been signed by an Official of the organization applying for the grant who has authority to obligate the organization legally.

(c) Standard Form 424A—Budget Information Non-Construction Programs.

(d) Narrative Budget Justification—for each object class category required under Section B., Standard Form 424A.

(e) Project Narrative—A narrative that addresses issues described in the "Application Review Information" section of this announcement.

2. Application Format

Submit application materials on white 8½ x 11 inch paper only. Do not use colored, oversized or folded materials.

Please do not include organizational brochures or other promotional materials, slides, films, clip, etc.

The font size may be no smaller than 12 pitch and the margins must be at least one inch on all sides.

Please present application materials either in loose-leaf notebooks or in folders with pages two-hole punched at the top center and fastened separately with a slide paper fastener.

Please do not include books or videotapes as they are not easily reproduced and are, therefore, inaccessible to the reviewers.

3. Page Limitation

Each application narrative should not exceed 20 pages in a double spaced 12 pitch font. Attachments and appendices should not exceed 25 pages and should be used only to provide supporting documentation such as administration charts, position descriptions, resumes, and letters of intent or partnership agreements. A table of contents and an abstract should be included but will not count in the page limitations. Each page should be numbered sequentially, including the attachments and appendices. This limitation of 20 pages should be considered a maximum, and not necessarily a goal. Application forms (including the Narrative Budget Justification) are not to be counted in the page limit. Any material submitted

beyond the 20 pages will not be considered.

4. Forms and Certifications

Applicants requesting financial assistance for a non-construction project must sign and return Standard Form 424B, Assurances: Non-Construction Programs with their applications.

Applications must provide a Certification Regarding Lobbying. Prior to receiving an award in excess of $100,000, applicants shall furnish an executed copy of the lobbying certification. Applicants must sign and return the certification with their application.

Applicants must make the appropriate certification of their compliance with all Federal statues relating to nondiscrimination. By signing and submitting the application, applicants are providing the certification and need not mail back a certification form.

Applicants must make the appropriate certification of their compliance with the requirements of the Pro-Children Act of 1994 as outlined in Certification Regarding Environmental Tobacco Smoke.

Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov* apply site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov.*
- You must search for the downloadable application package by the CFDA number.

Please see Section V.1. Criteria, for instructions on preparing the project summary/abstract and the full project description.

*IV.3 Submission Date and Times*

The closing date for receipt of applications is February 28, 2005 (and February 28 of each succeeding year). Mailed applications received after 4:30 p.m. on the closing date will be classified as late. ACF will send an acknowledgement of receipt of application to the applicant.

*Deadline:* Applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370 L'Enfant Promenade, S.W., 4th Floor West, Washington, DC 20447.

Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, ACF Mailroom, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

*Late applications:* Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. Determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Table of Contents | As described above | Consistent with guidance in "Application Content" section of this announcement.. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Abstract of Proposed Project | Brief abstract that identifies the type of project, the target population and the major elements of the proposed project. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424 | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Completed Standard Form 424A ... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Narrative Budget Justification ..... | As described above ..... | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Project Narrative ..... | A narrative that addresses issues described in the "Application Review Information" section of this announcement. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424B ... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Lobbying ... | As described above and per required form. | May be found on *http://www.acfhhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Environmental Tobacco Smoke. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*Additional Forms:* Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| | | | |
|---|---|---|---|
| Survey on Ensuring Equal Opportunity for Applicants. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*IV.4 Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR Part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 2003, of the most recent SPOC list, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions or for projects administered by federally-recognized Indian Tribes need take no action in regard to E.O. 12372: Alabama, Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wyoming.

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs a soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards..

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Washington, DC 20447.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*IV.5 Funding Restrictions*

Pre-award costs are not allowable charges to this program grant.

Construction is not an allowable activity or expenditure under this solicitation.

*IV.6 Other Submission Requirements*

*Electronic Address to Submit Applications: http://www.Grants.gov.*

Please see Section IV.2. Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

*Submission by Mail:* Applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447.

*Hand Delivery:* Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline

date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, ACF Mailroom, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

**V. Application Review Information**

*V.1. Criteria*

Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Public reporting burden for this collection of information is estimated to average 25 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 03/31/2004.

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 number.

Instructions: ACF Uniform Project Description (UPD)

The following are instructions and guidelines on how to prepare the "project summary/abstract" and "Full Project Description" sections of the application. The generic UPD requirement is followed by the evaluation criterion specific to the Standing Announcement for Services to Recently Arrived Refugees Grant legislation.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions and the specified evaluation criteria. The instructions give a broad overview of what your project description should include while the evaluation criteria expands and clarifies more program-specific information that is needed.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Approach

Outline a plan of action which describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished. When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Staff and Position Data

Provide a biographical sketch for each key person appointed and a job description for each vacant key position. A biographical sketch will also be required for new key staff as appointed.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information.

Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, or by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Third-Party Agreements

Include written agreements between grantees and sub-grantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other terms and conditions that structure or define the relationship.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must

include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

The following guidelines are for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. For purposes of preparing the budget and budget justification, "Federal resources" refers only to the ACF grant for which you are applying. Non-Federal resources are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, *etc.* Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (**Note:** Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those which belong under other categories such as equipment, supplies, construction, etc. Third-party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant, should be included under this category.

*Justification:* All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and sub-recipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11). Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc. Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (non-contractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, it should immediately upon notification that an award will be made, develop a tentative indirect cost rate proposal based on its most recently completed fiscal year in accordance with the principles set forth in the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. It should be noted that when an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgment that

the applicant is accepting a lower rate than allowed.

Program Income

*Description:* The estimated amount of income, if any, expected to be generated from this project.

*Justification:* Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

Nonfederal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application in order to be given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria

Criterion 1. *Objectives and Need for Assistance*—The applicant demonstrates comprehensive understanding of refugee populations as new members of the U.S. community. The applicant also demonstrates an understanding of the activities that assist a community to prepare for new refugee populations. The conditions in proposed resettlement communities are clearly described. The need for additional services leading to enhanced resettlement for arriving populations is documented. The applicant provides a national placement plan that documents understanding of the arriving refugee groups and their characteristics. The applicant demonstrates a clear understanding of the population to be served. The national voluntary agency documents the number of special populations and the services needed. The number of refugees projected to be served is reasonable in light of the resettlement capacity. (25 points)

Criterion 2. *Results or Benefits Expected*—The applicant clearly describes the results and benefits to be achieved. The applicant proposes an increase in the actual number of free cases placed in the specified community or, in the case of special populations, the applicant clearly describes the additional program or services appropriate to the needs of the group. Results or benefits are described in terms of the opportunities provided for refugees. Proposed outcomes are measurable and achievable within the grant project period including special services and refugee self-sufficiency. The proposed monitoring and information collection is adequately planned and can be feasibly implemented within the proposed timelines. The applicant clearly describes how the special population will benefit from proposed services, *e.g.*, enhanced case management, special medical care, referrals and follow-up with culturally and linguistically appropriate mainstream providers. The applicant describes how the impact of the funds will be measured on key indicators associated with the purpose of the project. Proposed outcomes are tangible and achievable within the grant project period, and the proposed monitoring and information collection are adequately planned. (25 points)

Criterion 3. *Approach*—The strategy and plan, including a description of each proposed preferred community and an assessment of appropriateness for placement, are likely to achieve increased placement in preferred communities and excellent opportunities for assimilation including specific discussion of special populations where appropriate. The proposed activities and timeframes are reasonable and feasible. The plan describes in detail how the proposed activities will be accomplished as well as the potential for the project to achieve economic independence for arriving refugees. The application includes a clear and comprehensive description of the preferred sites proposed. The application includes a clear and comprehensive description of the national voluntary agency placement planning activities, including meeting with the State Refugee Coordinator, documenting coordination and outcomes, community preparation activities, and how they will be impacted by this project. Assurance is provided that proposed services will be delivered in a manner that is linguistically and culturally appropriate to the target population. (20 points)

Criterion 4. *Organizational Profiles*—The administrative and management features of the project, including a plan for fiscal and programmatic management of each activity and planning activities, are described in detail with proposed start-up times, ongoing timelines, major milestones or benchmarks, a component/project organization chart, management of affiliates, monitoring and a staffing chart of affiliate network. The qualifications of project staff, both national applicant and affiliate agencies, as well as any volunteers, are documented. Discuss instances of managing grants of the same size as you are requesting here. (15 points)

Criterion 5. *Budget and Budget Justification*—The budget and narrative justification are reasonable, clearly presented, and cost-effective in relation to the proposed activities and anticipated results. The per capita budget is justified and reasonable. The applicant clearly indicates how awarded funds will complement Reception and Placement and other social services to achieve the objectives. (15 points)

*V.2. Review and Selection Process*

Each application submitted under this program announcement will undergo a pre-review to determine that (1) the application was received by the closing date and submitted in accordance with the instructions in this announcement and (2) the applicant is eligible for funding. It is necessary that applicants state specifically which priority area they are applying for. Applications will be screened for priority area appropriateness. Applications which pass the initial ACF screening will be evaluated and rated by an independent review panel on the basis specific evaluation criteria. The results of these reviews will assist the Director and ORR program staff in considering competing applications. Reviewers' scores will weigh heavily in funding decisions but will not be the only factors considered. Applications will generally be considered in order of the average scores assigned by reviewers. However, highly ranked applications are not guaranteed funding because other factors are taken into consideration. These include, but are not limited to, the number of similar types of existing grants or projects funded with ORR funds in the last five years, comments of reviewers and government officials; staff evaluation and input; geographic distribution; previous program performance of applicants; compliance with grant terms under previous ORR grants; audit reports; investigative reports; an applicants progress in resolving any final audit disallowance on previous ORR or other Federal agency grants. ORR will consider the geographic distribution of funds among States and the relative proportion of funding among rural and urban areas. The evaluation criteria were designed to assess the quality of a proposed project, and to determine the likelihood of its success. The evaluation criteria are closely related and are considered as a whole in judging the overall quality of an application. Points are awarded only to applications which are responsive to the evaluation criteria within the context of this program announcement.

**VI. Award Administration Information**

*VI.1. Award Notices*

Successful applicants can expect notification no later than September 30, 2005 (and September 30 of each succeeding year). A notice of award signed by the grants management officer will be mailed to the authorized representative. ORR will mail notification to the authorized representative of unsuccessful applicants.

*VI.2. Administrative and National Policy Requirements*

45 CFR Part 74.

*VI.3. Reporting Requirements*

*Programmatic Reports:* Semi-Annually and a final report is due 90 days after the end of grant period.

*Financial Reports:* Semi-Annually and a final report is due 90 days after the end of grant period.

There are no special reporting requirements.

Original reports and one copy should be mailed to the Grants Management Contact listed in section VII Agency Contacts.

**VII, Agency Contacts**

*Program Office Contacts*

Priority Areas 1 and 2: Sue Benjamin, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–401–4851, E-mail: *sbenjamin@acf.hhs.gov*.

Priority Area 3: Mitiku Ashebir, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–205–3602, E-mail: *mashebir@acf.hhs.gov*.

*Grants Management Office Contact*

Sylvia Johnson, Grants Officer, HHS, ACF, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447, Telephone: 202–401–4524, E-mail: *sjohnson@acf.hhs.gov*.

**VIII. Other Information**

The Director reserves the right to award more, or less than the funds described in this announcement. In the absence of worthy applications, the Director may decide not to make an award if deemed in the best interest of the Government. Funding for future years, under this announcement, is at the Director's discretion and depends on the availability of appropriated funds. The Director may invite applications outside of the proposed closing date, if necessary, to respond to the needs of an imminently arriving refugee population.

An applicant may submit more than one application under this announcement, but must apply separately for each priority area.

Applications in Priority Area 1 are for project periods of up to three years (36 months). Awards, on a competitive basis, will be for a twelve (12) month budget period although project periods may be up to thirty-six (36) months. Applications for continuation grants funded under these awards, beyond the twelve (12) month budget period but within the thirty-six (36) month project period, will be entertained in subsequent years on a noncompetitive basis, subject to availability of funds, satisfactory progress of the grantee and a determination that continued funding would be in the best interest of the Government.

**Priority Area 2: Unanticipated Arrivals**

**I. Funding Opportunity Description**

*Legislative Authority:* This program is authorized by section 412(c)(1)(A) of the Immigration and Nationality Act (INA)(8 U.S.C. 1522(c)(1)(A), as amended, which authorizes the Director "to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(i) to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services; (ii) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and (iii) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services."

*Description*

Purpose and Objectives

Under Priority Area 2, ORR invites applications that propose seventeen (17) month projects for a minimum of 100 refugees annually. Examples of situations for which applicants may request funds for grants under Priority Area 2 are as follows: (1) The existing service system does not have culturally and linguistically compatible staff; and (2) refugee services do not presently exist or the service capacity is not sufficient to accommodate significant increases in arrivals.

The purpose and objectives ORR seeks to achieve through Priority Area 2, Unanticipated Arrivals, are to provide additional resources to communities where the arrival of refugees is not anticipated and the refugee services are insufficient. Under these circumstances, resources are needed to provide additional service capacity to accommodate an increase of refugees. Through Priority Area 2—Unanticipated Arrivals, ORR intends to offer to communities the resources to respond to the unanticipated arrivals with adequate and culturally and linguistically appropriate social services.

This grant program is intended to provide for services that respond to the needs of new refugee populations shortly after arrival into the community. Applicants should view these resources, therefore, as a temporary solution to insufficient services necessitating program adjustment because of the unanticipated arrival of a refugee population in a specific community. Planning for the application and implementation of the program must be done in concert with the State Refugee Coordinator to assure an orderly transition and complement of services. ORR's expectation by the end of the grant project period is that the State government will have incorporated services for these new populations into its refugee services network funded and described in the last semi-annual performance report. ORR expects that applicants will coordinate with other local organizations in considering projects and proposing services.

Allowable Activities

Allowable activities in the unanticipated arrivals program are social services for refugees that are appropriate and accessible in language and culture. Services provided by all grantees, whether private, not-for-profit or public agencies, must comply with the regulations at 45 CFR sections 400.147, 400.150(a), and 400.154–156 regarding priorities for services, eligibility for services, scope of services, and service requirements.

Applications under this section should indicate how the grantee will ensure that (1) services are appropriate and accessible in language and culture, and (2) an orderly transition is achieved whereby services for the new populations will be incorporated into the State's refugee services network.

**II. Award Information**

*Funding Instrument Type:* Grant.

*Anticipated Total Priority Area Funding:* $630,000 up to every 17 months.

*Anticipated Number of Awards:* 15.

*Ceiling of Individual Awards:* $210,000 up to every 17 months.

The award amount is for planning purposes only.

*Floor on Amount of Individual Awards:* $50,000 up to every 17 months.

*Average Projected Award Amount:* $115,000 up to every 17 months.

*Project Periods for Awards:* Up to 17 months.

**III. Eligibility Information**

*III.1. Eligible Applicants*

County governments
City of township governments
Independent school districts
State controlled institutions of higher education
Native American tribal organizations (other Federally recognized tribal governments)
Nonprofits having a 501(c)(3) status with the IRS, other than institutions of higher education
Nonprofits that do not have a 501(c)(3) status with the IRS, other than institutions of higher education
Faith-based non-profit organizations

Additional Information on Eligibility

*Non-Profit Status:* Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing (a) a reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate; (c) a statement from a State taxing body; State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; (e) or any of the items referenced above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

*Client Eligibility:* Eligibility for refugee social services includes: (1) Refugees; (2) asylees; (3) Cuban and Haitian entrants; (4) certain Amerasians from Vietnam; including U.S. citizens; (5) for eligibility for trafficking victims, refer to 45 CFR 400.43 and ORR State Letter #01–13, *http://www.acf.hhs.gov/programs/orr/policy/sl01–13.htm* as modified by ORR State Letter #02–01 *http://www.acf.hhs.gov/programs/orr/policy/sl02–01.htm* on trafficking victims. For convenience, the term "refugee" is used in this notice to encompass all such eligible persons.

There are no pre-award additional requirements.

*III.2. Cost-Sharing or Matching*

Cost sharing or matching funds are not required for applications submitted under this program announcement.

*III.3. Other*

There is no limit on the number of applications that an organization can submit for this announcement.

All applicants must have a DUNS number. On June 27, 2003, the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applications to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formal, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711, or you may request a number on-line at *http://www.dnb.com.*

Applications that fail to follow the required format described in section IV.2. Content and Form of Application Submission will be considered non-responsive and will not be eligible for funding under this announcement.

**IV. Application and Submission Information**

*IV.1 Address To Request Application Package*

Sue Benjamin, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone—202–401–4851, or E-mail: *sbenjamin@acf.hhs.gov.*

*IV.2 Content and Form of Application Submission*

The required application package will include the following:

Application Content

An original and two copies of the complete application are required. The original and 2 copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures. Each application must include the following components:

1. Table of Contents

(a) Abstract of the Proposed Project—very brief, not to exceed 250 words, that would be suitable for use in an announcement that the application has been selected for a grant award and which identifies the type of project, the target population and the major elements of the work plan.

(b) Completed Standard Form 424—that has been signed by an Official of the organization applying for the grant who has authority to obligate the organization legally.

(c) Standard Form 424A—Budget Information Non-Construction Programs.

(d) Narrative Budget Justification—for each object class category required under Section B, Standard Form 424A.

(e) Project Narrative—A narrative that addresses issues described in the "Application Review Information" section of this announcement.

Please see Section V.1. Criteria, for instructions on preparing the project summary/abstract and the full project description.

2. Application Format

Submit application materials on white 8½ x 11 inch paper only. Do not use colored, oversized or folded materials.

Please do not include organizational brochures or other promotional materials, slides, films, clip, etc.

The font size may be no smaller than 12 pitch and the margins must be at least one inch on all sides.

Please present application materials either in loose-leaf notebooks or in folders with pages two-hole punched at the top center and fastened separately with a slide paper fastener.

Please do not include books or videotapes as they are not easily reproduced and are, therefore, inaccessible to the reviewers.

3. Page Limitation

Each application narrative should not exceed 20 pages in a double spaced 12 pitch font. Attachments and appendices should not exceed 25 pages and should be used only to provide supporting documentation such as administration charts, position descriptions, resumes, and letters of intent or partnership agreements. A table of contents and an

executive summary should be included but will not count in the page limitations. Each page should be numbered sequentially, including the attachments and appendices. This limitation of 20 pages should be considered a maximum, and not necessarily a goal. Application forms (including the Narrative Budget Justification) are not to be counted in the page limit. Any material submitted beyond the 20 pages will not be considered.

4. Forms and Certifications

Applicants requesting financial assistance for a non-construction project must sign and return Standard Form 424B, Assurances: Non-Construction Programs with their applications.

Applications must provide a Certificate Regarding Lobbying. Prior to receiving an award in excess of $100,000, applicants shall furnish an executed copy of the lobbying certification. Applicants must sign and return the certification with their application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the application, applicants are providing the certification and need not mail back a certification form.

Applicants must make the appropriate certification of their compliance with the requirements of the Pro-Children Act of 1994 as outlined in Certification Regarding Environmental Tobacco Smoke.

Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov* apply site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov*.
- You must search for the downloadable application package by the CFDA number.

*IV.3 Submission Date and Time*

The closing date for receipt of applications is February 28, 2005 (and February 28 of each succeeding year). Mailed applications received after 4:30 p.m. on the closing date will be classified as late. ACF will send an acknowledgement of receipt of application to the applicant.

*Deadline:* Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447.

Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, ACF Mailroom, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

*Late applications:* Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. Determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Table of Contents | As described above | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Abstract of Proposed Project | Brief abstract that identifies the type of project, the target population and the major elements of the proposed project. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Completed Standard Form 424 ..... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424A ... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Narrative Budget Justification ..... | As described above ..... | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Project Narrative ..... | A narrative that addresses issues described in the "Application Review Information" section of this announcement. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424B ... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Lobbying ... | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Environmental Tobacco Smoke. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*Additional Forms:* Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| | | | |
|---|---|---|---|
| Survey on Ensuring Equal Opportunity for Applicants. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*IV.4 Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR Part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 2003, of the most recent SPOC list, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions or for projects administered by federally-recognized Indian Tribes need take no action in regard to E.O. 12372: Alabama, Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wyoming.

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs a soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Washington, DC 20447.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*IV.5 Funding Restrictions*

Pre-award costs are not allowable charges to this program grant.

Construction is not an allowable activity or expenditure under this solicitation.

*IV.6 Other Submission Requirements*

*Electronic Address to Submit Applications: www.Grants.gov.* Please see Section IV.2. Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

*Submission by Mail:* Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370

L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447. Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

*Hand Delivery:* Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, ACF Mailroom, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

**V. Application Review Information**

*V.1. Criteria*

Paperwork Reduction Act of 1995 (Pub.L. 104–13)

Public reporting burden for this collection of information is estimated to average 25 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 03/31/2004.

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 number.

Instructions: ACF Uniform Project Description (UPD)

The following are instructions and guidelines on how to prepare the "project summary/abstract" and "Full Project Description" sections of the application. The generic UPD requirement is followed by the evaluation criterion specific to the Standing Announcement for Services to Recently Arrived Refugees Grant legislation.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions and the specified evaluation criteria. The instructions give a broad overview of what your project description should include while the evaluation criteria expands and clarifies more program-specific information that is needed.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Approach

Outline a plan of action which describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished. When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Staff and Position Data

Provide a biographical sketch for each key person appointed and a job description for each vacant key position. A biographical sketch will also be required for new key staff as appointed.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information.

Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. Any non-profit organization submitting an application must submit proof of its non-profit status in this application at the time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, or by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Third-Party Agreements

Include written agreements between grantees and sub-grantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other

terms and conditions that structure or define the relationship.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

The following guidelines are for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. For purposes of preparing the budget and budget justification, "Federal resources" refers only to the ACF grant for which you are applying. Non-Federal resources are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (**Note:** Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those which belong under other categories such as equipment, supplies, construction, etc. Third-party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant, should be included under this category.

*Justification:* All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and sub-recipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11). Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (non-contractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, it should immediately upon notification that an award will be made, develop a tentative

indirect cost rate proposal based on its most recently completed fiscal year in accordance with the principles set forth in the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. It should be noted that when an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgment that the applicant is accepting a lower rate than allowed.

Program Income

*Description:* The estimated amount of income, if any, expected to be generated from this project.

*Justification:* Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

Nonfederal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application in order to be given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria

Criterion 1. *Objectives and Need*—The application establishes that the unanticipated number of at least 100 refugees or more is significant relative to the resident population. The applicant documents the most recent 12-month period of refugee arrivals, both anticipated and unanticipated. The application includes a description of the need for services and how funding through the Unanticipated Arrivals program would meet those needs. The application, supported by a letter from the relevant voluntary agency, documents the planned projections of refugees for the next 12 months. (25 points)

Criterion 2. *Results or Benefits Expected*—The application clearly describes the project goals; appropriateness of the performance measures to the project activities; appropriateness of the performance outcomes and the results and benefits to be achieved. The application describes how the impact of the funds will be measured on key indicators associated with the purpose of the project. Proposed outcomes are measurable and achievable within the grant project period, and the proposed monitoring and information collection is adequately planned and can be feasibly implemented within the proposed timelines. (25 points)

Criterion 3. *Approach*—The strategy and plan are likely to achieve the proposed results; the proposed activities and timeframes are reasonable and feasible. The plan describes in detail how the proposed activities will be accomplished as well as the potential for the project to increase the available services for unanticipated arriving refugees. Assurance is provided that proposed services will be delivered in a manner that is linguistically and culturally appropriate to the target population. Where coalition partners are proposed, the applicant has described each partner agency's respective role and financial responsibilities, and how the activities to be implemented by the coalition will enhance the accomplishment of the project goals. The applicant documents the planning consultation efforts and activities undertaken to achieve an orderly transition of services for these new populations. The State Refugee Coordinator indicates an interest in continuing these services to the Unanticipated Arrivals through their State formula social service funds. (20 points)

Criterion 4. *Organizational Profiles*—Individual organization staff, including volunteers, are well qualified. The administrative and management features of the project, including a plan for fiscal and programmatic management of each activity, are described in detail with proposed start-up times, ongoing timelines, major milestones or benchmarks, a component/project organization chart, and a staffing chart. Evidence of commitment of any coalition partners in implementing the activities is demonstrated, *e.g.*, by Memorandums of Understanding (MOUs) among participants. Discuss instances of managing grants of the same size as you are requesting here. (15 points)

Criterion 5. *Budget and Budget Justification*—The budget and narrative justification are reasonable, clearly presented, and cost-effective in relation to the proposed activities and anticipated results. (15 points)

*V.2. Review and Selection Process*

Each application submitted under this program announcement will undergo a pre-review to determine that (1) the application was received by the closing date and submitted in accordance with the instructions in this announcement and (2) the applicant is eligible for funding. It is necessary that applicants state specifically which priority area they are applying for. Applications will be screened for priority area appropriateness. If applications are found to be inappropriate for the priority area in which they are submitted, applicants will be contacted for verbal approval of redirection to a more appropriate priority area. Applications which pass the initial ACF screening will be evaluated and rated by an independent review panel on the basis specific evaluation criteria. The results of these reviews will assist the Director and ORR program staff in considering competing applications. Reviewers' scores will weigh heavily in funding decisions but will not be the only factors considered. Applications will generally be considered in order of the average scores assigned by reviewers. However, highly ranked applications are not guaranteed funding because other factors are taken into consideration. These include, but are not limited to, the number of similar types of existing grants or projects funded with ORR funds in the last five years, comments of reviewers and government officials; staff evaluation and input; geographic distribution; previous program performance of applicants; compliance with grant terms under previous ORR grants; audit reports; investigative reports; an applicants progress in resolving any final audit disallowance on previous ORR or other Federal agency grants. ORR will consider the geographic distribution of funds among States and the relative proportion of funding among rural and urban areas. The evaluation criteria were designed to assess the quality of a proposed project, and to determine the likelihood of its success. The evaluation criteria are closely related and are considered as a whole in judging the overall quality of an application. Points are awarded only to applications which are responsive to the evaluation criteria within the context of this program announcement.

## VI. Award Administration Information

*VI.1. Award Notices*

Successful applicants can expect notification no later than September 30, 2005 (and September 30 of each succeeding year). A notice of award signed by the grants management officer will be mailed to the authorized representative. ORR will mail

notification to the authorized representative of unsuccessful applicants.

*VI.2. Administrative and National Policy Requirements*

45 CFR Part 74.

*VI.3. Reporting Requirements*

Programmatic Reports: Semi-Annually and a final report is due 90 days after the end of grant period.

Financial Reports: Semi-Annually and a final report is due 90 days after the end of grant period.

There are no special reporting requirements.

Original reports and one copy should be mailed to the Grants Management Contact listed in section VII Agency Contacts.

**VII. Agency Contacts**

*Program Office Contacts*

Priority Areas 1 and 2: Sue Benjamin, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–401–4851, E-mail: *sbenjamin@acf.hhs.gov.*

Priority Area 3: Mitiku Ashebir, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–205–3602, E-mail: *mashebir@acf.hhs.gov.*

*Grants Management Office Contact*

Sylvia Johnson, Grants Officer, HHS, ACF, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th Floor West, Telephone: 202–401–4524, Washington, DC 20447, E-mail: *sjohnson@acf.hhs.gov.*

**VIII. Other Information**

The Director reserves the right to award more, or less than the funds described in this announcement. In the absence of worthy applications, the Director may decide not to make an award if deemed in the best interest of the Government. Funding for future years, under this announcement, is at the Director's discretion and depends on the availability of appropriated funds. The Director may invite applications outside of the proposed closing date, if necessary, to respond to the needs of an imminently arriving refugee population.

An applicant may submit more than one application under this announcement, but must apply separately for each priority area.

Applications in Priority Area 2 are for project periods and budget periods of up to seventeen (17) months.

**Priority Area 3: Ethnic Community Self-Help**

**I. Funding Opportunity Description**

*Legislative Authority:* This program is authorized by section 412(c)(1)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1522(c)(1)(A)), as amended, which authorizes the Director "to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(i) to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services; (ii) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and (iii) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services."

*Description*

Purpose and Objectives

The objective of this program is to provide assistance to organized ethnic communities comprised and representative of refugee populations. ORR's intended purpose is to build bridges among refugee communities and community resources. ORR is interested in applications from national, regional (multi-state), or local refugee community organizations that address community building, facilitate cultural adjustment and integration of refugees, and deliver mutually supportive functions such as information exchange, civic participation, resource enhancement, orientation and support to newly arriving refugees and public education to the larger community on the background, needs and potential of refugees.

Respondents to this program category will be of two general types:

(1) Multi-site or national ethnic organizations which propose to develop or strengthen local ethnic groups and/or a national network of ethnic entities for purposes of linking refugees to community resources and promoting and strengthening community participation; or,

(2) Emerging local ethnic communities which seek to function as bridges between newly arrived refugees and mainstream local resources and organizations.

A robust community is one that has the capacity to generate and control its own resources, determine its own goals, set priorities, plan and mobilize a cross-section of community members, including the elderly, women and youth, to work together to achieve these goals and to create collaborations with others from within and outside the community to further these goals.

ORR recognizes that one key factor in strengthening communities is the development of strong community-based organizations (CBOs). A strong ethnic organization can tap into the community's interest in self-help, improving services, supporting community leaders, attracting resources by exploring various opportunities and collaborating with mainstream agencies and groups, and at the same time, remain accountable to the community. These community based ethnic organizations may be faith-based.

Strong CBOs can also facilitate positive interaction between refugees and established residents in mainstream communities. The ability to organize and to voice their concerns collectively gives refugees a better sense of identity and hope for their own and their community's future. Refugee self-help groups can be important building blocks for effective resettlement and can function as bridges between the refugee community and local resources by paving the way for smooth integration and positive and productive community relations.

Many refugees who arrived in this country during the past century organized themselves around self-help in order to assist their own members, to foster long-term community growth, to preserve their cultural heritage, and to assist community members in securing employment and other social services. Many refugees who have come to the United States in recent years have not yet organized; consequently, they may be experiencing barriers to accessing mainstream resources and to participating fully in economic, social, and civic activities in the larger community.

ORR has found that effective refugee self-help groups result in: a shared vision of the community's future which inspires members to work together to secure that future; a perception of refugees not as needy recipients but as active partners in their integration into their communities; a link between individual self-sufficiency and community self-reliance; local communities which apply their own cultural, civic and socio-economic values to long-term strategies and programs; a role for refugees as decision-makers on community needs, program responses, and service delivery systems; local resources that stay within

the community; collaboration among refugee and mainstream service providers, policy makers, and public and private institutions.

In recognition of the special vulnerability of newly arrived populations, ORR intends to provide support to refugee ethnic communities who have significant populations in the United States within the last ten years. Awards will be based on the applicant's documentation and justification of such factors as community service needs and sound organizational and service delivery systems and available resources or a plan for such, aimed at mutual assistance in the community.

Allowable Activities

1. National organization applicants to this notice may propose activities that may include, but are not limited to, the following: organizing newly arriving refugees for self-help and mutual assistance, organizational and leadership development, civic participation; inspiring self-determination; linking technical assistance and resources for local ethnic communities; orientation on the background and potential of refugees to the larger community, establishing and strengthening links with institutions such as schools, crime prevention and law enforcement entities promoting mediation and constructive conflict resolution, promoting health and mental health services and augmenting agency linkages via internet connections; facilitating information dissemination on ethnic-specific issues; or convening of national or regional meetings and/or conference calls.

2. Local ethnic self-help applicants to this notice may propose any of the following activities: self-help organizing efforts, orientation designed to inform the refugee community about issues essential to functioning effectively in the new society; focused orientation and assistance to parents in connecting with school systems; dissemination of information on access to community health and mental health services, including health care for the uninsured, health insurance, health maintenance organizations, the importance of preventive health, required immunizations, and available universal coverage; pairing refugee individuals or families with community volunteers; enhancing and facilitating refugee rural resettlement efforts, information and training on the roles of men and women in the U.S. culture, such as, information on healthy marriage education programs and partnerships with healthy marriage community and faith-based programs; information on laws regarding child welfare, child abuse and neglect; information on sexual harassment and coercion, and domestic violence; bilingual staff assistance for women's shelters, and techniques for self-protection and safety; activities designed to improve relations between refugees and law enforcement entities; community training for such activities as civic organizing, resource strategies, and non-profit management and accountability.

The above are examples of services. Applicants may propose other relevant services and may request funds to cover core or general operating expenses. In all instances, however, activities must be designed to supplement, rather than to supplant or duplicate, the existing array of refugee services available in the community.

Planning and coalition-building should be guided by the overarching goal of improving the economic condition of refugee families and of giving them the information needed to achieve economic self-sufficiency and social and civic integration into their new country and their new communities.

Non-Allowable Activities

Funds will not be awarded to applicants for the purpose of engaging in activities of a distinctly political nature, activities designed exclusively to promote the preservation of a specific cultural heritage, or activities with an international objective (*i.e.*, activities related to events in the refugees' country of origin).

## II. Award Information

*Funding Instrument Type:* Grant.

*Anticipated Total Priority Area Funding:* $1,400,000 per 12 months.

*Anticipated Number of Awards:* 15–20.

*Ceiling of Individual Awards:* $200,000 per 12 months.

The award amount is for planning purposes only.

*Floor on Amount of Individual Awards:* $100,000 per 12 months.

*Average Projected Award Amount:* $130,000 per 12 months.

*Project Periods for Awards:* Up to 36 months.

## III. Eligibility Information

### *III.1. Eligible Applicants*

County governments
City of township governments
Independent school districts
State controlled institutions of higher education
Native American tribal organizations (other Federally recognized tribal governments)
Nonprofits having a 501(c)(3) status with the IRS, other than institutions of higher education
Nonprofits that do not have a 501(c)(3) status with the IRS, other than institutions of higher education
Faith-based non-profit organizations

Additional Information on Eligibility

*Non-Profit Status:* Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing (a) a reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate; (c) a statement from a State taxing body; State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; (e) or any of the items referenced above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

*Client Eligibility:* Eligibility for refugee social services includes: (1) Refugees; (2) asylees; (3) Cuban and Haitian entrants; (4) certain Amerasians from Vietnam; including U.S. citizens; (5) for eligibility for trafficking victims refer to 45 CFR 400.43 and ORR State Letter #01–13, *http://www.acf.hhs.gov/programs/orr/policy/sl01–13.htm* as modified by ORR State Letter #02–01 *http://www.acf.hhs.gov/programs/orr/policy/sl02–01.htm* on trafficking victims. For convenience, the term "refugee" is used in this notice to encompass all such eligible persons.

There are no pre-award additional requirements.

### *III.2. Cost-Sharing or Matching*

Cost sharing or matching funds are not required for applications submitted under this program announcement.

### *III.3. Other*

There is no limit on the number of applications that an organization can submit for this announcement.

All applicants must have a DUNS number. On June 27, 2003, the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal

grant applications to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formal, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711, or you may request a number on-line at *http://www.dnb.com*.

Applications that fail to follow the required format described in section IV.2. Content and Form of Application Submission will be considered non-responsive and will not be eligible for funding under this announcement.

**IV. Application and Submission Information**

*IV.1 Address To Request Application Package*

Mitiku Ashebir, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone—202–401–4851, E-mail: *mashebir@acf.hhs.gov*.

*IV.2 Content and Form of Application Submission*

The required application package will include the following:

Application Content

An original and two copies of the complete application are required. The original and 2 copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures. Each application must include the following components:

1. Table of Contents

(a) Abstract of the Proposed Project—very brief, not to exceed 250 words, that would be suitable for use in an announcement that the application has been selected for a grant award and which identifies the type of project, the target population and the major elements of the work plan.

(b) Completed Standard Form 424—that has been signed by an Official of the organization applying for the grant who has authority to obligate the organization legally.

(c) Standard Form 424A—Budget Information Non-Construction Programs.

(d) Narrative Budget Justification—for each object class category required under Section B., Standard Form 424A.

(e) Project Narrative—A narrative that addresses issues described in the "Application Review Information" section of this announcement.

Please see Section V.1. Criteria, for instructions on preparing the project summary/abstract and the full project description.

2. Application Format

Submit application materials on white 8½ × 11 inch paper only. Do not use colored, oversized or folded materials.

Please do not include organizational brochures or other promotional materials, slides, films, clips, etc.

The font size may be no smaller than 12 pitch and the margins must be at least one inch on all sides.

Please present application materials either in loose-leaf notebooks or in folders with pages two-hole punched at the top center and fastened separately with a slide paper fastener.

Please do not include books or videotapes as they are not easily reproduced and are, therefore, inaccessible to the reviewers.

3. Page Limitation

Each application narrative should not exceed 20 pages in a double spaced 12 pitch font. Attachments and appendices should not exceed 25 pages and should be used only to provide supporting documentation such as administration charts, position descriptions, resumes, and letters of intent or partnership agreements. A table of contents and an executive summary should be included but will not count in the page limitations. Each page should be numbered sequentially, including the attachments and appendices. This limitation of 20 pages should be considered a maximum, and not necessarily a goal. Application forms (including the Narrative Budget Justification) are not to be counted in the page limit. Any material submitted beyond the 20 pages will not be considered.

4. Forms and Certifications

Applicants requesting financial assistance for a non-construction project must sign and return Standard Form 424B, Assurances: Non-Construction Programs with their applications.

Applications must provide a Certificate Regarding Lobbying. Prior to receiving an award in excess of $100,000, applicants shall furnish an executed copy of the lobbying certification. Applicants must sign and return the certification with their application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the application, applicants are providing the certification and need not mail back a certification form.

Applicants must make the appropriate certification of their compliance with the requirements of the Pro-Children Act of 1994 as outlined in Certification Regarding Environmental Tobacco Smoke.

Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov* apply site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an

automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.

- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov*.
- You must search for the downloadable application package by the CFDA number.

*IV.3 Submission Date and Time*

The closing date for receipt of applications is February 28, 2005 (and February 28 of each succeeding year). Mailed applications received after 4:30 p.m. on the closing date will be classified as late. ACF will send an acknowledgement of receipt of application to the applicant.

Deadline: Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447.

Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson." (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

*Late applications:* Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. Determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Table of Contents | As described above | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Abstract of Proposed Project | Brief abstract that identifies the type of project, the target population and the major elements of the proposed project. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424 | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424A | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Narrative Budget Justification | As described above | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Project Narrative | A narrative that addresses issues described in the "Application Review Information" section of this announcement. | Consistent with guidance in "Application Content" section of this announcement. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Completed Standard Form 424B | As described above and per required form. | May be found on http://www.acf.hhs.gov/programs/orr/funding. | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Lobbying | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |
| Certification Regarding Environmental Tobacco Smoke. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/orr/funding.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*Additional Forms:* Private, non-profit organizations may voluntarily submit with their applications the survey located under "Grants Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| | | | |
|---|---|---|---|
| Survey on Ensuring Equal Opportunity for Applicants. | As described above and per required form. | May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By 02/28/05 (and by 02/28 of every succeeding year). |

*IV.4 Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR Part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 2003, of the most recent SPOC list, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions or for projects administered by federally-recognized Indian Tribes need take no action in regard to E.O. 12372: Alabama, Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wyoming.

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs a soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Washington, DC 20447.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*IV.5 Funding Restrictions*

Pre-award costs are not allowable charges to this program grant. Construction is not an allowable activity or expenditure under this solicitation.

*IV.6 Other Submission Requirements*

*Electronic Address to Submit Applications: www.Grants.gov.*

Please see Section IV.2. Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

*Submission by Mail:* Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline date at: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, Attention: Sylvia Johnson, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447. Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

*Hand Delivery:* Applications hand-carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, ACF Mailroom, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note "Attention: Sylvia Johnson. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) ACF cannot accommodate transmission of applications by fax or e-mail.

**V. Application Review Information**

*V.1. Criteria*

Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Public reporting burden for this collection of information is estimated to average 25 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 03/31/2004.

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 number.

Instructions: ACF Uniform Project Description (UPD)

The following are instructions and guidelines on how to prepare the "project summary/abstract" and "Full Project Description" sections of the application. The generic UPD requirement is followed by the evaluation criterion specific to the Standing Announcement for Services to Recently Arrived Refugees Grant legislation.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions and the specified evaluation criteria. The instructions give a broad overview of what your project description should include while the evaluation criteria expands and clarifies more program-specific information that is needed.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In

developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Approach

Outline a plan of action which describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished. When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Staff and Position Data

Provide a biographical sketch for each key person appointed and a job description for each vacant key position. A biographical sketch will also be required for new key staff as appointed.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information.

Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, or by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Third-Party Agreements

Include written agreements between grantees and sub-grantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other terms and conditions that structure or define the relationship.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

The following guidelines are for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. For purposes of preparing the budget and budget justification, "Federal resources" refers only to the ACF grant for which you are applying. Non-Federal resources are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: First column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (**Note:** Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight,

and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those which belong under other categories such as equipment, supplies, construction, etc. Third-party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant, should be included under this category.

*Justification:* All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and sub-recipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11). Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc. Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (non-contractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, it should immediately upon notification that an award will be made, develop a tentative indirect cost rate proposal based on its most recently completed fiscal year in accordance with the principles set forth in the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. It should be noted that when an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgment that the applicant is accepting a lower rate than allowed.

Program Income

*Description:* The estimated amount of income, if any, expected to be generated from this project.

*Justification:* Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

Nonfederal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application in order to be given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria

Criterion 1. *Organizational Profiles*—Individual organization staff, including volunteers, proposed partners and consultants, if any, are well qualified. The administrative and management features of the project, including a plan for fiscal and programmatic management of each activity, is described in detail with proposed start-up times, ongoing timelines, major milestones or benchmarks, a component/project organization chart, and a staffing chart. If appropriate, written agreements between grantees and sub-grantees or other cooperating entities, detailing work to be performed, remuneration, and other terms and conditions that structure or define the relationship to this project, are provided. Discuss instances of managing grants of the same size as you are requesting here. (25 points)

Criterion 2. *Approach*—The strategy and plan are likely to achieve the proposed results; the proposed activities, timeframes and benchmarks are meaningful, reasonable and feasible. The reason for taking the proposed approach to community organizing and support activities is adequately described. Proposed activities are likely to lead to desired outcomes, and the project is likely to lead to increased ethnic community self-help and participation in the community. (25 points)

Criterion 3. *Results or Benefits Expected*—The applicant describes outcomes which are likely to be reached through community organizing and the projected program activity. Two or more key indicators associated with ethnic community self-help are provided as measures of the impact of the proposed project. Proposed outcomes are measurable and achievable within the grant project period, and the proposed monitoring, information collection, and documentation activities are adequately planned. (20 points)

Criterion 4. *Objectives and Need for Assistance*—The applicant clearly describes the need for ethnic organizing in the community proposed and documents an understanding of the distinguishing characteristics of the relevant ethnic group. The principal and subordinate objectives are clearly stated; supporting documentation, such as letters of support from concerned interests are included. The applicant describes in detail how the ethnic community has been involved in the project planning, how project participants are identified, and provides evidence of their support for the plan of action and involvement as the project

becomes operational. Planning studies incorporating demographic data and participant information are referenced or included as needed. (15 points)

Criterion 5. *Budget and Budget Justification*—The budget and narrative justification are reasonable, clearly presented, and cost-effective in relation to the proposed activities and anticipated results. (15 points)

*V.2. Review and Selection Process*

Each application submitted under this program announcement will undergo a pre-review to determine that (1) the application was received by the closing date and submitted in accordance with the instructions in this announcement and (2) the applicant is eligible for funding. It is necessary that applicants state specifically which priority area they are applying for. Applications will be screened for priority area appropriateness. If applications are found to be inappropriate for the priority area in which they are submitted, applicants will be contacted for verbal approval of redirection to a more appropriate priority area. Applications which pass the initial ACF screening will be evaluated and rated by an independent review panel on the basis specific evaluation criteria. The results of these reviews will assist the Director and ORR program staff in considering competing applications. Reviewers' scores will weigh heavily in funding decisions but will not be the only factors considered. Applications will generally be considered in order of the average scores assigned by reviewers. However, highly ranked applications are not guaranteed funding because other factors are taken into consideration. These include, but are not limited to, the number of similar types of existing grants or projects funded with ORR funds in the last five years, comments of reviewers and government officials; staff evaluation and input; geographic distribution; previous program performance of applicants; compliance with grant terms under previous ORR grants; audit reports; investigative reports; an applicants progress in resolving any final audit disallowance on previous ORR or other Federal agency grants. ORR will consider the geographic distribution of funds among States and the relative proportion of funding among rural and urban areas. The evaluation criteria were designed to assess the quality of a proposed project, and to determine the likelihood of its success. The evaluation criteria are closely related and are considered as a whole in judging the overall quality of an application. Points are awarded only to applications which are responsive to the evaluation criteria within the context of this program announcement.

## VI. Award Administration Information

*VI.1. Award Notices*

Successful applicants can expect notification no later than September 30, 2005 (and September 30 of each succeeding year). A notice of award signed by the grants management officer will be mailed to the authorized representative. ORR will mail notification to the authorized representative of unsuccessful applicants.

*VI.2. Administrative and National Policy Requirements*

45 CFR Part 74.

*VI.3. Reporting Requirements*

*Programmatic Reports:* Semi-Annually and a final report is due 90 days after the end of grant period.

*Financial Reports:* Semi-Annually and a final report is due 90 days after the end of grant period.

There are no special reporting requirements.

Original reports and one copy should be mailed to the Grants Management Contact listed in section VII Agency Contacts.

## VII. Agency Contacts

*Program Office Contacts*

Priority Areas 1 and 2: Sue Benjamin, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–401–4851, E-mail: *sbenjamin@acf.hhs.gov.*

Priority Area 3: Mitiku Ashebir, HHS, ACF, ORR/DCR, 370 L'Enfant Promenade, SW., 8th Floor West, Washington, DC 20447, Telephone: 202–205–3602, E-mail: *mashebir@acf.hhs.gov.*

*Grants Management Office Contact*

Sylvia Johnson, Grants Officer, HHS, ACF, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th Floor West, Telephone: 202–401–4524, Washington, DC 20447, E-mail: *sjohnson@acf.hhs.gov.*

## VIII. Other Information

The Director reserves the right to award more, or less than the funds described in this announcement. In the absence of worthy applications, the Director may decide not to make an award if deemed in the best interest of the Government. Funding for future years, under this announcement, is at the Director's discretion and depends on the availability of appropriated funds. The Director may invite applications outside of the proposed closing date, if necessary, to respond to the needs of an imminently arriving refugee population.

Applications in Priority Area 3 are for project periods of up to thirty six (36) months. Awards, on a competitive basis, will be for a twelve (12) month budget period although project periods may be up to thirty-six (36) months. Applications for continuation grants funded under these awards, beyond the twelve (12) month budget period but within the thirty-six (36) month project period, will be entertained in subsequent years on a noncompetitive basis, subject to availability of funds, satisfactory progress of the grantee and a determination that continued funding would be in the best interest of the Government.

Dated: April 14, 2004.

**Nguyen Van Hanh,**

*Director, Office of Refugee Resettlement.*

[FR Doc. 04–9183 Filed 4–22–04; 8:45 am]

BILLING CODE 4184–01–P


Federal Register

Friday,
April 23, 2004

Part IV

# Securities and Exchange Commission

17 CFR Parts 239 and 274

**Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings; Final Rule**

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 239 and 274**

**[Release Nos. 33–8408; IC–26418; File No. S7–26–03]**

**RIN 3235–AI99**

## Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission is adopting amendments to Form N–1A under the Securities Act of 1933 and the Investment Company Act of 1940 to require open-end management investment companies to disclose in their prospectuses both the risks to shareholders of frequent purchases and redemptions of investment company shares, and the investment company's policies and procedures with respect to such frequent purchases and redemptions. The Commission is also amending Forms N–3, N–4, and N–6 to require similar prospectus disclosure for insurance company separate accounts issuing variable annuity and variable life insurance contracts. In addition, the Commission is adopting amendments to Forms N–1A and N–3 to clarify that open-end management investment companies and insurance company managed separate accounts that offer variable annuities, other than money market funds, are required to explain both the circumstances under which they will use fair value pricing and the effects of using fair value pricing. Finally, the Commission is requiring open-end management investment companies and insurance company managed separate accounts that offer variable annuities to disclose both their policies and procedures with respect to the disclosure of their portfolio securities, and any ongoing arrangements to make available information about their portfolio securities.

**DATES:** *Effective Date:* May 28, 2004.

*Compliance Date:* All initial registration statements and post-effective amendments to effective registration statements filed on Form N–1A, N–3, N–4, or N–6 on or after December 5, 2004, must comply with the amendments. Section II.D. of this release contains more information on the compliance date.

**FOR FURTHER INFORMATION CONTACT:** Kieran G. Brown, Attorney, or David S. Schwartz, Senior Counsel, Office of Disclosure Regulation, Division of Investment Management, (202) 942–0721, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission ("Commission") is adopting amendments to Forms N–1A,[1] N–3,[2] N–4,[3] and N–6,[4] registration forms used by investment companies to register under the Investment Company Act of 1940 ("Investment Company Act") and to offer their securities under the Securities Act of 1933 ("Securities Act").[5]

**Table of Contents**

I. Introduction and Background
II. Discussion
  A. Disclosure Concerning Frequent Purchases and Redemptions of Fund Shares
  B. Disclosure of Circumstances Under Which Funds Will Use Fair Value Pricing and the Effects of Such Use
  C. Selective Disclosure of Fund Portfolio Holdings
  D. Compliance Date
III. Paperwork Reduction Act
IV. Cost/Benefit Analysis
V. Consideration of Effects on Efficiency, Competition, and Capital Formation
VI. Final Regulatory Flexibility Analysis
VII. Statutory Authority
Text of Rule and Form Amendments

### I. Introduction and Background

Millions of individual American investors hold shares of open-end management investment companies ("mutual funds"), relying on these funds for their retirements, their children's educations, and their other basic financial needs.[6] The tremendous number of mutual fund investors reflects the trust that they have placed in both funds and the regulatory protections provided by the federal securities laws.

Recent scandals, however, have revealed instances where some in the mutual fund industry, and some intermediaries that sell fund shares, have violated the trust that has been placed in them and lost sight of their obligations to investors under the federal securities laws. Many of these abuses relate to "market timing," including the overriding of stated market timing policies by fund executives to benefit large investors at the expense of small investors, or to benefit the fund's investment adviser.[7] Other abuses involve the selective disclosure by some fund managers of their funds' portfolio holdings in order to curry favor with large investors.[8] This selective disclosure can facilitate fraud and have severe, adverse ramifications for a fund's investors if someone uses that portfolio information to trade against the fund, or otherwise uses the information in a way that would harm the fund.[9]

The Commission is extremely concerned by the abuses that have surfaced in the mutual fund industry, and we have taken vigorous enforcement action where violations of the federal securities laws have been uncovered. We also believe, however, that regulatory reforms are necessary to help prevent such abuses from occurring in the future. Thus, the Commission has pursued an aggressive regulatory reform agenda to address

[1] 17 CFR 239.15A; 17 CFR 274.11A.

[2] 17 CFR 239.17a; 17 CFR 274.11b.

[3] 17 CFR 239.17b; 17 CFR 274.11c.

[4] 17 CFR 239.17c; 17 CFR 274.11d.

[5] The Commission proposed these amendments in December 2003. Investment Company Act Release No. 26287 (Dec. 11, 2003) [68 FR 70402 (Dec. 17, 2003)] ("Proposing Release").

[6] A management investment company is an investment company other than a unit investment trust or face-amount certificate company. *See* section 4 of the Investment Company Act [15 U.S.C. 80a–4]. Management investment companies typically issue shares representing an undivided proportionate interest in a changing pool of securities, and include open-end and closed-end companies. *See* T. Lemke, G. Lins, A. Smith III, Regulation of Investment Companies, Vol. I, ch. 4, section 4.04, at 4–5 (2002). An open-end company is a management company that is offering for sale or has outstanding any redeemable securities of which it is the issuer.

[7] *See, e.g., In re Massachusetts Financial Services Co.*, Investment Company Act Release No. 26347 (Feb. 5, 2004) (investment adviser and two of its executives violated federal securities laws by allowing widespread market timing trading in certain funds in contravention of those funds' prospectus disclosures); *In re Alliance Capital Management, L.P.*, Investment Company Act Release No. 26312 (Dec. 18, 2003) (investment adviser violated federal securities laws by allowing market timing in certain of its mutual funds in exchange for fee-generating investments in its hedge funds and other mutual funds); *In re James P. Connelly, Jr.*, Investment Company Act Release No. 26209 (Oct. 16, 2003) (executive of an investment adviser to a fund complex, in derogation of fund disclosures, violated federal securities laws by approving agreements that allowed select investors to market time certain funds in the complex).

[8] *See, e.g., In the Matter of Alliance Capital Management, L.P.*, Investment Advisers Act Release No. 2205 (Dec. 18, 2003) and Investment Company Act Release No. 26312 (Dec. 18, 2003) (disclosure of material nonpublic information about certain mutual fund portfolio holdings permitted favored client to profit from market timing). More than 30% of mutual fund complexes that responded to a Commission examination request for information sent to 88 of the largest such complexes appear to have disclosed portfolio information in circumstances that may have provided certain fund shareholders with the ability to make advantageous decisions to place orders for fund shares.

[9] *See* Section I, "Introduction and Background," of the Proposing Release for a fuller description of market timing and selective disclosure abuses. Proposing Release, *supra* note 5, 68 FR at 70402–70405.

these abuses.[10] As part of this agenda, in December 2003, we proposed rules intended to shed more light on market timing and selective disclosure of portfolio holdings.

The Commission received 47 comment letters relating to the proposals from investors, participants in the fund industry, and others. The commenters generally supported the Commission's proposals to improve the disclosure provided to investors, although some expressed concerns regarding portions of the disclosure or suggested changes. Today, the Commission is adopting these proposals, with modifications to address commenters' concerns.

With respect to market timing, the amendments that the Commission is adopting will require improved disclosure in fund prospectuses of a mutual fund's risks, policies, and procedures.[11] The amendments will:

- Require a mutual fund to describe in its prospectus the risks, if any, that frequent purchases and redemptions of fund shares may present for other shareholders;
- Require a mutual fund to state in its prospectus whether or not the fund's board of directors has adopted policies and procedures with respect to frequent purchases and redemptions of fund shares and, if the board has not adopted any such policies and procedures, state the specific basis for the view of the board that it is appropriate for the fund not to have such policies and procedures;
- Require a mutual fund to describe in its prospectus any policies and procedures for deterring frequent purchases and redemptions of fund shares, and in its Statement of Additional Information ("SAI")[12] any arrangements to permit frequent purchases and redemptions of fund shares; and
- Require similar disclosure in prospectuses for insurance company separate accounts offering variable insurance contracts, with respect to frequent transfers among sub-accounts.

In addition, the amendments will clarify instructions to our registration forms to require all mutual funds (other than money market funds) and insurance company managed separate accounts that offer variable annuities to explain in their prospectuses both the circumstances under which they will use fair value pricing and the effects of using fair value pricing. Fair valuation of a fund's portfolio securities, which is required under certain circumstances, can serve to foreclose certain arbitrage opportunities available to market timers.

With respect to selective disclosure of portfolio holdings, the amendments will require mutual funds and insurance company managed separate accounts that offer variable annuities to disclose their policies with respect to disclosure of portfolio holdings information. The amendments will:

- Require a fund to describe in its SAI any policies and procedures with respect to the disclosure of the fund's portfolio securities to any person and any ongoing arrangements to make available information about the fund's portfolio securities to any person; and
- Require a fund to state in its prospectus that a description of the policies and procedures is available in the fund's SAI, and on the fund's website, if applicable.

## II. Discussion

### *A. Disclosure Concerning Frequent Purchases and Redemptions of Fund Shares*

The Commission is adopting, with several modifications to reflect commenters' concerns, amendments to Form N–1A, the registration form used by mutual funds, that will require disclosure of both the risks to fund shareholders of frequent purchases and redemptions of fund shares, and a fund's policies and procedures with respect to such frequent purchases and redemptions.[13] Market timing strategies often involve such frequent purchases and redemptions of fund shares. These amendments are intended to require mutual funds to describe with specificity the restrictions they place on frequent purchases and redemptions, if any, and the circumstances under which any such restrictions will not apply. Commenters generally supported the proposed requirements, and agreed that the additional disclosure will enable investors to assess mutual funds' risks, policies, and procedures in this area and determine if a fund's policies and procedures are in line with their expectations.[14]

#### 1. Description of the Risks of Frequent Purchases and Redemptions of Fund Shares

We are adopting, as proposed, amendments that will require a mutual fund's prospectus to describe the risks, if any, that frequent purchases and redemptions of fund shares may present for other shareholders of the fund.[15] These risks may include, among other things, dilution in the value of fund shares held by long-term shareholders, interference with the efficient management of the fund's portfolio, and increased brokerage and administrative

[10] Investment Company Act Release No. 26363 (Mar. 11, 2004) [69 FR 12752 (Mar. 17, 2004)] (proposing requirements for enhanced disclosure regarding portfolio managers of registered management investment companies); Investment Company Act Release No. 26375A (Mar. 5, 2004) [69 FR 11762 (Mar. 11, 2004)] (proposing mandatory redemption fee on short-term trades); Investment Company Act Release No. 26372 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004)] (adopting requirements for expense disclosure in fund shareholder reports and quarterly portfolio disclosure); Investment Company Act Release No. 26356 (Feb. 24, 2004) [69 FR 9726 (Mar. 1, 2004)] (proposing to prohibit the use of brokerage commissions to finance distribution of fund shares); Investment Company Act Release No. 26350 (Feb. 11, 2004) [69 FR 7852 (Feb. 19, 2004)] (proposing to require improved disclosure regarding the reasons for fund directors' approval of investment advisory contracts); Investment Company Act Release No. 26341 (Jan. 29, 2004) [69 FR 6438 (Feb. 10, 2004)] (proposing point-of-sale disclosure and a new confirmation statement for brokers to use when selling fund shares); Investment Company Act Release No. 26337 (Jan. 20, 2004) [69 FR 4040 (Jan. 27, 2004)] (proposing requirement for investment adviser code of ethics); Investment Company Act Release No. 26323 (Jan. 15, 2004) (69 FR 3472 (Jan. 23, 2004)] (proposing amendments to enhance independence of fund boards of directors); Investment Company Act Release No. 26313 (Dec. 18, 2003) [68 FR 74820 (Dec. 24, 2003)] (requesting comment on measures to improve disclosure of mutual fund transaction costs); Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74713 (Dec. 24, 2003)] (adopting rules requiring funds and advisers to adopt and implement policies and procedures designed to prevent violations of the federal securities laws); Investment Company Act Release No. 26298 (Dec. 17, 2003) [68 FR 74732 (Dec. 24, 2003)] (proposing amendments that would require enhanced disclosure regarding breakpoint discounts on front-end sales loads); Investment Company Act Release No. 26288 (Dec. 11, 2003) [68 FR 70388 (Dec. 17, 2003)] (proposing amendments to rules governing pricing of mutual fund shares intended to prevent unlawful late trading in fund shares).

[11] Market timing may take many forms. In this release, we have used the term to refer to arbitrage activity involving the frequent buying and selling of mutual fund shares in order to take advantage of the fact that there may be a lag between a change in the value of a mutual fund's portfolio securities and the reflection of that change in the fund's share price.

[12] The SAI is part of a fund's registration statement and contains information about a fund in addition to that contained in the prospectus. The SAI is required to be delivered to investors upon request and is available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System.

[13] Item 6(e) of Form N–1A. The amendments to Form N–1A reflect the recent adoption of amendments to the Form that renumber Items 7 (Shareholder Information), 12 (Description of the Fund and Its Investments and Risks), and 18 (Purchase, Redemption, and Pricing of Shares) as Items 6, 11, and 17, respectively. *See* Investment Company Act Release No. 26372 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004)].

[14] Under rule 38a–1 under the Investment Company Act [17 CFR 270.38a–1], a fund must have procedures reasonably designed to ensure compliance with its disclosed policies regarding market timing. *See* Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74714, 74720 (Dec. 24, 2003)].

[15] Item 6(e)(1) of Form N–1A.

costs. The disclosure should be specific to the fund, taking into account its investment objectives, policies, and strategies. For example, we would generally expect a fund that invests in overseas markets to describe, among other things, the risks of time-zone arbitrage.

2. Adoption of Policies and Procedures by Fund's Board

We are also adopting, as proposed, amendments that require a mutual fund's prospectus to state whether the fund's board of directors has adopted policies and procedures with respect to frequent purchases and redemptions of fund shares by fund shareholders.[16] If the fund's board of directors has not adopted any such policies and procedures, the fund's prospectus will be required to include a statement of the specific basis for the view of the board that it is appropriate for the fund not to have such policies and procedures.[17]

3. Description of Fund Policies and Procedures With Respect to Frequent Purchases and Redemptions

We are adopting, with one modification, a requirement that the fund's prospectus include a description of policies and procedures adopted by the board with respect to frequent purchases and redemptions, including:

- Whether or not the fund discourages frequent purchases and redemptions of fund shares by fund shareholders;
- Whether or not the fund accommodates frequent purchases and redemptions of fund shares by fund shareholders; and
- Any policies and procedures of the fund for deterring frequent purchases and redemptions of fund shares by fund shareholders.

The description of the mutual fund's policies and procedures, if any, for deterring frequent purchases and redemptions of fund shares by fund shareholders will be required to include any restrictions imposed by the fund to prevent or minimize such frequent purchases and redemptions, including:

- Any restrictions on the volume or number of purchases, redemptions, or exchanges that a shareholder may make within a given time period;
- Any exchange fee or redemption fee;
- Any costs or administrative or other fees or charges that are imposed on shareholders deemed to be engaged in frequent purchases and redemptions of fund shares, together with a description of the circumstances under which such costs, fees, or charges will be imposed;
- Any minimum holding period that is imposed before an investor may make exchanges into another fund;
- Any restrictions imposed on exchange or purchase requests submitted by overnight delivery, electronically, or via facsimile or telephone; and
- Any right of the fund to reject, limit, delay, or impose other conditions on exchanges or purchases or to close or otherwise limit accounts based on a history of frequent purchases and redemptions of fund shares, including the circumstances under which such right will be exercised.

The amendments will require a fund's policies and procedures for deterring frequent purchases and redemptions, including any restrictions imposed to prevent or minimize such frequent purchases and redemptions, to be described with specificity.[18] For example, a fund might state that a 2% redemption fee will be applied to all redemptions within five days after purchase or, in describing any restrictions on the volume or number of purchases, redemptions, or exchanges that a shareholder may make within a given time period, a fund might state that it prohibits more than five round-trips in and out of a particular fund per year. A fund will also be required to indicate whether each restriction applies uniformly in all cases, or whether the restriction will not be imposed under certain circumstances. If any restriction will not be imposed under certain circumstances, the fund will be required to describe with specificity the circumstances under which the restriction will not be imposed.

Commenters were divided on whether funds' policies, procedures, and restrictions on purchases and redemptions should be required to be described with specificity. Many commenters, including a number of investors and intermediaries, argued that requiring specific disclosure of a fund's policies, procedures, and restrictions is important in order to put investors on notice of what types of activities the fund considers harmful, and to encourage funds to apply their restrictions uniformly. On the other hand, several commenters from the fund industry argued that the specificity requirement could have the unintended effect of assisting investors who wished to engage in frequent purchases and redemptions, and could deprive funds of flexibility in administering their policies and procedures to deter frequent purchases and redemptions. In addition, one commenter asked for clarification that a fund may reserve the right to reject any trade for any reason, because it is not possible to identify all types of potentially abusive trading in advance.

On balance, we continue to believe that it is important that a fund's prospectus describe with specificity its policies, procedures, and restrictions with respect to frequent purchases and redemptions of fund shares. We believe that requiring specificity in this disclosure will help investors both to assess mutual funds' policies and procedures with respect to frequent purchases and redemptions, and to assess whether such policies and procedures are in line with their expectations. We agree with those commenters who argued that requiring specific disclosure may discourage funds from applying or waiving their restrictions arbitrarily. We also believe, however, that funds will be able to more effectively deter abusive market timing if they have some flexibility to address abuses as they arise. To that end, a fund may reserve the right to reject a purchase or exchange request for any reason, provided that it discloses this policy in its prospectus.

We are removing the proposed requirement that a fund describe its policies and procedures for detecting frequent purchases and redemptions of fund shares.[19] Many commenters who addressed this issue recommended either removing this requirement, or permitting the disclosure to be general in nature. These commenters argued that disclosure about how the fund detects frequent purchases and redemptions could be harmful to the fund, in that it might provide investors seeking to engage in market timing through frequent purchases and redemptions with a "road map" on how to avoid detection. Further, commenters argued that this disclosure would be of marginal utility to most investors. We agree.

In connection with removing this proposed requirement, we are adding a statement clarifying that a fund's disclosure regarding whether its restrictions to prevent or minimize frequent purchases and redemptions are uniformly applied must indicate whether each such restriction applies to

[16] Item 6(e)(2) of Form N–1A.

[17] Item 6(e)(3) of Form N–1A.

[18] Item 6(e)(4)(iii) of Form N–1A. A fund need not repeat this disclosure to the extent that it is provided in the prospectus in response to other Items of Form N–1A, including Items 3 (redemption and exchange fees), 6(c) (restrictions on redemptions, and redemption charges), and 7(a)(2) (exchange privileges).

[19] Proposed Item 7(e)(4)(iv) of Form N–1A.

trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker dealers, transfer agents, third party administrators, and insurance companies.[20] We continue to believe that investors should be informed about how a fund applies its restrictions on frequent purchases and redemptions to persons trading through omnibus accounts, which would have been addressed by the proposed disclosure regarding policies and procedures for detecting frequent purchases and redemptions. The overall effectiveness of a fund's restrictions on frequent purchases and redemptions may depend significantly on how effectively the fund can deter frequent purchases and redemptions made through such omnibus accounts.[21]

4. Inclusion of Disclosure Regarding Frequent Purchases and Redemptions in Prospectus

The amendments that we are adopting also clarify, as proposed, that the new disclosure that will be required within the prospectus regarding frequent purchases and redemptions of fund shares may not be omitted from the prospectus in reliance on Item 6(g), formerly designated as Item 6(f).[22] Item 6(g) permits funds to omit from the prospectus certain information concerning purchase and redemption procedures if, among other things, the information is included in a separate document that is incorporated by reference into, and filed and delivered with, the prospectus. We believe that the information required by new Item 6(e) is more appropriately included in the same document as the prospectus.

5. Description of Arrangements Permitting Frequent Purchases and Redemptions

We are adopting, substantially as proposed, the requirement that a mutual fund describe any arrangements with any person to permit frequent purchases and redemptions of fund shares, except that we are moving the required disclosure to the fund's SAI and requiring a cross-reference to this disclosure in the fund's prospectus.[23] The description of arrangements to permit frequent purchases and redemptions must include the identity of the persons permitted to engage in frequent purchases and redemptions and any compensation or other consideration received by the fund, its investment adviser, or any other party pursuant to such arrangements.[24] Several commenters objected to this proposed requirement, and in particular to the proposed requirement for specific identification of persons permitted to engage in frequent purchases and redemptions. These commenters argued that specific identification of these investors may violate such investors' privacy, and that a long list of names would not be useful to investors and might tend to obscure other, more basic information that is more important to an investment decision. In particular, these commenters suggested that identification of these investors would not be useful in the case of investors who are trading through a defined contribution plan or similar plan that has an arrangement with the fund to permit frequent purchases and redemptions.

We believe that disclosure of the persons who have arrangements with a fund to permit frequent purchases and redemptions is necessary in order to help investors assess the risks to fund shareholders of frequent purchases and redemptions. We are, however, modifying the requirement to permit a fund that has an arrangement to permit frequent purchases and redemptions by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code, to identify the group rather than identifying each individual group member. In addition, in order to address concerns that the description of the arrangements might be lengthy, and therefore that inclusion of this information in the prospectus might tend to obscure other, more basic information in the prospectus, we are permitting this disclosure to be included in the SAI.[25] A fund that includes this disclosure in its SAI will be required to include a statement in its prospectus, adjacent to the other disclosure regarding frequent purchases and redemptions, that the fund's SAI includes a description of all arrangements with any person to permit frequent purchases and redemptions of fund shares.[26]

We reemphasize, as we stated in the Proposing Release, that a mutual fund that enters into an arrangement with any person to permit frequent purchases and redemptions of fund shares may only do so consistent with the antifraud provisions of the federal securities laws and the fiduciary duties of the fund and its investment adviser. Disclosure provided pursuant to these amendments will not make lawful conduct that is otherwise unlawful. For example, disclosure will not render lawful an arrangement whereby an investment adviser permits frequent purchases and redemptions of a mutual fund's shares in return for consideration that benefits the adviser, such as an agreement to maintain assets in other accounts managed by the adviser.

6. Applicability of Requirements to Exchange Traded Funds

As adopted, the amendments to Form N–1A will apply to all mutual funds. Some commenters argued that exchange traded funds ("ETFs") should be excluded from the proposed disclosure requirements. These commenters argued that market timing is generally not an issue for ETFs because, unlike traditional mutual funds, ETFs sell and redeem their shares at net asset value ("NAV") only in large blocks, generally in exchange for a basket of securities that mirrors the composition of the ETF's portfolio, plus a small amount of cash. Further, the commenters noted, shares issued by ETFs are listed for trading on stock exchanges, which allows retail investors to purchase and

[20] Item 6(e)(4)(iii) of Form N–1A.

Persons that are not registered as broker-dealers need to consider whether the securities activities that they are undertaking are brokerage activities that require them to register as broker-dealers. Section 3(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act") defines a broker as a person engaged in the business of effecting transactions in securities. It includes several exceptions for certain bank activities. Section 15 of the Exchange Act essentially makes it unlawful for a broker or dealer "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills)" unless the broker or dealer is registered with the Commission.

[21] As part of our recent proposal for a mandatory redemption fee on short-term trades, we proposed a requirement that, on at least a weekly basis, each financial intermediary provide to a fund the Taxpayer Identification Number ("TIN") and the amount and dates of all purchases, redemptions, or exchanges for each shareholder within an omnibus account. Investment Company Act Release No. 26375A (Mar. 5, 2004) [69 FR 11762, 11766 (Mar. 11, 2004)] (proposed rule 22c–2(c) under the Investment Company Act). This information would assist funds in detecting market timers who a fund has prohibited from purchasing fund shares and who attempt to enter the fund through a different account. *See also* Jonas Max Ferris, *Next Scandal: Brokers?*, The Street.Com, Nov. 26, 2003 (noting that although omnibus account structure has many benefits, it can be used to hide questionable trades by market timers); Kathleen Pender, *401(k) Plans Face Scrutiny*, San Francisco Chronicle, Oct. 23, 2003, at B1 (discussing difficulty of mutual funds knowing when 401(k) participants are engaging in market timing because each retirement plan is usually one omnibus account).

[22] Item 6(g) of Form N–1A.

[23] Items 6(e)(5) and 17(e) of Form N–1A.

[24] An instruction clarifies that the consideration required to be disclosed includes any agreement to maintain assets in the fund or in other investment companies or accounts managed by the investment adviser or by any affiliated person of the investment adviser. Instruction 1 to Item 17(e) of Form N–1A.

[25] Item 17(e) of Form N–1A.

[26] Item 6(e)(5) of Form N–1A.

sell individual ETF shares among themselves at market prices throughout the day.[27] However, we note that, in those cases when an ETF purchases and redeems its shares in cash rather than "in kind," frequent purchases and redemptions may present risks for long-term shareholders of ETFs that are similar to the risks that frequent purchases and redemptions present for long-term mutual fund shareholders. Accordingly, we have determined not to exclude ETFs from the proposed disclosure requirements. If an ETF's board has determined that there are no risks to fund shareholders as a result of frequent purchases and redemptions of ETF shares, and therefore has determined not to adopt policies and procedures with respect to frequent purchases and redemptions of fund shares, the fund may reflect these facts in its disclosure.

7. Amendments to Registration Forms for Variable Insurance Products

We are also adopting requirements for similar disclosure in Forms N–3,[28] N–4,[29] and N–6,[30] the registration forms for insurance company separate accounts that issue variable annuity and variable life insurance contracts, with respect to both the risks of frequent transfers of contract value among sub-accounts, and the separate account's policies and procedures with respect to such frequent transfers. As discussed in the Proposing Release, these disclosure requirements are similar to those applicable to mutual funds with respect to frequent purchases and redemptions, with modifications to address the different structure of these issuers.[31] We note that we are making the same modifications to the proposed requirements for Forms N–3, N–4, and N–6 that we are making with respect to Form N–1A.[32]

Separate accounts funding a variable insurance contract are generally divided into a number of sub-accounts, each of which invests in a different underlying mutual fund. Several commenters argued that certain aspects of the proposed disclosure requirements did not sufficiently take account of the unique nature of variable insurance contracts, in particular their two-tier structure. These commenters raised three concerns. First, they argued that the disclosure requirements will cause underlying funds to adopt new policies and procedures restricting frequent transfers. According to the commenters, these new policies and procedures of the underlying funds will be inconsistent with one another, and the separate accounts' prospectus disclosure of these policies and procedures will therefore be voluminous and potentially confusing. Second, the commenters noted that the insurance company depositors for separate accounts will have the task of administering the policies and procedures of the underlying funds, and that in many cases an insurance company will not be able to administer all of the different variations of policies and procedures, and may as a result decide to limit the number of funds that the separate account offers. Third, the commenters argued that the ability of an insurance company to adopt corresponding restrictions on contractowners' rights to engage in frequent transfers unilaterally at the separate account level will be limited by state insurance law and by provisions in existing contracts. In order to address these concerns, commenters asked that disclosure by both the separate account and the underlying fund be permitted to be general, or, in the alternative, that we clarify that underlying funds may rely on the restrictions on frequent transfers adopted by the insurance company depositor at the separate account level.

We believe that it is important for issuers of variable insurance contracts to provide disclosure regarding their policies and procedures with respect to transfers of contract value that is as specific as the disclosure that will be required for mutual funds with respect to frequent purchases and redemptions of fund shares. Market timing of mutual funds through a variable annuity or variable life insurance contract, in the form of tax-free transfers of contract value among sub-accounts,[33] can be as detrimental for investors in variable insurance products as market timing can be for investors in mutual funds. With respect to the concerns raised about the possible inconsistency of policies and procedures of different underlying funds and about potential limits on an insurer's ability to restrict transfers at the separate account level, we note that the disclosure requirements do not require issuers of variable insurance contracts, or underlying funds, to adopt any particular restrictions on transfers of contract value. It is the responsibility of insurance company depositors for separate accounts and underlying funds to adopt and implement appropriate and workable policies, procedures, and restrictions with respect to frequent transfers among sub-accounts. The rules that we are adopting simply require disclosure of these policies, procedures, and restrictions in the variable insurance contract prospectus and the underlying fund prospectus.

*B. Disclosure of Circumstances Under Which Funds Will Use Fair Value Pricing and the Effects of Such Use*

The Commission is adopting, with one modification to address commenters' concerns, proposed amendments to the Instruction to Item 6(a)(1) of Form N–1A, and adding a corresponding Instruction to Form N–3, to clarify that all mutual funds and managed separate accounts that offer variable annuities, other than money market funds, are required to explain briefly in their prospectuses both the circumstances under which they will use fair value pricing and the effects of using fair value pricing.[34] We are adopting these amendments to clearly reflect that funds are required to use fair value prices any time that market quotations for their portfolio securities are not readily available (including

[27] *See* Investment Company Act Release No. 25258 (Nov. 8, 2001) [66 FR 57614, 57614–57615 (Nov. 15, 2001)] (describing ETFs).

[28] Item 8(e) of Form N–3. Form N–3 is used by all insurance company separate accounts offering variable annuity contracts that are registered under the Investment Company Act as management investment companies.

[29] Item 7(e) of Form N–4. Form N–4 is used by all insurance company separate accounts offering variable annuity contracts that are registered under the Investment Company Act as unit investment trusts. *See* section 4(2) of the Investment Company Act [15 U.S.C. 80a–4(2)] (defining "unit investment trust").

[30] Item 6(f) of Form N–6. Form N–6 is used by all insurance company separate accounts offering variable life insurance policies that are registered under the Investment Company Act as unit investment trusts.

[31] Proposing Release, *supra* note 5, 68 FR at 70407.

[32] Similar to the modification we are making to Item 6(e)(4)(iii) of Form N–1A, we are adding a statement clarifying that a separate account's disclosure regarding whether its restrictions to prevent or minimize frequent transfers among sub-accounts are uniformly applied must indicate whether each such restriction applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker dealers, transfer agents, and third party administrators. *See* Item 8(e)(iv)(C) of Form N–3; Item 7(e)(iv)(C) of Form N–4; Item 6(f)(4)(iii) of Form N–6. In some cases, this disclosure may not be relevant to insurance company separate accounts issuing variable insurance contracts because the contracts are held in the name of the contractowner and not an intermediary.

[33] Increases in the cash values of variable annuity and variable life insurance contracts—known as the "inside buildup"—are tax-deferred until the contract's surrender or maturity. *See* I.R.C. 7702(g) (1986).

[34] Instruction to Item 6(a)(1) of Form N–1A; Instruction to Item 11(c) of Form N–3. We are not amending Forms N–4 and N–6 because these forms are used by insurance company separate accounts that are organized as unit investment trusts and typically hold only securities issued by underlying mutual funds. These underlying mutual funds are responsible for valuing their own portfolio securities, including, as required, through fair valuation.

when they are not reliable).[35] Money market funds will not be subject to the requirement to disclose the circumstances under which they will use fair value pricing and the effects of such use, because such funds are subject to rule 2a–7 under the Investment Company Act, which contains its own detailed pricing requirements.[36] Commenters generally supported this proposed amendment.

The required disclosure regarding the circumstances under which a fund will use fair value pricing should be specific to the fund. For example, if a fund invests exclusively in frequently traded exchange listed securities of large capitalization domestic issuers and calculates its NAV as of the time the exchange typically closes, there may be very limited circumstances in which it will use fair value pricing (*e.g.*, if the exchange on which a portfolio security is principally traded closes early or if trading in a particular portfolio security was halted during the day and did not resume prior to the fund's NAV calculation). By contrast, if a fund invests primarily in securities that are traded on overseas markets, we would expect a fuller discussion of the circumstances under which the fund will use fair value pricing, such as specific events occurring after the close of the overseas exchange that would cause the fund to use fair value pricing.[37] The instruction we are adopting will also require a fund to explain the effects of using fair value pricing, similar to the current instruction.[38]

A number of commenters expressed concern that requiring specific disclosure of the circumstances under which a fund will use fair value pricing might help arbitrageurs to identify circumstances in which they could take unfair advantage of a fund's pricing policies. In addition, one such commenter argued that limiting funds to specific formulas that can be changed only by registration statement amendments or supplements may prove unworkable in volatile markets or business emergencies. These commenters recommended that the Commission require only general disclosure of the circumstances under which a fund will use fair value pricing. We wish to clarify that neither the requirement we are adopting, nor the current requirement, requires disclosure of the specific methodologies and formulas that a fund uses to determine fair value prices. For example, if a fund has a policy to fair value price securities traded on overseas markets in the event that there is a specific percentage change in the value of one or more domestic securities indices following the close of the overseas markets, the fund will not be required to disclose the specific percentage change that would trigger fair valuation. In addition, a fund's disclosure need not be so specific that the fund may not adjust the triggering events from time to time in response to market events or other causes.

Our amendments will require the fair value pricing disclosure to be included in a fund's prospectus, as proposed. Some commenters suggested that the required information about fair value pricing may be more appropriately included in a fund's SAI. In addition, some commenters suggested that the location of the disclosure should depend on the significance of market timing as a potential problem for the fund; thus, in cases where market timing is a more important concern, such as foreign stock funds that are subject to time-zone arbitrage, the information should be included in the prospectus itself. We continue to believe, however, that information about the circumstances under which a fund will use fair value pricing and the effects of using fair value pricing should be included in the prospectus together with other key information about a fund. We also believe that it is preferable for investors if the information is uniformly located in one document, rather than located in the prospectus for some funds and the SAI for others. In addition, the instruction requires the disclosure regarding fair value pricing to be brief, and, as noted above, funds will not be required to provide detailed information about their fair value pricing methodologies and formulas.

One commenter also requested clarification regarding how the instruction would apply in the case of a mutual fund that invests in other mutual funds, such as a fund of funds. The commenter noted that each mutual fund in which a fund is invested will have to include in its own prospectus a brief explanation of the circumstances under which it will use fair value pricing and the effects of such use. We are adding language to the instruction to clarify that, with respect to any portion of a fund's assets that are invested in one or more mutual funds, the fund may briefly explain that the fund's NAV is calculated based upon the NAVs of the mutual funds in which the fund invests, and that the prospectuses for those funds explain the circumstances under which they will use fair value pricing and the effects of using fair value pricing.[39]

### *C. Selective Disclosure of Fund Portfolio Holdings*

We are adopting, with modifications to address commenters' concerns, amendments to Form N–1A that will require mutual funds to disclose both their policies and procedures with respect to the disclosure of their portfolio securities and any ongoing arrangements to make available information about their portfolio securities.[40] We are also adopting parallel amendments to Form N–3 for managed separate accounts that issue variable annuities.[41] These amendments are intended to provide greater transparency of fund practices with respect to the disclosure of the fund's portfolio holdings, and to reinforce funds' and advisers' obligations to

[35] *See* Investment Company Act Release No. 14244 (Nov. 21, 1984) [49 FR 46558, 46559–46660 n.7 (Nov. 27, 1984)] (proposing amendments to rule 22c–1).

[36] Rule 2a–7(c) under the Investment Company Act [17 CFR 270.2a–7(c)] (describing the requirements for calculating the share price of money market funds using the amortized cost and penny-rounding methods).

[37] We note that rule 38a–1 under the Investment Company Act [17 CFR 270.38a–1] requires funds to adopt policies and procedures that require a fund to monitor for circumstances that may necessitate the use of fair value prices, establish criteria for determining when market quotations are no longer reliable for a particular portfolio security, provide a methodology or methodologies by which the fund determines the current fair value of the portfolio security, and regularly review the appropriateness and accuracy of the method used in valuing securities and make any necessary adjustments. *See* Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74713, 74718 (Dec. 24, 2003)].

[38] *See* Investment Company Act Release No. 23064 (Mar. 13, 1998) [63 FR 13916 (Mar. 23, 1998)] (adopting Instruction to Item 7(a)(1) of Form N–1A requiring a brief explanation of the circumstances and the effects of using fair value pricing). In the Proposing Release, we stated that we would expect that the description of the effects of using fair value pricing would be fund specific, *e.g.*, minimizing the possibilities for time-zone arbitrage, in the case of a fund investing in overseas markets. *See* Proposing Release, *supra* note 5, 68 FR at 70408. As one commenter noted, minimizing the possibilities for time-zone arbitrage may be more appropriately characterized as an objective of fair value pricing than a guaranteed result or effect.

[39] Instruction to Item 6(a)(1) of Form N–1A; Instruction to Item 11(c) of Form N–3.

[40] Items 4(d) and 11(f) of Form N–1A. A fund's compliance policies and procedures under rule 38a–1 under the Investment Company Act should address potential misuses of nonpublic information, including the disclosure to third parties of material information about the fund's portfolio, its trading strategies, or pending transactions. Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74714, 74719 (Dec. 24, 2003)].

[41] Items 5(f) and 19(e) of Form N–3. We are not amending Forms N–4 and N–6 because these forms are used by insurance company separate accounts that are organized as unit investment trusts, which typically hold only securities issued by underlying mutual funds.

prevent the misuse of material, nonpublic information.

We reemphasize, as we stated in the Proposing Release, that a mutual fund or investment adviser that discloses the fund's portfolio securities may only do so consistent with the antifraud provisions of the federal securities laws and the fund's or adviser's fiduciary duties. Disclosure provided pursuant to these amendments would not make lawful conduct that is otherwise unlawful. Divulging nonpublic portfolio holdings to selected third parties is permissible only when the fund has legitimate business purposes for doing so and the recipients are subject to a duty of confidentiality, including a duty not to trade on the nonpublic information.[42] Examples of instances in which selective disclosure of a fund's portfolio securities may be appropriate, subject to confidentiality agreements and trading restrictions, include disclosure for due diligence purposes to an investment adviser that is in merger or acquisition talks with the fund's current adviser, disclosure to a newly hired investment adviser or sub-adviser prior to commencing its duties, or disclosure to a rating agency for use in developing a rating.

1. Policies and Procedures

Under the amendments we are adopting, a fund will be required to describe its policies and procedures with respect to the disclosure of its portfolio securities in its SAI, and to state in its prospectus that a description of the fund's policies and procedures is available in its SAI and, if applicable, on its Web site (*i.e.*, if the fund posts this description on its Web site).[43] Commenters generally supported these proposed requirements, including the proposed inclusion of the fund's policies and procedures in the SAI.

Under our amendments, the SAI description of the mutual fund's policies and procedures with respect to the disclosure of its portfolio securities will be required to include:

- How the policies and procedures apply to disclosure to different categories of persons, including individual investors, institutional investors, intermediaries that distribute the fund's shares, third-party service providers, rating and ranking organizations, and affiliated persons of the fund;[44]
- Any conditions or restrictions placed on the use of information about portfolio securities that is disclosed, including any requirement that the information be kept confidential or prohibitions on trading based on the information, and any procedures to monitor the use of this information;[45]
- The frequency with which information about portfolio securities is disclosed, and the length of the lag, if any, between the date of the information and the date on which the information is disclosed;[46]
- Any policies and procedures with respect to the receipt of compensation or other consideration by the fund, its investment adviser, or any other party in connection with the disclosure of information about portfolio securities;[47]
- The individuals or categories of individuals who may authorize disclosure of the fund's portfolio securities;[48]
- The procedures that the fund uses to ensure that disclosure of information about portfolio securities is in the best interests of fund shareholders, including procedures to address conflicts between the interests of fund shareholders, on the one hand, and those of the fund's investment adviser; principal underwriter; or any affiliated person of the fund, its investment adviser, or its principal underwriter, on the other;[49] and
- The manner in which the board of directors exercises oversight of disclosure of the fund's portfolio securities.[50]

A mutual fund's disclosure of its policies and procedures with respect to the disclosure of its portfolio securities will be required to include any policies and procedures of the fund's investment adviser, or any other third party, that the fund uses or that are used on the fund's behalf.[51]

We are clarifying that a fund may satisfy the requirement to disclose the persons who may authorize disclosure of the fund's portfolio holdings by describing either the individuals or categories of individuals who may authorize disclosure.[52] We agree with one commenter that disclosure of these persons by category may provide investors with more relevant information than the names of select individuals. We emphasize, however, that funds will be required to identify either individuals (*e.g.*, a fund's chief executive officer) or categories of individuals (*e.g.*, a fund's executive officers) and not entities or categories of entities. Thus, it would not suffice for a fund to disclose that the fund's investment adviser or its service providers may authorize disclosure of portfolio holdings.

2. Arrangements To Make Portfolio Holdings Available

We are also adopting, with modifications, a requirement that a mutual fund describe in its SAI any ongoing arrangements to make available information about the fund's portfolio securities to any person, including the identity of the persons who receive information pursuant to such arrangements and any compensation or other consideration received by the fund, its investment adviser, or any other party in connection with each such arrangement.[53] An instruction to this requirement clarifies that the consideration required to be disclosed includes any agreement to maintain assets in the fund or in other investment

[42] *Cf.* Investment Company Act Release No. 24209 (Dec. 20, 1999) [64 FR 72590, 72595 (Dec. 28, 1999)] (proposing exemption from Regulation FD for disclosure of material information to persons who have expressly agreed to maintain the information in confidence, and noting that such a confidentiality agreement would also include an agreement not to trade on the nonpublic information).

[43] Items 4(d) and 11(f)(1) of Form N–1A; Items 5(f) and 19(e)(i) of Form N–3.

[44] Item 11(f)(1)(i) of Form N–1A. With respect to managed separate accounts issuing variable annuity contracts registered on Form N–3, the categories will include contractowners, participants, annuitants, and beneficiaries. Item 19(e)(i)(A) of Form N–3.

[45] Item 11(f)(1)(ii) of Form N–1A; Item 19(e)(i)(B) of Form N–3.

[46] Item 11(f)(1)(iii) of Form N–1A; Item 19(e)(i)(C) of Form N–3.

[47] Item 11(f)(1)(iv) of Form N–1A. With respect to managed separate accounts issuing variable annuity contracts registered on Form N–3, this description will also be required to include any policies and procedures with respect to the receipt of compensation or other consideration by the sponsoring insurance company. Item 19(e)(i)(D) of Form N–3. *See* Section II.C.2., "Arrangements to Make Portfolio Holdings Available," below (discussing restrictions on receipt of consideration in connection with disclosure of portfolio holdings).

[48] Item 11(f)(1)(v) of Form N–1A; Item 19(e)(i)(E) of Form N–3.

[49] Item 11(f)(1)(vi) of Form N–1A. With respect to managed separate accounts issuing variable annuity contracts registered on Form N–3, this description will be required to include the procedures that are used to ensure that disclosure of information about portfolio securities is in the best interests of contractowners, participants, annuitants, and beneficiaries, including procedures to address conflicts between the interests of such persons, on the one hand, and those of the separate account's investment adviser or principal underwriter; the sponsoring insurance company; or any affiliated person of the separate account, its investment adviser or principal underwriter, or the sponsoring insurance company, on the other. Item 19(e)(i)(F) of Form N–3.

[50] Item 11(f)(1)(vii) of Form N–1A; Item 19(e)(i)(G) of Form N–3.

[51] Instruction to Item 11(f)(1) of Form N–1A; Instruction to Item 19(e)(i) of Form N–3.

[52] Item 11(f)(1)(v) of Form N–1A; Item 19(e)(i)(E) of Form N–3.

[53] Item 11(f)(2) of Form N–1A. With respect to managed separate accounts issuing variable annuity contracts registered on Form N–3, disclosure of any compensation or other consideration received by the sponsoring insurance company will also be required. Item 19(e)(ii) of Form N–3.

companies or accounts managed by the fund's investment adviser or by any affiliated person of the investment adviser.[54] As indicated above, however, divulging portfolio holdings to selected third parties is permissible only when the fund has legitimate business purposes for doing so. The Commission is not aware of any situation where the receipt of consideration by the fund's investment adviser or its affiliates in connection with an arrangement to make available information about the fund's portfolio securities would be a legitimate business purpose. With respect to any ongoing arrangements, a fund will also be required to describe:

- Any conditions or restrictions placed on the use of information about portfolio securities that is disclosed, including any requirement that the information be kept confidential or prohibitions on trading based on the information, and any procedures to monitor the use of this information;
- The frequency with which information about portfolio securities is disclosed, and the length of the lag, if any, between the date of the information and the date on which the information is disclosed; and
- The individuals or categories of individuals who may authorize disclosure of the fund's portfolio securities.[55]

Several commenters objected to the application of the proposed requirement for disclosure of ongoing arrangements to a number of different types of potential recipients of portfolio holdings information, including third-party providers of auditing, custody, proxy voting, and other services for the fund, as well as rating and ranking organizations. These commenters argued that detailed information about the fund's sharing of portfolio holdings information with these third-party service providers, where necessary to enable the provider to perform services for the fund, would not be useful to investors. The commenters also argued that a fund could have arrangements to provide portfolio holdings information to other types of recipients, such as financial planners for use in providing asset allocation services to their clients, or institutional investors who are considering whether to invest in a fund, and that individual identification of these recipients would be burdensome and could raise confidentiality concerns.

We have determined not to modify the proposed requirement as suggested by these commenters, because we believe that investors have a significant interest in knowing how widely and with whom the fund shares its portfolio holdings information. Further, we do not believe that the required disclosure of arrangements to make available information about the fund's portfolio securities will be overly burdensome, because circumstances in which the fund may have legitimate business purposes for entering into an arrangement to selectively disclose its portfolio holdings information typically would be limited. In most cases, these arrangements would be with a relatively small number of service providers to the fund.

One commenter recommended that the Commission clarify that any arrangement in which a fund provides publicly available portfolio holdings information to any person would not be covered by the requirement to disclose ongoing arrangements. Another commenter asked that the Commission confirm that posting information to a Web site constitutes public disclosure.

We are adding two exceptions from the requirement to describe ongoing arrangements which we believe will address these commenters' concerns. First, a mutual fund will not be required to describe an ongoing arrangement to make available information about the fund's portfolio securities if, not later than the time that the fund makes available the portfolio securities information to any person pursuant to the arrangement, the fund discloses the information in a publicly available filing with the Commission that is required to include the information.[56] A fund may not satisfy this exception by making a voluntary filing of its portfolio information with the Commission, *e.g.*, a filing on Form N–Q to disclose month-end portfolio holdings.

Second, a fund will not be required to describe an ongoing arrangement to make available information about its portfolio securities if it (i) makes that information available on its Web site; and (ii) discloses in its prospectus the availability of the information on its Web site.[57] Specifically, a fund will not be required to describe such an arrangement if it makes the portfolio securities information available to any person pursuant to the arrangement no earlier than the day next following the day on which the fund makes the information available on its website in the manner specified in its prospectus.[58] In order to rely on this exception, a fund will be required to disclose in its current prospectus that the portfolio securities information will be available on its website, including (i) the nature of the information that will be available, including both the date as of which the information will be current (*e.g.*, month-end) and the scope of the information (*e.g.*, complete portfolio holdings, largest 20 holdings); (ii) the date when the information will first become available and the period for which the information will remain available, which shall end no earlier than the date on which the fund files a Form N–CSR or Form N–Q for the period that includes the date as of which the Web site information is current; and (iii) the location on the fund's website where either the information or a prominent hyperlink (or series of prominent hyperlinks) to the information will be available.[59]

These exceptions will permit a fund to omit disclosure of arrangements to make portfolio information available in these two specific situations, when the information is, in any event, either publicly available in a required filing with the Commission or readily accessible on the fund's Web site.[60] This will permit a fund, for example, to e-mail its portfolio holdings information regularly to investors who had requested this information without being required to disclose the names of all the investors on the e-mail list, provided that the information is also available through one of the two means specified in the rule.

### *D. Compliance Date*

The effective date for these amendments is May 28, 2004. All initial registration statements on Forms N–1A, N–3, N–4, and N–6, and all post-effective amendments to effective registration statements on these forms,

[54] Instruction 1 to Item 11(f)(2) of Form N–1A. With respect to managed separate accounts issuing variable annuity contracts registered on Form N–3, the consideration required to be disclosed will also include any agreement to maintain assets in other investment companies or accounts managed or sponsored by the sponsoring insurance company of the registrant or by an affiliated person of such sponsoring insurance company. Instruction 1 to Item 19(e)(ii) of Form N–3.

[55] Item 11(f)(2) of Form N–1A; Item 19(e)(ii) of Form N–3.

[56] Instruction 2 to Item 11(f)(2) of Form N–1A; Instruction 2 to Item 19(e)(ii) of Form N–3. Currently, filings that are required to include portfolio securities information would include a fund's required semi-annual filings on Form N–CSR [17 CFR 249.331; 17 CFR 274.128] and required filings for the first and third fiscal quarters on Form N–Q [17 CFR 249.332; 17 CFR 274.130].

[57] Instruction 3 to Item 11(f)(2) of Form N–1A; Instruction 3 to Item 19(e)(ii) of Form N–3.

[58] Instruction 3(a) to Item 11(f)(2) of Form N–1A; Instruction 3.a. to Item 19(e)(ii) of Form N–3.

[59] Instruction 3(b) to Item 11(f)(2) of Form N–1A; Instruction 3.b. to Item 19(e)(ii) of Form N–3.

[60] Except where specifically provided by Commission rule, making information accessible on a website is not necessarily adequate disclosure under the federal securities laws.

filed on or after December 5, 2004, must include the disclosure required by the amendments. We are selecting this compliance date in order to coordinate with the compliance date for new rule 38a–1 under the Investment Company Act, which is October 5, 2004. Rule 38a–1 requires fund boards to adopt policies and procedures with respect to market timing, pricing of portfolio securities, and misuses of nonpublic information, including the disclosure to third parties of material information about the fund's portfolio.[61] A compliance date of December 5, 2004, will provide sufficient time for funds and their boards to review and update their policies and procedures in connection with the implementation of rule 38a–1, and to draft new disclosure to reflect these updated policies and procedures. Generally, a fund should file its first post-effective amendment complying with the new disclosure requirements pursuant to rule 485(a) under the Securities Act because such post-effective amendments typically will involve a number of material changes that do not fall within the scope of rule 485(b).[62]

### III. Paperwork Reduction Act

As explained in the Proposing Release, certain provisions of the amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 [44 U.S.C. 3501, *et seq.*]. The titles for the collections of information are: (1) "Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies"; (2) "Form N–3—Registration Statement of Separate Accounts Organized as Management Investment Companies"; (3) "Form N–4—Registration Statement of Separate Accounts Organized as Unit Investment Trusts"; and (4) "Form N–6 under the Investment Company Act of 1940 and the Securities Act of 1933, Registration Statement of Insurance Company Separate Accounts Registered as Unit Investment Trusts that Offer Variable Life Insurance Policies." 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.

Form N–1A (OMB Control No. 3235–0307), Form N–3 (OMB Control No. 3235–0316), Form N–4 (OMB Control No. 3235–0318), and Form N–6 (OMB Control No. 3235–0503) were adopted pursuant to section 8(a) of the Investment Company Act [15 U.S.C. 80a–8(a)] and section 5 of the Securities Act [15 U.S.C. 77e]. We published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted these proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB approved the collections of information for the amendments to Forms N–1A, N–3, N–4 and N–6. We received no comments on the proposed collection of information requirements.

The amendments adopted in this release will amend Form N–1A to require mutual funds to provide improved disclosure regarding their policies and procedures with respect to frequent purchases and redemptions of fund shares. The amendments will also amend Forms N–3, N–4, and N–6 to require similar disclosure in prospectuses for insurance company separate accounts offering variable insurance contracts, with respect to frequent transfers among sub-accounts. In addition, the Commission is adopting amendments to instructions to Forms N–1A and N–3 that clarify that all mutual funds and managed separate accounts that issue variable annuities (other than money market funds) are required to explain in their prospectuses the circumstances under which they will use fair value pricing, and the effects of using fair value pricing. Finally, the Commission is adopting amendments to Form N–1A to require disclosure regarding mutual funds' policies and procedures with respect to the selective disclosure of their portfolio holdings to any person, and parallel amendments to Form N–3 for managed separate accounts that issue variable annuities.

*Form N–1A*

Form N–1A, including the amendments, contains collection of information requirements. The likely respondents to this information collection are open-end funds registering with the Commission. Compliance with the disclosure requirements of Form N–1A is mandatory. Responses to the disclosure requirements are not confidential.

We continue to estimate that the amendments will increase the hour burden per portfolio per filing of an initial registration statement by 10 hours and will increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement by 4 hours. The estimated total annual hour burden for all funds for preparation and filing of initial registration statements and post-effective amendments to Form N–1A is 1,142,296 hours.[63]

*Form N–3*

Form N–3, including the amendments, contains collection of information requirements. The likely respondents to this information collection are separate accounts, organized as management investment companies offering variable annuities, registering with the Commission on Form N–3. Compliance with the disclosure requirements of Form N–3 is mandatory. Responses to the disclosure requirements are not confidential.

We continue to estimate that the amendments will increase the hour burden per portfolio per filing of an initial registration statement on Form N–3 by 10 hours and will increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement on Form N–3 by 4 hours. The estimated total annual hour burden for all funds for preparation and filing of initial registration statements and post-effective amendments on Form N–3 is 34,832 hours.[64]

---

[61] *See* Investment Company Act Release No. 26287 (Dec. 11, 2003) [68 FR 70402 (Dec. 17, 2003)].

[62] A post-effective amendment may only be filed under rule 485(b) [17 CFR 230.485(b)] if it is filed for one or more specified purposes, including to make non-material changes to the registration statement. A post-effective amendment filed for any purpose not specified in rule 485(b) must be filed pursuant to rule 485(a) under the Securities Act [17 CFR 230.485(a)]. A post-effective amendment filed under rule 485(b) may become effective immediately upon filing, while a post-effective amendment filed under rule 485(a) generally becomes effective either 60 days or 75 days after filing, unless the effective date is accelerated by the Commission.

[63] This estimate differs from the estimate of 1,107,078 hours contained in the Proposing Release due to the following additional annual hour burdens for Form N–1A that were not taken into account in the Proposing Release: 2,252 hours resulting from the proposed rules relating to sales load breakpoint disclosure; 1,968 hours resulting from the proposed rules relating to disclosure of sales loads and revenue sharing in connection with the proposals for new mutual fund confirmation and point of sale disclosure; and 30,998 hours resulting from proposed amendments relating to portfolio manager disclosure. The estimate is based on the following calculation: (822.5 hours per portfolio per initial registration statement × 483 portfolios) + (108.5 hours per portfolio per post-effective amendment × 6,542 portfolios) + 2,252 hours + 1,968 hours + 30,998 hours = 1,142,296 hours.

[64] This estimate differs from the estimate of 34,662 hours contained in the Proposing Release due to an additional annual hour burden of 170 hours for Form N–3 resulting from proposed amendments relating to portfolio manager disclosure that was not taken into account in the Proposing Release. The estimate is based on the following calculation: (11,144.4 hours for filing initial registration statements) + (23,517.8 hours for filing post-effective amendments) + 170 hours = 34,832 hours.

*Form N–4*

Form N–4, including the amendments, contains collection of information requirements. The likely respondents to this information collection are separate accounts, organized as unit investment trusts that offer variable annuity contracts, registering with the Commission on Form N–4. Compliance with the disclosure requirements of Form N–4 is mandatory. Responses to the disclosure requirements are not confidential.

We continue to estimate that the amendments will increase the hour burden per filing of an initial registration statement on Form N–4 by 5 hours and will increase the hour burden per filing of a post-effective amendment to a registration statement on Form N–4 by 2 hours. The estimated total annual hour burden for separate accounts for preparation and filing of initial registration statements and post-effective amendments on Form N–4 is 288,701 hours.[65]

*Form N–6*

Form N–6, including the amendments, contains collection of information requirements. The likely respondents to this information collection are separate accounts, organized as unit investment trusts that offer variable life insurance policies, registering with the Commission on Form N–6. Compliance with the disclosure requirements of Form N–6 is mandatory. Responses to the disclosure requirements are not confidential.

We continue to estimate that the amendments will increase the hour burden per filing of an initial registration statement on Form N–6 by 5 hours, and will increase the hour burden per filing of a post-effective amendment that is an annual update on Form N–6 by 2 hours. The estimated total annual hour burden for separate accounts for preparation and filing of initial registration statements and post-effective amendments on Form N–6 is 52,100 hours.[66]

## IV. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The amendments that the Commission is adopting will require mutual funds to provide enhanced disclosure about their policies and procedures with respect to frequent purchases and redemptions of fund shares. Specifically, the amendments:

- Require a mutual fund to describe in its prospectus the risks, if any, that frequent purchases and redemptions of fund shares may present for other shareholders;
- Require a mutual fund to state in its prospectus whether or not the fund's board of directors has adopted policies and procedures with respect to frequent purchases and redemptions of fund shares and, if the board has not adopted any such policies and procedures, state the specific basis for the view of the board that it is appropriate for the fund not to have such policies and procedures;
- Require a mutual fund to describe in its prospectus any policies and procedures for deterring frequent purchases and redemptions of fund shares, and in its SAI any arrangements to permit frequent purchases and redemptions of fund shares; and
- Require similar disclosure in prospectuses for insurance company separate accounts offering variable insurance contracts, with respect to frequent transfers among sub-accounts.

The Commission is also adopting amendments to clarify instructions to its registration forms for mutual funds and insurance company managed separate accounts that offer variable annuities to require that all such funds (other than money market funds) explain in their prospectuses both the circumstances under which they will use fair value pricing and the effects of using fair value pricing.

In addition, the amendments require mutual funds, and insurance company managed separate accounts that offer variable annuities, to disclose their policies with respect to the disclosure of portfolio holdings information. The amendments:

- Require a fund to describe in its SAI any policies and procedures with respect to the disclosure of the fund's portfolio securities to any person and any ongoing arrangements to make available information about the fund's portfolio securities to any person; and
- Require a fund to state in its prospectus that a description of the policies and procedures is available in the fund's SAI, and on the fund's website, if applicable.

*A. Benefits*

The amendments we are adopting to our registration forms will benefit investors in a number of respects. First, the amendments will benefit fund investors by providing them with more detailed information about mutual fund practices relating to frequent purchases and redemptions of fund shares (or, in the case of insurance company separate accounts offering variable insurance products, frequent transfers of contract value among sub-accounts). The amendments are intended to require mutual funds and insurance company separate accounts to describe with specificity the restrictions they place on frequent purchases and redemptions (or frequent transfers among sub-accounts), if any, and the circumstances under which each such restriction will not apply. Market timing arbitrage strategies often involve such frequent purchases and redemptions of mutual fund shares or frequent transfers among sub-accounts of insurance company separate accounts. By increasing transparency of funds' policies and procedures in this area, the amendments are designed to help restore investor confidence in the fairness of fund operations and in the practices and procedures of intermediaries selling fund shares. This additional disclosure will enable investors to assess funds' risks, policies, and procedures in this area and determine if a fund's policies and procedures are in line with the investor's expectations. In addition, increasing transparency regarding arrangements to permit frequent purchases and redemptions of fund shares (or frequent transfers among sub-accounts) and selective disclosure of portfolio holdings information may benefit fund shareholders by deterring arrangements motivated by considerations of the interests of the fund's adviser rather than the interests of fund shareholders.

Second, the amendments to Forms N–1A and N–3 relating to fair value pricing will benefit investors by clarifying that all mutual funds and managed separate accounts that offer variable annuities, other than money market funds, are required to explain both the circumstances under which they will use fair value pricing and the effects of using such pricing. These amendments will clearly reflect that funds are required to use fair value prices any time that market quotations for their portfolio securities are not readily available (including when they are not reliable). Fair valuation of a fund's portfolio securities, which is required under certain circumstances, can serve to foreclose arbitrage opportunities available to market timers.

Finally, the amendments to Forms N–1A and N–3 relating to funds' policies and procedures with respect to the

[65] This estimate is the same as the estimate in the Proposing Release. This estimate is based on the following calculation: (43,717 hours for filing initial registration statements) + (244,984 hours for filing post-effective amendments) = 288,701 hours.

[66] This estimate is the same as the estimate in the Proposing Release. This estimate is based on the following calculation: (38,512 hours for filing initial registration statements) + (10,088 hours for filing post-effective amendments that are annual updates) + (3,500 hours for other post-effective amendments) = 52,100 hours.

selective disclosure of portfolio holdings information may benefit investors by providing greater transparency of fund practices relating to the disclosure of the fund's portfolio holdings, and by reinforcing funds' and advisers' obligations to prevent the misuse of material, non-public information.

*B. Costs*

The amendments will impose new requirements on mutual funds to provide disclosure of their policies and procedures with respect to frequent purchases and redemptions of fund shares (or frequent transfers of contract value among sub-accounts, in the case of insurance company separate accounts offering variable insurance contracts), and selective disclosure of portfolio holdings information. We estimate that complying with the new disclosure requirements will entail a relatively small financial burden. The information regarding a fund's policies and procedures in these areas should be readily available to management and the board of directors of a fund. Therefore, we expect that the cost of compiling and reporting this information should be limited.

The amendments will require additional prospectus disclosure by a mutual fund regarding its policies and procedures relating to frequent purchases and redemptions by fund shareholders and additional prospectus disclosure by an insurance company separate account that issues variable insurance contracts regarding its policies and procedures relating to frequent transfers among sub-accounts. In addition, the amendments will require disclosure in the SAI for these registrants of arrangements to permit frequent purchases and redemptions (or frequent transfers among sub-accounts, in the case of insurance company separate accounts issuing variable insurance contracts). In addition, the amendments will require each mutual fund and insurance company managed separate account to describe in its SAI any policies and procedures regarding the disclosure of the fund's portfolio holdings information, and to state in its prospectus that a description of those policies and procedures is available in the fund's SAI.[67] These costs may include both internal costs (for attorneys and other non-legal staff of a fund, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and typesetting of the disclosure).[68] For purposes of the Paperwork Reduction Act, we have estimated that the new disclosure requirements will add 35,545 hours to the burden of completing Forms N–1A, N–3, N–4, and N–6.[69] We estimate that this additional burden will equal total internal costs of $2,977,605 annually, or approximately $784 per fund.[70]

The external costs of providing the new prospectus disclosure relating to frequent purchases and redemptions of mutual fund shares and frequent transfers among sub-accounts of insurance company separate accounts may or may not be significant, depending on the complexity of a fund's policies and procedures in these areas, the extent to which restrictions on frequent purchases and redemptions or transfers among sub-accounts apply uniformly in all cases or will not be imposed under certain circumstances, and the extent to which a fund currently provides specific disclosure in this area. We expect that the external costs of providing disclosure regarding arrangements to permit frequent purchases and redemptions of mutual fund shares and frequent transfers among sub-accounts of insurance company separate accounts will be minimal, because this disclosure will be included in the SAI, which is delivered to investors upon request. We also expect that the external costs of providing the new disclosure relating to each mutual fund's and insurance company managed separate account's policies and procedures with respect to disclosure of portfolio holdings information will be minimal, because the required description of a fund's policies and procedures with respect to the disclosure of the fund's portfolio securities to any person and any ongoing arrangements to make available information about the fund's portfolio securities will be required in the fund's SAI.[71]

## V. Consideration of Effects on Efficiency, Competition, and Capital Formation

Section 2(c) of the Investment Company Act [15 U.S.C. 80a–2(c)] and section 2(b) of the Securities Act [15 U.S.C. 77(b)] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The amendments are intended to provide greater transparency for mutual fund shareholders regarding a fund's policies and procedures with respect to frequent purchases and redemptions of fund shares (or frequent transfers of contract value among sub-accounts, in the case of insurance company separate accounts offering variable insurance contracts), and selective disclosure of portfolio holdings information.[72] These changes may improve efficiency. The enhanced disclosure requirements are intended to enable shareholders to make a more informed assessment as to whether a particular fund is in line with shareholders' investment objectives, which could promote more efficient allocation of investments by investors and more efficient allocation of assets among competing funds. The amendments may also improve competition, as enhanced disclosure may prompt funds to compete to provide investors with policies and

[67] The amendments clarifying mutual funds' and insurance company managed separate accounts' disclosure requirements with respect to fair value pricing are not expected to result in any significant costs.

[68] We note that, with respect to the amendments regarding mutual funds' policies and procedures with respect to frequent purchases and redemptions and insurance company separate accounts' policies and procedures with respect to frequent transfers among sub-accounts, in many cases funds currently provide disclosure in their prospectuses or elsewhere of the limitations that they place on frequent trading in order to discourage market timing.

[69] This represents 30,998 additional hours for Form N–1A, 728 additional hours for Form N–3, 3,269 additional hours for Form N–4, and 550 additional hours for Form N–6.

[70] These figures are based on a Commission estimate that approximately 3,800 investment companies will be subject to the amendments and an estimated hourly wage rate of $83.77. The estimate of the number of investment companies is based on data derived from the Commission's EDGAR filing system. The estimated wage rate is a blended rate, based on published hourly wage rates for assistant/associate general counsels ($82.05) and programmers ($42.05) in New York City, and the estimate that professional and non-professional staff will divide time equally on compliance with the disclosure requirements, yielding a weighted wage rate of $62.05 (($82.05×.50)+(42.05×.50))= $62.05). See Securities Industry Association, *Report on Monogement & Professional Earnings in the Securities Industry* 2003 (Sept. 2003). This weighted wage rate was then adjusted upward by 35% for overhead, reflecting the costs of supervision, space, and administrative support, to obtain the total per hour internal cost of $83.77 ($62.05×1.35)=$83.77). This estimate differs from the estimate in the Proposing Release, which was based on published compensation for compliance attorneys ($37.60) and programmers ($29.44) outside New York City, contained in the Securities Industry Association's *Report on Monogement ond Professionol Eornings in the Securities Industry 2002*.

[71] A fund will be required to state in its prospectus that a description of its policies and procedures is available in the fund's SAI, and on the fund's website, if applicable.

[72] The amendments clarifying mutual funds' and insurance company managed separate accounts' disclosure requirements with respect to fair value pricing are not expected to have a significant effect on efficiency, competition, and capital formation.

procedures that effectively protect long-term investors from harmful market timing, and from the misuse of portfolio holdings information through selective disclosure. Finally, the effects of the amendments on capital formation are unclear.

Although, as noted above, we believe that the amendments will benefit investors, the magnitude of the effect of the amendments on efficiency, competition, and capital formation, and the extent to which they will be offset by the costs of the amendments, are difficult to quantify. We note that, with respect to the amendments regarding funds' policies and procedures with respect to frequent purchases and redemptions (or frequent transfers among sub-accounts), in many cases funds currently provide disclosure in their prospectuses or elsewhere of the limitations that they place on frequent trading in order to discourage market timing.

We received one comment on the possible effects of the proposed amendments on competition, from a trade association affiliated with the variable life insurance industry. The commenter urged the Commission to modify the rule to prevent any anticompetitive impact, by implementing constructive market timing solutions that operate fairly across all product platforms. As discussed above, we believe that is important for issuers of variable insurance contracts to provide disclosure regarding their policies and procedures with respect to transfers of contract value that is as specific as the disclosure that will be required for mutual funds with respect to frequent purchases and redemptions of fund shares. Market timing of mutual funds through a variable annuity or variable life insurance contract, in the form of tax-free transfers of contract value among sub-accounts, can be as detrimental for investors in variable insurance products as market timing can be for investors in mutual funds.

## VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("Analysis") has been prepared in accordance with 5 U.S.C. 604, and relates to the form amendments under the Securities Act and the Investment Company Act that require funds to provide additional disclosure about their policies and procedures with respect to frequent purchases and redemptions of mutual fund shares (or, with respect to insurance company separate accounts, frequent transfers among sub-accounts) and selective disclosure of fund portfolio holdings to any person. An Initial Regulatory Flexibility Analysis ("IRFA"), which was prepared in accordance with 5 U.S.C. 603, was published in the Proposing Release.

### *A. Reasons for, and Objectives of, the Amendments*

Sections I and II of this Release describe the reasons for and objectives of the amendments. As discussed in detail above, the amendments adopted by the Commission include disclosure reforms intended to shed more light on market timing and selective disclosure of portfolio holdings information.

### *B. Significant Issues Raised by Public Comment*

In the IRFA for the proposed amendments, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the likely impact of the proposal on small entities, and the nature of any impact, and we asked commenters to provide any empirical data supporting the extent of the impact. We received no comment letters specifically on the IRFA, but one commenter requesting an extension of the compliance date stated that the Commission should be mindful of the costs that would be incurred by small mutual funds if successive disclosure changes are required, particularly in light of the compliance costs these funds face currently.

### *C. Small Entities Subject to the Rule*

The amendments adopted by the Commission will affect registered investment companies that are small entities. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[73] Approximately 145 investment companies registered on Form N–1A meet this definition.[74] We estimate that few, if any, registered separate accounts registered on Form N–3, N–4, or N–6 are small entities.[75]

### *D. Reporting, Recordkeeping, and Other Compliance Requirements*

The amendments will require a mutual fund to disclose in its prospectus both the risks to shareholders of the frequent purchase and redemption of fund shares, and the fund's policies and procedures with respect to frequent purchases and redemptions of fund shares. The amendments will require similar prospectus disclosure for insurance company separate accounts issuing variable insurance contracts. The amendments also clarify that all mutual funds and insurance company managed separate accounts that issue variable annuities, other than money market funds, are required to explain both the circumstances under which they will use fair value pricing, and the effects of using fair value pricing. Finally, the amendments require mutual funds and insurance company managed separate accounts that issue variable annuities to disclose their policies and procedures with respect to the disclosure of their portfolio securities to any person and any ongoing arrangements to make available information about their portfolio securities.

The Commission estimates some one-time formatting and ongoing costs and burdens that will be imposed on all funds, including funds that are small entities. We note, however, that in many cases funds currently provide disclosure in their prospectuses of the limitations that they place on frequent trading in order to discourage market timing. For purposes of the Paperwork Reduction Act, we have estimated that the new disclosure requirements will increase the hour burden per portfolio per filing of an initial registration statement on Forms N–1A and N–3 by 10 hours each and will increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement on each such form by 4 hours. For purposes of the Paperwork Reduction Act, we have estimated that the new disclosure requirements will increase the hour burden per portfolio per filing of an initial registration statement on Forms N–4 and N–6 by 5 hours each and will increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement on each such form by 2 hours. We estimate that this additional burden will increase total internal costs per fund by approximately $838 annually per portfolio for funds filing initial registration statements, and $335

[73] 17 CFR 270.0–10.

[74] This estimate is based on analysis by the Division of Investment Management staff of information from databases compiled by third-party information providers, including Morningstar, Inc. and Lipper.

[75] This estimate is based on figures compiled by Division of Investment Management staff regarding separate accounts registered on Forms N–3, N–4, and N–6. In determining whether an insurance company separate account is a small entity for purposes of the Regulatory Flexibility Act, the assets of insurance company separate accounts are aggregated with the assets of their sponsoring insurance companies. Rule 0–10(b) under the Investment Company Act [17 CFR 270.0–10(b)].

annually per portfolio for funds filing post-effective amendments, on Forms N–1A and N–3. We estimate that this additional burden will increase total internal costs per separate account by approximately $419 annually for filing an initial registration statement, and $168 annually for filing a post-effective amendment, on Forms N–4 and N–6.[76]

The external costs of providing the new prospectus disclosure relating to frequent purchases and redemptions of mutual fund shares and frequent transfers among sub-accounts of insurance company separate accounts that issue variable insurance contracts may or may not be significant, depending on the complexity of a fund's policies and procedures in these areas, the extent to which restrictions on frequent purchases and redemptions or frequent transfers among sub-accounts apply uniformly in all cases or will not be imposed under certain circumstances, and the extent to which a fund currently provides specific disclosure in this area. We expect that the external costs of providing disclosure regarding arrangements to permit frequent purchases and redemptions of mutual fund shares and frequent transfers among sub-accounts of insurance company separate accounts will be minimal, because this disclosure will be included in the SAI, which is delivered to investors upon request. We also expect that the external costs of providing the new disclosure relating to a mutual fund's or insurance company managed separate account's policies and procedures with respect to disclosure of portfolio holdings information will be minimal, because the required description of a fund's policies and procedures with respect to the disclosure of the fund's portfolio securities to any person and any ongoing arrangements to make available information about the fund's portfolio securities will be required in the fund's SAI.[77]

*E. Agency Action To Minimize Effect on Small Entities*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. The disclosure amendments will provide shareholders with greater transparency with respect to mutual funds' policies and procedures regarding frequent purchases and redemptions of fund shares (and, in the case of insurance company separate accounts that issue variable insurance contracts, frequent transfers among sub-accounts) and mutual funds' and insurance company managed separate accounts' policies and procedures regarding selective disclosure of their portfolio holdings. Different disclosure requirements for funds that are small entities may create the risk that the shareholders in these funds would not be as able as investors in larger funds to assess a fund's risks, policies, and procedures with respect to frequent purchases and redemptions of fund shares, as well as a fund's practices with respect to the disclosure of its portfolio holdings. We believe it is important for the disclosure that will be required by the amendments to be provided to shareholders by all funds, not just funds that are not considered small entities.

We have endeavored through these amendments to minimize the regulatory burden on all funds, including small entities, while meeting our regulatory objectives. For example, we have modified our proposal to extend the compliance date to December 5, 2004, to coordinate with the compliance date for new rule 38a–1 under the Investment Company Act. In addition, we have modified our proposals to include disclosure of arrangements by a fund to permit frequent purchases and redemptions in the SAI, rather than the prospectus. Small entities should benefit from the Commission's reasoned approach to the amendments to the same degree as other investment companies. Further clarification, consolidation, or simplification of the amendments for funds that are small entities would be inconsistent with the Commission's concern for investor protection. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context. Based on our past experience, we believe that the disclosure required by the amendments will be more useful to investors if there are enumerated informational requirements.

[76] These figures are based on an estimated hourly wage rate of $83.77. *See supra* note 70.

[77] The amendments clarifying mutual funds' and insurance company managed separate accounts' disclosure requirements with respect to fair value pricing are not expected to result in any significant costs.

**VII. Statutory Authority**

The Commission is adopting amendments to Forms N–1A, N–3, N–4, and N–6 pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and sections 8, 22, 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–22, 80a–24(a), 80a–29, and 80a–37].

**List of Subjects**

*17 CFR Part 239*

Reporting and recordkeeping requirements, Securities.

*17 CFR Part 274*

Investment companies, Reporting and recordkeeping requirements, Securities.

**Text of Rule and Form Amendments**

■ For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows.

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The authority citation for Part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

## PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 2. The authority citation for Part 274 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

**Note:** The text of Forms N–1A, N–3, N–4, and N–6 do not, and these amendments will not, appear in the Code of Federal Regulations.

■ 3. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

■ a. In Instruction 6 to Item 1(b)(1), revising the reference "Item 6(f)" to read "Item 6(g)";
■ b. In Instruction 6 to Item 1(b)(1), revising the reference "Item 6(f)(3)" to read "Item 6(g)(3)";
■ c. In Item 4, revising the title and adding new paragraph (d);
■ d. In Item 6, revising the Instruction to paragraph (a)(1);
■ e. In Item 6, redesignating paragraphs (e) and (f) as paragraphs (f) and (g), respectively;
■ f. In Item 6, adding paragraph (e);
■ g. In newly redesignated Item 6(f)(2)(i), revising the reference "paragraph (e)(1)" to read "paragraph (f)(1)";
■ h. In newly redesignated paragraph (g) of Item 6, revising the introductory text;
■ i. In paragraph (a)(2) of Item 7, revising the reference "Item 6(f)" to read "Item 6(g)";
■ j. In Item 11, adding paragraph (f); and
■ k. In Item 17, adding paragraph (e).

The additions and revisions read as follows:

**Form N–1A**

* * * * *

*Item 4. Investment Objectives, Principal Investment Strategies, Related Risks, and Disclosure of Portfolio Holdings*

* * * * *

(d) *Portfolio Holdings.* State that a description of the Fund's policies and procedures with respect to the disclosure of the Fund's portfolio securities is available (i) in the Fund's SAI; and (ii) on the Fund's website, if applicable.

* * * * *

*Item 6. Shareholder Information*

(a) * * *

(1) * * *

*Instruction:* A Fund (other than a Money Market Fund) must provide a brief explanation of the circumstances under which it will use fair value pricing and the effects of using fair value pricing. With respect to any portion of a Fund's assets that are invested in one or more open-end management investment companies that are registered under the Investment Company Act, the Fund may briefly explain that the Fund's net asset value is calculated based upon the net asset values of the registered open-end management investment companies in which the Fund invests, and that the prospectuses for these companies explain the circumstances under which those companies will use fair value pricing and the effects of using fair value pricing.

* * * * *

(e) *Frequent Purchases and Redemptions of Fund Shares.*

(1) Describe the risks, if any, that frequent purchases and redemptions of Fund shares by Fund shareholders may present for other shareholders of the Fund.

(2) State whether or not the Fund's board of directors has adopted policies and procedures with respect to frequent purchases and redemptions of Fund shares by Fund shareholders.

(3) If the Fund's board of directors has not adopted any such policies and procedures, provide a statement of the specific basis for the view of the board that it is appropriate for the Fund not to have such policies and procedures.

(4) If the Fund's board of directors has adopted any such policies and procedures, describe those policies and procedures, including:

(i) Whether or not the Fund discourages frequent purchases and redemptions of Fund shares by Fund shareholders;

(ii) Whether or not the Fund accommodates frequent purchases and redemptions of Fund shares by Fund shareholders; and

(iii) Any policies and procedures of the Fund for deterring frequent purchases and redemptions of Fund shares by Fund shareholders, including any restrictions imposed by the Fund to prevent or minimize frequent purchases and redemptions. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, third party administrators, and insurance companies. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(A) Any restrictions on the volume or number of purchases, redemptions, or exchanges that a shareholder may make within a given time period;

(B) Any exchange fee or redemption fee;

(C) Any costs or administrative or other fees or charges that are imposed on shareholders deemed to be engaged in frequent purchases and redemptions of Fund shares, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(D) Any minimum holding period that is imposed before an investor may make exchanges into another Fund;

(E) Any restrictions imposed on exchange or purchase requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(F) Any right of the Fund to reject, limit, delay, or impose other conditions on exchanges or purchases or to close or otherwise limit accounts based on a history of frequent purchases and redemptions of Fund shares, including the circumstances under which such right will be exercised.

(5) If applicable, include a statement, adjacent to the disclosure required by paragraphs (e)(1) through (e)(4) of this Item, that the SAI includes a description of all arrangements with any person to permit frequent purchases and redemptions of Fund shares.

* * * * *

(g) *Separate Disclosure Document.* A Fund may omit from the prospectus information about purchase and redemption procedures required by Items 6(b)–(d) and 7(a)(2), other than information that is also required by Item 6(e), and provide it in a separate document if the Fund:

* * * * *

*Item 11. Description of the Fund and Its Investments and Risks*

* * * * *

(f) *Disclosure of Portfolio Holdings.*

(1) Describe the Fund's policies and procedures with respect to the disclosure of the Fund's portfolio securities to any person, including:

(i) How the policies and procedures apply to disclosure to different categories of persons, including individual investors, institutional investors, intermediaries that distribute the Fund's shares, third-party service providers, rating and ranking organizations, and affiliated persons of the Fund;

(ii) Any conditions or restrictions placed on the use of information about portfolio securities that is disclosed, including any requirement that the information be kept confidential or prohibitions on trading based on the information, and any procedures to monitor the use of this information;

(iii) The frequency with which information about portfolio securities is disclosed, and the length of the lag, if any, between the date of the information and the date on which the information is disclosed;

(iv) Any policies and procedures with respect to the receipt of compensation or other consideration by the Fund, its

investment adviser, or any other party in connection with the disclosure of information about portfolio securities;

(v) The individuals or categories of individuals who may authorize disclosure of the Fund's portfolio securities (*e.g.*, executive officers of the Fund);

(vi) The procedures that the Fund uses to ensure that disclosure of information about portfolio securities is in the best interests of Fund shareholders, including procedures to address conflicts between the interests of Fund shareholders, on the one hand, and those of the Fund's investment adviser; principal underwriter; or any affiliated person of the Fund, its investment adviser, or its principal underwriter, on the other; and

(vii) The manner in which the board of directors exercises oversight of disclosure of the Fund's portfolio securities.

*Instruction:* Include any policies and procedures of the Fund's investment adviser, or any other third party, that the Fund uses, or that are used on the Fund's behalf, with respect to the disclosure of the Fund's portfolio securities to any person.

(2) Describe any ongoing arrangements to make available information about the Fund's portfolio securities to any person, including the identity of the persons who receive information pursuant to such arrangements. Describe any compensation or other consideration received by the Fund, its investment adviser, or any other party in connection with each such arrangement, and provide the information described by paragraphs (f)(1)(ii), (iii), and (v) of this Item with respect to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 11(f)(2) includes any agreement to maintain assets in the Fund or in other investment companies or accounts managed by the investment adviser or by any affiliated person of the investment adviser.

2. The Fund is not required to describe an ongoing arrangement to make available information about the Fund's portfolio securities pursuant to this Item, if, not later than the time that the Fund makes the portfolio securities information available to any person pursuant to the arrangement, the Fund discloses the information in a publicly available filing with the Commission that is required to include the information.

3. The Fund is not required to describe an ongoing arrangement to make available information about the Fund's portfolio securities pursuant to this Item if:

(a) the Fund makes the portfolio securities information available to any person pursuant to the arrangement no earlier than the day next following the day on which the Fund makes the information available on its website in the manner specified in its prospectus pursuant to paragraph (b); and

(b) the Fund has disclosed in its current prospectus that the portfolio securities information will be available on its website, including (1) the nature of the information that will be available, including both the date as of which the information will be current (*e.g.*, month-end) and the scope of the information (*e.g.*, complete portfolio holdings, Fund's largest 20 holdings); (2) the date when the information will first become available and the period for which the information will remain available, which shall end no earlier than the date on which the Fund files its Form N–CSR or Form N–Q with the Commission for the period that includes the date as of which the website information is current; and (3) the location on the Fund's website where either the information or a prominent hyperlink (or series of prominent hyperlinks) to where the information will be available.

* * * * *

*Item 17. Purchase, Redemption, and Pricing of Shares*

* * * * *

(e) *Arrangements Permitting Frequent Purchases and Redemptions of Fund Shares.* Describe any arrangements with any person to permit frequent purchases and redemptions of Fund shares, including the identity of the persons permitted to engage in frequent purchases and redemptions pursuant to such arrangements, and any compensation or other consideration received by the Fund, its investment adviser, or any other party pursuant to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 17(e) includes any agreement to maintain assets in the Fund or in other investment companies or accounts managed by the investment adviser or by any affiliated person of the investment adviser.

2. If the Fund has an arrangement to permit frequent purchases and redemptions by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Fund may identify the group rather than identifying each individual group member.

* * * * *

■ 4. Form N–3 (referenced in §§ 239.17a and 274.11b) is amended by:

■ a. In Item 5, adding paragraph (f);

■ b. In Item 8, adding paragraph (e);

■ c. In Item 11, adding an Instruction to paragraph (c);

■ d. In Item 19, adding paragraph (e); and

■ e. In Item 23, adding paragraph (f).

The additions read as follows:

**Form N–3**

* * * * *

*Item 5. General Description of Registrant and Insurance Company*

* * * * *

(f) State that a description of the Registrant's policies and procedures with respect to the disclosure of the Registrant's portfolio securities is available (A) in the Registrant's Statement of Additional Information; and (B) on the Registrant's website, if applicable.

* * * * *

*Item 8. General Description of Variable Annuity Contracts*

* * * * *

(e)(i) Describe the risks, if any, that frequent transfers of contract value among sub-accounts of the Registrant may present for other contractowners and other persons (*e.g.*, participants, annuitants, or beneficiaries) who have material rights under the variable annuity contracts.

(ii) State whether or not the Registrant's board of managers has adopted policies and procedures with respect to frequent transfers of contract value among sub-accounts of the Registrant.

(iii) If the Registrant's board of managers has not adopted any such policies and procedures, provide a statement of the specific basis for the view of the board that it is appropriate for the Registrant not to have such policies and procedures.

(iv) If the Registrant's board of managers has adopted any such policies and procedures, describe those policies and procedures, including:

(A) whether or not the Registrant discourages frequent transfers of contract value among sub-accounts of the Registrant;

(B) whether or not the Registrant accommodates frequent transfers of contract value among sub-accounts of the Registrant; and

(C) any policies and procedures of the Registrant for deterring frequent

transfers of contract value among sub-accounts of the Registrant, including any restrictions imposed by the Registrant to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(1) any restrictions on the volume or number of transfers that may be made within a given time period;

(2) any transfer fee;

(3) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of contract value among sub-accounts of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(4) any minimum holding period that is imposed before a transfer may be made from a sub-account into another sub-account of the Registrant;

(5) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(6) any right of the Registrant to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit contracts based on a history of frequent transfers among sub-accounts, including the circumstances under which such right will be exercised.

(v) If applicable, include a statement, adjacent to the disclosure required by paragraphs (e)(i) through (e)(iv) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant.

* * * * *

*Item 11. Purchases and Contract Value*

* * * * *

(c) * * *

*Instruction:* A Registrant (other than a money market fund or sub-account) must provide a brief explanation of the circumstances under which it will use fair value pricing and the effects of using fair value pricing. With respect to any portion of a Registrant's assets that are invested in one or more open-end management investment companies that are registered under the Investment Company Act, the Registrant may briefly explain that the Registrant's net asset value is calculated based upon the net asset values of the registered open-end management investment companies in which the Registrant invests, and that the prospectuses for these companies explain the circumstances under which those companies will use fair value pricing and the effects of using fair value pricing.

* * * * *

*Item 19. Investment Objectives and Policies*

* * * * *

(e)(i) Describe the Registrant's policies and procedures with respect to the disclosure of the Registrant's portfolio securities to any person, including:

(A) how the policies and procedures apply to disclosure to different categories of persons, including contractowners, participants, annuitants, beneficiaries, institutional investors, intermediaries that distribute the Registrant's contracts, third-party service providers, rating and ranking organizations, and affiliated persons of the Registrant;

(B) any conditions or restrictions placed on the use of information about portfolio securities that is disclosed, including any requirement that the information be kept confidential or prohibitions on trading based on the information, and any procedures to monitor the use of this information;

(C) the frequency with which information about portfolio securities is disclosed, and the length of the lag, if any, between the date of the information and the date on which the information is disclosed;

(D) any policies and procedures with respect to the receipt of compensation or other consideration by the Registrant, its investment adviser, the Insurance Company, or any other party in connection with the disclosure of information about portfolio securities;

(E) the individuals or categories of individuals who may authorize disclosure of the Registrant's portfolio securities (*e.g.*, executive officers of the Registrant's investment adviser);

(F) the procedures that the Registrant uses to ensure that disclosure of information about portfolio securities is in the best interests of contractowners, participants, annuitants, and beneficiaries, including procedures to address conflicts between the interests of such persons, on the one hand, and those of the Registrant's investment adviser or principal underwriter; the Insurance Company; or any affiliated person of the Registrant, its investment adviser or principal underwriter, or the Insurance Company, on the other; and

(G) the manner in which the board of managers exercises oversight of disclosure of the Registrant's portfolio securities.

*Instruction:* Include any policies and procedures of the Registrant's investment adviser, or any other third party, that the Registrant uses, or that are used on the Registrant's behalf, with respect to the disclosure of the Registrant's portfolio securities to any person.

(ii) Describe any ongoing arrangements to make available information about the Registrant's portfolio securities to any person, including the identity of the persons who receive information pursuant to such arrangements. Describe any compensation or other consideration received by the Registrant, its investment adviser, the Insurance Company, or any other party in connection with each such arrangement, and provide the information described by paragraphs (e)(i)(B), (C), and (E) of this Item with respect to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 19(e)(ii) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the investment adviser, the Insurance Company, or any affiliated person of the investment adviser or the Insurance Company.

2. The Registrant is not required to describe an ongoing arrangement to make available information about the Registrant's portfolio securities pursuant to this Item, if, not later than the time that the Registrant makes the portfolio securities information available to any person pursuant to the arrangement, the Registrant discloses the information in a publicly available filing with the Commission that is required to include the information.

3. The Registrant is not required to describe an ongoing arrangement to make available information about the Registrant's portfolio securities pursuant to this Item if:

a. the Registrant makes the portfolio securities information available to any person pursuant to the arrangement no earlier than the next day following the day on which the Registrant makes the information available on its website in the manner specified in its prospectus pursuant to paragraph b.; and

b. the Registrant has disclosed in its current prospectus that the portfolio securities information will be available

on its website, including (1) the nature of the information that will be available, including both the date as of which the information will be current (*e.g.*, month-end) and the scope of the information (*e.g.*, complete portfolio holdings, Registrant's largest 20 holdings); (2) the date when the information will first become available and the period for which the information will remain available, which shall end no earlier than the date on which the Registrant files its Form N–CSR or Form N–Q with the Commission for the period that includes the date as of which the website information is current; and (3) the location on the Registrant's website where either the information or a prominent hyperlink (or series of prominent hyperlinks) to the information will be available.

* * * * *

*Item 23. Purchase and Pricing of Securities Being Offered*

* * * * *

(f) Describe any arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, its investment adviser, the Insurance Company, or any other party pursuant to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 23(f) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the investment adviser, the Insurance Company, or any affiliated person of the investment adviser or the Insurance Company.

2. If the Registrant has an arrangement to permit frequent transfers of contract value among sub-accounts of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

* * * * *

■ 5. Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by:

■ a. In Item 7, adding paragraph (e); and

■ b. In Item 19, adding paragraph (c).

The additions read as follows:

**Form N–4**

* * * * *

*Item 7. General Description of Variable Annuity Contracts*

* * * * *

(e)(i) Describe the risks, if any, that frequent transfers of contract value among sub-accounts of the Registrant may present for other contractowners and other persons (*e.g.*, participants, annuitants, or beneficiaries) who have material rights under the variable annuity contracts.

(ii) State whether or not the Registrant or depositor has policies and procedures with respect to frequent transfers of contract value among sub-accounts of the Registrant.

(iii) If neither the Registrant nor the depositor has any such policies and procedures, provide a statement of the specific basis for the view of the depositor that it is appropriate for the Registrant and depositor not to have such policies and procedures.

(iv) If the Registrant or depositor has any such policies and procedures, describe those policies and procedures, including:

(A) whether or not the Registrant or depositor discourages frequent transfers of contract value among sub-accounts of the Registrant;

(B) whether or not the Registrant or depositor accommodates frequent transfers of contract value among sub-accounts of the Registrant; and

(C) any policies and procedures of the Registrant or depositor for deterring frequent transfers of contract value among sub-accounts of the Registrant, including any restrictions imposed by the Registrant or depositor to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(*1*) any restrictions on the volume or number of transfers that may be made within a given time period;

(*2*) any transfer fee;

(*3*) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of contract value among sub-accounts of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(*4*) any minimum holding period that is imposed before a transfer may be made from a sub-account into another sub-account of the Registrant;

(*5*) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(*6*) any right of the Registrant or depositor to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit contracts based on a history of frequent transfers among sub-accounts, including the circumstances under which such right will be exercised.

(v) If applicable, include a statement, adjacent to the disclosure required by paragraphs (e)(i) through (e)(iv) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant.

* * * * *

*Item 19. Purchase of Securities Being Offered*

* * * * *

(c) Describe any arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, the depositor, or any other party pursuant to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 19(c) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the depositor, any investment adviser of a portfolio company, or any affiliated person of the depositor or of any such investment adviser.

2. If the Registrant has an arrangement to permit frequent transfers of contract value among sub-accounts of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

* * * * *

■ 6. Form N–6 (referenced in §§ 239.17c and 274.11d) is amended by:

■ a. In Item 6, adding paragraph (f); and

■ b. In Item 19, adding paragraph (d).

The additions read as follows:

**Form N–6**

* * * * *

*Item 6. General Description of Contracts*

* * * * *

(f) *Frequent Transfers Among Sub-Accounts of the Registrant.*

(1) Describe the risks, if any, that frequent transfers of Contract value among sub-accounts of the Registrant may present for other Contractowners and other persons (*e.g.*, the insured or beneficiaries) who have material rights under the Contract.

(2) State whether or not the Registrant or Depositor has policies and procedures with respect to frequent transfers of Contract value among sub-accounts of the Registrant.

(3) If neither the Registrant nor the Depositor has any such policies and procedures, provide a statement of the specific basis for the view of the Depositor that it is appropriate for the Registrant and Depositor not to have such policies and procedures.

(4) If the Registrant or Depositor has any such policies and procedures, describe those policies and procedures, including:

(i) whether or not the Registrant or Depositor discourages frequent transfers of Contract value among sub-accounts of the Registrant;

(ii) whether or not the Registrant or Depositor accommodates frequent transfers of Contract value among sub-accounts of the Registrant; and

(iii) any policies and procedures of the Registrant or Depositor for deterring frequent transfers of Contract value among sub-accounts of the Registrant, including any restrictions imposed by the Registrant or Depositor to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(A) any restrictions on the volume or number of transfers that may be made within a given time period;

(B) any transfer fee;

(C) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of Contract value among sub-accounts of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(D) any minimum holding period that is imposed before a transfer may be made from a sub-account into another sub-account of the Registrant;

(E) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(F) any right of the Registrant or Depositor to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit Contracts based on a history of frequent transfers among sub-accounts, including the circumstances under which such right will be exercised.

(5) If applicable, include a statement, adjacent to the disclosure required by paragraphs (f)(1) through (f)(4) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of Contract value among sub-accounts of the Registrant.

* * * * *

*Item 19. Additional Information About Operation of Contracts and Registrant*

* * * * *

(d) Describe any arrangements with any person to permit frequent transfers of Contract value among sub-accounts of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, the Depositor, or any other party pursuant to such arrangements.

*Instructions:*

1. The consideration required to be disclosed by Item 19(d) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the Depositor, any investment adviser of a Portfolio Company, or any affiliated person of the Depositor or of any such investment adviser.

2. If the Registrant has an arrangement to permit frequent transfers of Contract value among sub-accounts of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

* * * * *

Dated: April 16, 2004.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 04–9150 Filed 4–22–04; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Friday,
April 23, 2004

Part V

# Department of Housing and Urban Development

**Notice of Funding Availability for Fiscal Year (FY) 2004 Rural Housing and Economic Development Program; Notice**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4932–N–01]

## Notice of Funding Availability for Fiscal Year (FY) 2004 Rural Housing and Economic Development Program

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice of funding availability (NOFA).

### Overview Information

A. *Federal Agency Name:* Department of Housing and Urban Development, Community Planning and Development, Office of Rural Housing and Economic Development.

B. *Funding Opportunity Title:* Rural Housing and Economic Development (RHED) program.

C. *Announcement Type:* Initial Announcement.

D. *Funding Opportunity Number:* The **Federal Register** number is FR–4932–N–01. The OMB approval number is 2506–0169.

E. *Catalog of Federal Domestic Assistance (CFDA) Number(s):* Rural Housing and Economic Development. The CDFA number is 14.250.

F. DATES: *Application Deadline:* Applications are due May 24, 2004. Please *see* Section IV of this NOFA for application submission, delivery, and timely receipt requirements.

G. *Optional, Additional Overview Content Information:*

1. The purpose of the Rural Housing and Economic Development program is to build capacity at the state and local level for rural housing and economic development and to support innovative housing and economic development activities in rural areas. The funds made available under this program will be awarded competitively through a selection process conducted by HUD in accordance with the HUD Reform Act.

### I. Funding Opportunity Description

*A. Background*

There has been a growing national recognition of the need to enhance the capacity of local rural nonprofit organizations, community development corporations, federally recognized Indian tribes, state housing finance agencies (HFAs) and state economic development and community development agencies to expand the supply of affordable housing and to engage in economic development activities in rural areas. A number of resources are available from the federal government to address these problems, including programs of the United States Department of Agriculture (USDA), the Economic Development Administration (EDA), the Appalachian Regional Commission (ARC), the Department of Interior (for Indian tribes), and HUD. The Rural Housing and Economic Development program was developed to supplement these resources and to focus specifically on capacity building and promoting innovative approaches to housing and economic development in rural areas. In administering these funds, HUD encourages you to coordinate your activities with those supported by any of the agencies listed above.

*B. Definitions*

1. *Appalachia's Distressed Counties* means those counties in Appalachia that the Appalachian Regional Commission (ARC) has determined to have unemployment and poverty rates that are 150 percent of the respective U.S. rates and a per capita income that is less than 67 percent of the U.S. per capita income, and have counties with 200 percent of the U.S. poverty rate and one other indicator, such as the percentage of overcrowded housing. Refer to *http://www.arc.gov* for a list of ARC distressed counties and more information.

2. *Colonia* means any identifiable, rural community that:

a. Is located in the state of Arizona, California, New Mexico, or Texas;

b. Is within 150 miles of the border between the U.S. and Mexico; and

c. Is determined to be a Colonia on the basis of objective need criteria, including a lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, sanitary, and accessible housing.

3. *Farm Worker* means a farm employee of an owner, tenant, labor contractor, or other operator raising or harvesting agricultural or aquacultural commodities; or a worker in the employment of a farm operator, handling, planting, drying, packing, grading, storing, delivering to storage or market, or carrying to market agricultural or aquacultural commodities produced by the operator. Seasonal farm workers are those farm employees who typically do not have a constant year-round salary.

4. *Firm Commitment* means an agreement by which an applicant's partner agrees to perform an activity specified in the application, and demonstrates the financial capacity to deliver the resources necessary to carry out the activity, and commits the resources to the activity, either in cash or through in-kind contributions. It is irrevocable, subject only to approval and receipt of a FY2004 Rural Housing and Economic Development grant. Each letter of commitment must include the organization's name and applicant's name, reference the Rural Housing and Economic Development program, and describe the proposed total level of commitment and responsibilities, expressed in dollar value for cash or in-kind contributions, as they relate to the proposed program. The commitment must be written on the letterhead of the participating organization, must be signed by an official of the organization legally able to make commitments on behalf of the organization, and must be dated no earlier than the date of publication of this NOFA. In documenting a firm commitment, the applicant's partner must:

a. Specify the authority by which the commitment is made, the amount of the commitment, the proposed use of funds, and the relationship of the commitment to the proposed investment. If the committed activity is to be self-financed, the applicant's partner must demonstrate its financial capability through a corporate or personal financial statement or other appropriate means. If any portion of the activity is to be financed through a lending institution, the participant must provide evidence of the institution's commitment to fund the loan;

b. Affirm that the firm commitment is contingent only upon the receipt of FY2004 Rural Housing and Economic Development funds and state a willingness on the part of the signatory to sign a legally binding agreement (conditioned upon HUD's environmental review and approval of a property where applicable) upon award of the grant.

5. *Federally Recognized Indian tribe* means any tribal entity eligible to apply for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe. The list of federally recognized Indian tribes can be found in the notice published by the Department of the Interior on December 5, 2003 (68 FR 68180) and is also available from HUD.

6. *Innovative Housing Activities* means projects, techniques, methods, combinations of assistance, construction materials, energy efficiency improvements, or financing institutions or sources new to the eligible area or to its population. The innovative activities can also build upon and enhance a model that already exists.

7. *Local Rural Nonprofit Organization or Community Development Corporation* means either of the following:

a. Any private entity with tax-exempt status recognized by the Internal Revenue Service (IRS) which serves the eligible rural area identified in the application (including a local affiliate of a national organization that provides technical and capacity building assistance in rural areas); or

b. Any public nonprofit entity such as a Council of Governments that will serve specific local nonprofit organizations in the eligible area.

8. *Lower Mississippi Delta Region* means the eight-state, 240-county/parish region defined by Congress in the Lower Mississippi Delta Development Act, Public Law 100–460. Refer to *http://www.dra.gov* for more information.

9. *Eligible Rural Area* means one of the following:

a. A non-urban place having fewer than 2,500 inhabitants (within or outside of metropolitan areas).

b. A county with an urban population of 20,000 inhabitants or less.

c. Territory, including its persons and housing units, in the rural portions of "extended cities." The U.S. Census Bureau identifies the rural portions of extended cities.

d. Open country that is not part of or associated with an urban area. The USDA describes "open country" as a site separated by open space from any adjacent densely populated urban area. Open space includes undeveloped land, agricultural land, or sparsely settled areas, but does not include physical barriers (such as rivers and canals), public parks, commercial and industrial developments, small areas reserved for recreational purposes, or open space set aside for future development.

e. Any place with a population not in excess of 20,000 and not located in a Metropolitan Statistical Area.

10. *State Community and/or Economic Development Agency* means any state agency that has promotion of economic development statewide or in a local community as its primary purpose.

11. *State Housing Finance Agency* means any state agency created to assist local communities and housing providers with financing assistance for development of housing in rural areas, particularly for low- and moderate-income people.

## II. Award Information

### *A. Amount Allocated*

1. *Available Funds.* Approximately $25 million in Fiscal Year (FY) 2004 funding (plus any additional funds available through recapture) are being made available through this NOFA.

2. *Funding Categories and Maximum Award Amounts.* HUD will award up to approximately $25 million on a competitive basis in the following, funding categories. Applicants must apply for funds in only one of the two categories: Category 1, Capacity Building, or Category 2, Support for Innovative Housing and Economic Development Activities.

a. *Category 1: Capacity Building.* HUD will award up to approximately $10 million to applicants for capacity building activities. This amount will go directly to local rural nonprofit organizations or community development corporations or federally recognized Indian tribes to increase an organization's capacity to support innovative housing and economic development activities. The maximum amount awarded to a successful applicant in this category will be $150,000.

b. *Category 2: Support for Innovative Housing and Economic Development Activities.* HUD will award up to approximately $15 million to federally recognized Indian tribes, state housing finance agencies (HFAs), state community and/or economic development agencies, local rural nonprofit organizations or community development corporations to support innovative housing and economic development activities in rural areas throughout the nation. The maximum amount awarded to a successful applicant in this category will be $400,000.

### *B. Grant Amount.*

In the event, you, the applicant, are awarded a grant that has been reduced (*e.g.*, the application contained some activities that were ineligible or budget information did not support the request), you will be required to modify your project plans and application to conform to the terms of HUD's approval before execution of the grant agreement. HUD reserves the right to reduce or de-obligate the award if suitable modifications to the proposed project are not submitted by the awardee within 90 days of the request. Any modifications must be within the scope of the original application. HUD reserves the right to not make awards under this NOFA.

### *C. Grant Period.*

Recipients will have 36 months from the date of the executed grant agreement to complete all project activities.

### *D. Notification of Approval or Disapproval.*

HUD will notify you whether or not you have been selected for an award. If you are selected, HUD's notice to you concerning the amount of the grant award (based on the approved application) will constitute HUD's conditional approval, subject to negotiation and execution of a grant agreement by HUD.

## III. Eligibility Information

### *A. Eligible Applicants*

Eligible applicants for the Rural Housing and Economic Development program are local rural nonprofit organizations and community development corporations, federally recognized Indian tribes, state housing finance agencies and state community and/or economic development agencies. Eligible applicants for each of the funding categories are as follows:

1. *For Capacity Building Funding.* If you are a local rural nonprofit, including grassroots, faith-based and other community-based grassroots organization, community development corporation, or federally recognized Indian tribe, you are eligible for capacity building funding to carry out innovative housing and economic development activities that should lead to an applicant becoming self-sustaining in the future.

2. *For Support for Innovative Housing and Economic Development Activities Funding.* If you are a local rural nonprofit organizations, including grassroots, faith-based and other community-based grassroots organization, community development corporation, federally recognized Indian tribe, state HFA, or state economic development or community development agency, you may apply for funding to support innovative housing and economic development activities in rural areas.

### *B. Cost Sharing or Matching*

There is no match required under the Rural Housing and Economic Development program. Applicants that submit evidence of leveraging dollars under Rating Factor 4 "Leveraging Resources" will receive points according to the scale under that factor.

### *C. Other*

1. *Eligible Activities.* The following are examples of eligible activities under the Rural Housing and Economic Development program. These examples are illustrative and are not meant to limit the activities that you may propose in your application:

a. *For Capacity Building Funding.* Capacity building for innovative Rural Housing and Economic Development involves the enhancement of existing organizations to carry out new functions

or to perform existing functions more effectively. Permissible activities include, but are not limited to, the following:

(1) Enhancement of existing functions or creation of new functions to provide affordable housing and economic development in rural areas;

(2) Acquisition of additional space and support facilities;

(3) Salaries for additional staff needed to conduct the work, including financial management specialists, and economic development specialists;

(4) Training of staff in the areas of financial management, economic development financing, housing accessibility and visitability standards, fair housing issues, and complaint filing;

(5) Development of business plans to help the organization become self-sustaining;

(6) Development of Management Information Systems (MISs) and software to enable better and more accurate reporting of information to HUD and to other entities;

(7) Development of feasibility studies and market studies;

(8) Training in energy efficiency in construction for housing and commercial projects;

(9) Housing counseling services, including fair housing counseling, information on budgeting, and information on credit and available federal programs;

(10) Conducting conferences or meetings with other federal or state agencies to inform residents of programs, rights, and responsibilities associated with homebuying opportunities; and;

(11) Arranging for technical assistance to conduct needs assessments, conduct asset inventories, and develop strategic plans.

b. *For Support of Innovative Housing and Economic Development Activities.* This category is intended to support other costs for innovative housing and economic development activities. Permissible activities may include, but are not limited to the following:

(1) Cost of using new or innovative construction, energy efficiency, or other techniques that will result in the design or construction of innovative housing and economic development projects;

(2) Preparation of plans or of architectural or engineering drawings;

(3) Preparation of legal documents, government paperwork, and applications necessary for construction of housing and economic development activities to occur in the jurisdiction;

(4) Acquisition of land and buildings;

(5) Demolition of property to permit construction or rehabilitation activities to occur;

(6) Development of infrastructure to support the housing or economic development activities;

(7) Purchase of construction materials;

(8) Job training to support the activities of the organization;

(9) Homeownership counseling, including fair housing counseling, credit counseling, budgeting, access to credit, and other federal assistance available;

(10) Conducting conferences or meetings with other federal or state agencies to inform residents of programs, rights, and responsibilities associated with homebuying opportunities;

(11) Development of feasibility studies and market studies;

(12) Development of Management Information Systems (MISs) and software to enable better and more accurate reporting of information to HUD and to other entities;

(13) Establishing Community Development Financial Institutions (CDFIs), lines of credit, revolving loan funds, microenterprises, and small business incubators; and

(14) Provision of direct financial assistance to homeowners/businesses/developers, etc. This can be in the form of default reserves, pooling/securitization mechanisms, loans, grants, funding existing individual development accounts or similar activities.

2. *Statutory and Regulatory Requirements.* To be eligible for funding under HUD NOFAs issued during FY2004, you, the applicant, must meet all statutory and regulatory requirements applicable to this NOFA. If you need copies of the program regulations, they are available from the NOFA Information Center or through the *http://www.grants.gov* Web site. HUD may also eliminate ineligible activities from funding consideration and reduce funding amounts accordingly.

3. *General HUD Threshold Requirements.*

a. *Ineligible Applicants.* HUD will not consider an application from an ineligible applicant.

b. Dun and Bradstreet Data Universal Numbering System (DUNS) Number Requirement. Beginning in FY2004, any applicant seeking funding directly from HUD or other federal agencies must obtain a DUNS number and include it in its SF 424 Application for Federal Assistance submission. Failure to provide a DUNS number will prevent you from obtaining an award. Individuals who would personally apply for federal financial assistance, apart from any governmental, business, or nonprofit organization they may represent, are excluded from the requirement to obtain a DUNS number. This is pursuant to Office of Management and Budget (OMB) Policy issued in the **Federal Register** on June 27, 2003 (68 FR 38402). HUD's regulation implementing the DUNS Number requirement for its programs was issued in the **Federal Register** on March 26, 2004 (69 FR 15671). A copy of the OMB **Federal Register** Notice and HUD's regulation implementing the DUNS number can be found on HUD's Web site at *http://www.hud.gov/offices/adm/grants/duns.cfm.* Failure to provide a DUNS number with the application submission will be treated as a technical deficiency of the application. If the DUNS number is not provided within the cure period (see section V.B.1.g., Corrections to Deficient Applications) the application will not be funded. The Grants.gov Web page at *http://www.grants.gov/GetStarted* provides step-by-step instructions for obtaining a DUNS number, as well as procedures for registering in the Central Contractor Registry and e-Authentication. Registration in the Central Contractor Registry and receiving credentials from the Grants.gov E-Authentication provider are not necessary for submitting a paper copy application to HUD; only the DUNS number is required. Central contractor registration and e-Authentication is required for submittal of electronic grant applications through the Grants.gov portal. For FY2004, HUD is maintaining its policy of accepting paper copies of the application. However, it is HUD's intent to move to electronic submission of all applications in FY2005.

c. *Compliance with Fair Housing and Civil Rights Laws.*

(1) Applicants must comply with all applicable fair housing and civil rights requirements in 24 CFR 5.105(a).

(2) If you, the applicant:

(a) Have been charged with an on-going systemic violation of the Fair Housing Act; or

(b) Are a defendant in a Fair Housing Act lawsuit filed by the Department of Justice alleging an on-going pattern or practice of discrimination; or

(c) Have received a letter of findings identifying ongoing systemic noncompliance under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, or Section 109 of the Housing and Community Development Act of 1974; and

(d) The charge, lawsuit or letter of findings referenced in subpart (a), (b) or (c) above has not been resolved to HUD's satisfaction before the application deadline, then you are ineligible and HUD will not rate or rank your application. HUD will determine if actions to resolve the charge, lawsuit, or letter of findings taken prior to the application deadline are sufficient to resolve the matter.

(3) Examples of actions that normally would be considered sufficient to resolve the matter include, but are not limited to:

(i) A voluntary compliance agreement signed by all parties in response to a letter of findings;

(ii) A HUD-approved conciliation agreement signed by all parties;

(iii) A consent order or consent decree; or

(iv) An issuance of a judicial ruling or a HUD Administrative Law Judge's decision.

d. *Conducting Business In Accordance with Core Values and Ethical Standards.* Entities subject to 24 CFR parts 84 and 85 (most nonprofit organizations and state, local, and tribal governments or government agencies or instrumentalities that receive federal awards of financial assistance) are required to develop and maintain a written code of conduct (see 24 CFR 84.42 and 85.36(b)(3)). Consistent with regulations governing specific programs, your code of conduct must prohibit real and apparent conflicts of interest that may arise among officers, employees, or agents; prohibit the solicitation and acceptance of gifts or gratuities by your officers, employees, and agents for their personal benefit in excess of minimal value; and, outline administrative and disciplinary actions available to remedy violations of such standards. If you are awarded assistance under this NOFA, you will be required, prior to entering into an agreement with HUD, to submit a copy of your code of conduct and describe the methods you will use to ensure that all officers, employees, and agents of your organization are aware of your code of conduct. Failure to meet the requirement for a code of conduct will prohibit you from receiving an award of funds from HUD.

e. *Delinquent Federal Debts.* Consistent with the purpose and intent of 31 U.S.C. 3720B and 28 U.S.C. 3201(e), no award of federal funds shall be made to an applicant that has an outstanding delinquent federal debt unless: (1) The delinquent account is paid in full; (2) a negotiated repayment schedule is established and the repayment schedule is not delinquent; or (3) other arrangements satisfactory to HUD are made prior to the deadline submission date.

f. *Pre-Award Accounting System Surveys.* HUD may arrange for a pre-award survey of the applicant's financial management system in cases where the selected applicant has no prior federal support, the program office has reason to question whether the applicant's financial management system meets federal financial management standards, or the applicant is considered a high risk based upon past performance or financial management findings. HUD will not disburse funds to any applicant that does not have a financial management system that meets federal standards. See Section VI.B for additional information on this topic.

g. *Name Check Review.* Recommended applicants are subject to a name check review process. Name checks are intended to reveal matters that significantly reflect on the applicant's management and financial integrity or if any key individuals have been convicted or are presently facing criminal charges. If the name check reveals significant adverse findings that reflect on the business integrity or responsibility of the applicant or any key individual, HUD reserves the right to (1) deny funding or consider suspension/termination of an award immediately for cause; (2) require the removal of any key individual from association with management or implementation of the award; and (3) make appropriate provisions or revisions with respect to the method of payment or financial reporting requirements.

h. *False Statements.* A false statement in an application is grounds for denial or termination of an award and grounds for possible punishment as provided in 18 U.S.C. 1001.

i. *Prohibition Against Lobbying Activities.* You, the applicant, are subject to the provisions of Section 319 of Public Law 101–121 (approved October 23, 1989) (31 U.S.C. 1352) (the Byrd Amendment), which prohibits recipients of federal contracts, grants, or loans from using appropriated funds for lobbying the executive or legislative branches of the federal government in connection with a specific contract, grant, or loan. In addition, you must disclose, using Standard Form-LLL "Disclosure of Lobbying Activities," any funds, other than federally appropriated funds, that will be or have been used to influence federal employees, Members of Congress, and congressional staff regarding specific grants or contracts. Federally recognized Indian tribes and tribally designated housing entities (TDHEs) established by federally recognized Indian tribes as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment.

j. *Debarment and Suspension.* In accordance with 24 CFR part 24, no award of federal funds may be made to applicants that are presently debarred or suspended, or proposed to be debarred or suspended, from doing business with the federal government. This requirement applies to all lower tier covered transactions and to all solicitations for lower tier covered transactions. The prohibition includes the following:

(1) Having principals who, within the previous three years, have been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction, violation of federal or state anti-trust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; and

(2) Charges or indictments by a governmental entity (federal, state or local) for commission of any of the above violations.

4. *Additional Non-discrimination and Other Requirements.* You, the applicant, and your subrecipients must comply with:

a. *The Americans with Disabilities Act of 1990* (42 U.S.C. 1201 *et seq.*), the Age Discrimination Act of 1974 (42 U.S.C. 6101 *et seq.*), and Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 *et seq.*).

b. *Affirmatively Furthering Fair Housing.* Under Section 808(e)(5) of the Fair Housing Act, HUD is obliged to affirmatively further fair housing. HUD requires the same of its funding recipients. If you are a successful applicant, you will have a duty to affirmatively further fair housing opportunities for classes protected under the Fair Housing Act. Protected classes include race, color, national origin, religion, sex, disability, and familial status. Your application must include specific steps to:

(1) Overcome the effects of impediments to fair housing choice that were identified in the jurisdiction's Analysis of Impediments (AI) to Fair Housing Choice;

(2) Remedy discrimination in housing; or

(3) Promote fair housing rights and fair housing choice.

Further, you, the applicant, have a duty to carry out the specific activities provided in your responses to the rating factors in this NOFA that address affirmatively furthering fair housing.

c. *Economic Opportunities for Low- and Very Low-Income Persons (Section 3).* Recipients of assistance under this NOFA must comply with Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701u (Economic Opportunities for Low- and Very Low-Income Persons in Connection with Assisted Projects) and the HUD regulations at 24 CFR part 135, including the reporting requirements at subpart E. Section 3 requires recipients to ensure that, to the greatest extent feasible, training, employment, and other economic opportunities will be directed to low- and very-low income persons, particularly those who are recipients of government assistance for housing, and business concerns that provide economic opportunities to low- and very low-income persons.

d. *Ensuring the Participation of Small Businesses, Small Disadvantaged Businesses, and Woman-Owned Businesses.* HUD is committed to ensuring that small businesses, small disadvantaged businesses, and woman-owned businesses participate fully in HUD's direct contracting and in contracting opportunities generated by HUD financial assistance. Too often, these businesses still experience difficulty accessing information and successfully bidding on federal contracts. State, local, and tribal governments are required by 24 CFR 85.36(e) and nonprofit recipients of assistance (grantees and subgrantees) by 24 CFR 84.44(b) to take all necessary affirmative steps in contracting for the purchase of goods or services to assure that minority firms, women's business enterprises, and labor surplus area firms are used whenever possible, or as otherwise specified in this NOFA.

e. *Relocation.* The relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and the implementing government-wide regulation at 49 CFR part 24 cover any person who moves permanently from real property or moves personal property from real property directly because of acquisition, rehabilitation, or demolition for an activity undertaken with HUD assistance. Some HUD program regulations also cover persons who are temporarily relocated. For example, 24 CFR 570.606(b)(2)(i)(D)(1)–(3) provides guidance on temporary relocation for the CDBG program. You, the applicant should review the regulations for the Rural Housing and Economic Development program when planning your project.

f. *Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency (LEP).* Executive Order 13166 seeks to improve access to federally assisted services, programs and benefits for individuals with limited English proficiency. Applicants obtaining an award from HUD must seek to provide access to program benefits and information to LEP individuals through translation and interpretive services in accordance with LEP Guidance published on December 19, 2003 (68 FR 70967). For assistance and information regarding your LEP obligation, go to *www.LEP.gov.*

g. *Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations.* HUD is committed to full implementation of Executive Order 13279. The Executive Order established fundamental principles and policymaking criteria to guide federal agencies in formulating and developing policies that have implications for faith-based and community organizations to ensure the equal protection for these organizations in social services programs receiving federal financial assistance. Consistent with this order, HUD has undertaken a review of all policies and regulations that have implications for faith-based and community organizations, and has established a policy priority to provide full and equal access to grassroots faith-based and other community-based organizations in HUD program implementation. Copies of the regulatory changes can be found at: *http://www.hud.gov/grants/index.cfm.*

h. *Accessible Technology.* The Rehabilitation Act Amendments of 1998 (the Act) applies to electronic information technology (EIT) used by HUD for transmitting, receiving, using, or storing information to carry out the responsibilities of any federal funds awarded. The Act's coverage includes, but is not limited to, computers (hardware, software, word-processing, email, and web pages), facsimile machines, copiers, and telephones. Consistent with the principles of the Act, HUD requires the same of its funding recipients. If you are a successful applicant, you will be required when developing, procuring, maintaining, or using EIT, to ensure that the EIT allows employees with disabilities and members of the public with disabilities to have access to and use of information and data that is comparable to the access and use of information and data by employees and members of the public who do not have disabilities. If these standards impose a hardship on a funding recipient, the recipient may provide an alternative means to allow the individual to have access to and use the information and data. However, no recipient will be required to provide information services to a person with disabilities at any location other than a location at which the information services is generally provided.

i. *Procurement of Recovered Materials.* State agencies and agencies of a political subdivision of a state that are using assistance under a NOFA for procurement, and any person contracting with such an agency with respect to work performed under an assisted contract, must comply with the requirements of Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.

In accordance with Section 6002, these agencies and persons must procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the quantity acquired in the preceding fiscal year exceeded $10,000; must procure solid waste management services in a manner that maximizes energy and resource recovery; and must have established an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

j. *Participation in HUD-Sponsored Program Evaluation.* As a condition of the receipt of financial assistance under this NOFA, all successful applicants will be required to cooperate with all HUD staff or contractors performing HUD-funded research or evaluation studies.

k. *Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects.* Compliance with HUD regulations at 24 CFR 5.108 that implement Executive Order 13202 is a condition of receipt of assistance under this NOFA.

l. *Salary Limitation for Consultants.* FY2004 funds may not be used to pay or to provide reimbursement for payment of the salary of a consultant, whether retained by the federal government or the grantee, at more than the daily equivalent of the rate paid for level IV of the Executive Schedule, unless specifically authorized by law.

m. *OMB Circulars and Government-wide Regulations Applicable to Financial Assistance Programs.* Depending on applicant type, specific OMB circulars listed below may apply. The policies, guidance, and requirements of OMB Circular A–87 (Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments), OMB Circular A–21 (Cost Principles for Education Institutions), OMB Circular A–122 (Cost Principles for Non-Profit Organizations), OMB Circular A–133 (Audits of States, Local Governments, and Non-Profit Organizations), and the regulations at 24 CFR part 84 (Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations), and 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to state, local, and federally recognized Indian tribal governments), may apply to the award, acceptance, and use of assistance under this NOFA, and to the remedies for non-compliance, except when inconsistent with the provisions of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199, approved January 23, 2004), other federal statutes or regulations, or the provisions of this NOFA. Copies of the OMB Circulars may be obtained from EOP Publications, Room 2200, New Executive Office Building, Washington, DC 20503, telephone (202) 395–3080 (this is not a toll-free number), toll-free from 800–877 8339 (TTY Federal Information Relay Service); or from the Web site, *http://www.whitehouse.gov/omb/circulars/index.html.*

n. *Environmental Requirements.* If you become a recipient under this NOFA to assist physical development activities or property acquisition, you are generally prohibited from acquiring, rehabilitating, converting, demolishing, leasing, repairing or constructing property, or committing or expending HUD or non-HUD funds for these types of program activities, until HUD has completed an environmental review in accordance with 24 CFR part 50. See Section V.B.7 for additional information on this topic.

Requirements regarding the Environmental Review of project sites proposed in your application for the Rural Housing and Economic Development program are found at Section V.B.1.e. of this NOFA.

o. *Conflicts of Interest.* If you are a consultant or expert who is assisting HUD in rating and ranking applicants for funding under this NOFA, you are subject to 18 U.S.C. 208, the federal criminal conflict of interest statute, and the Standards of Ethical Conduct for Employees of the Executive Branch regulation published at 5 CFR part 2635. As a result, if you have assisted or plan to assist applicants with preparing applications for this NOFA, you may not serve on a selection panel and you may not serve as a technical advisor to HUD. All individuals involved in rating and ranking applications in response to HUD's FY2004 NOFAs, either published simultaneously with this NOFA or after the publication of this NOFA, including experts and consultants, must avoid conflicts of interest and the appearance of conflicts. Individuals involved in the rating and ranking of applications received under this NOFA must disclose to HUD's General Counsel or HUD's Ethics Law Division, if applicable, how the selection or non-selection of any applicant under this NOFA will affect the individual's financial interests, as provided in 18 U.S.C. 208, or how the application process involves a party with whom the individual has a covered relationship under 5 CFR 2635.502. The individual must disclose this information prior to participating in any matter regarding this NOFA. If you have questions regarding these provisions or if you have questions concerning a conflict of interest, you may call the Office of General Counsel, Ethics Law Division, at (202) 708–3815.

p. *Drug-Free Workplace.* If you receive an award of funds from HUD, you are required to provide a drug-free workplace. Compliance with this requirement means that you will do the following:

(1) Publish a statement notifying employees that it is unlawful to manufacture, distribute, dispense, possess, or use a controlled substance in the applicant's workplace and that such activities are prohibited. The notice must specify the actions that will be taken against the employee for violation of this prohibition. The statement must also notify employees as a condition of employment under the federal award that they are required to abide by the terms of the statement and that the employees must agree to notify the employer in writing of any violation of a criminal drug statute in the workplace no later than five calendar days after such violation.

(2) Establish an on-going drug-free awareness program to inform employees about the following:

(a) The dangers of drug abuse in the workplace;

(b) The applicant's policy of maintaining a drug-free workplace; and

(c) Any available drug counseling, rehabilitation, or employee maintenance programs; and

(d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.

(3) Notify the federal agency in writing within ten calendar days after receiving notice from an employee of a drug abuse conviction or otherwise receiving actual notice of a drug abuse conviction. The notification must be provided in writing to the Office of Departmental Grants Management and Oversight, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3156, Washington, DC 20410–3000, along with the following information:

(a) The program title and award number for each HUD award covered; and

(b) The HUD staff contact name, phone, and fax number.

(4) Require that each employee engaged in the performance of the federally funded activity be given a copy of the drug-free workplace statement required in item (1) and notifying the employee that one of the following actions will be taken against the employee within 30 calendar days of receiving notice of any drug abuse conviction:

(a) Institution of a personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(b) Requiring the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state, or local health, law enforcement, or other appropriate agency.

5. *Program-Specific Threshold Requirements.*

a. The application must receive a minimum rating score of 75 points to be considered for funding.

b. HUD will only fund eligible applicants as defined in this NOFA under Section III.A.

c. Applicants must serve an eligible rural area as defined in Section III. of this NOFA.

d. Proposed activities must meet the objectives of the Rural Housing and Economic Development program.

6. *Program Requirements:*

a. Applicants must demonstrate that their activities will continue to serve populations that are in need and that beneficiaries will have a choice of innovative housing and economic development opportunities as a result of these activities.

b. Environmental Review. Requirements regarding the Environmental Review of project sites proposed in your application for the Rural Housing and Economic

Development program are found at Section V.B.1.e, of this NOFA.

c. Executive Order 13202. Requirements regarding construction projects proposed in your application for the Rural Housing and Economic Development program can be found in Section V.B.7. of this NOFA.

7. *Energy Star.* The Department of Housing and Urban Development has adopted a wide-ranging energy action plan for improving energy efficiency in all program areas. As a first step in implementing the energy plan, HUD, the Environmental Protection Agency (EPA), and the Department of Energy (DoE) have signed a joint partnership to promote energy efficiency in HUD's affordable housing efforts and programs. The purpose of the Energy Star partnership is to promote energy efficiency in the affordable housing stock and to help protect the environment. Awardees constructing, rehabilitating, or maintaining housing or community facilities are encouraged to promote energy efficiency in design and operations. They are urged especially to purchase and use Energy Star labeled products. Awardees providing housing assistance or counseling services are encouraged to promote Energy Star to homebuyers and renters. Program activities may include developing Energy Star promotional and information materials, outreach to low- and moderate-income renters and buyers on the benefits and savings when using Energy Star products and appliances, and promoting the designation of community buildings and homes as Energy Star compliant. For further information about Energy Star see *http://www.energystar.gov* or call 888–STAR–YES (888–782–7937). Persons with hearing or speech impairments may access this number through TTY by calling 888–588–9920 or the toll-free Federal Information Relay Service at 800–877–8339.

## IV. Application and Submission Information

### *A. Address To Request Application Package*

This section describes how you may obtain application forms. Copies of the published Rural Housing and Economic Development NOFA and application forms may be downloaded from the Grants.gov Web site at *http://www.grants.gov/Find* or you may call HUD's NOFA Information Center at 800–HUD–8929. (This is not a toll-free number.) Persons with hearing or speech impairment may access this number through TTY by calling toll-free Federal Information Relay Service at 800–877–8339.

1. *Application Kit.* An application kit for the Rural Housing and Economic Development program is not necessary for submitting an application in response to this announcement. This announcement contains all the information necessary for the submission of your application for the Rural Housing and Economic Development program. In response to concerns about the length of time it takes for the publication and dissemination of application kits, HUD has made an effort to improve the readability of our NOFAs and publish all required forms and formats for application submission in the **Federal Register**. As a result of this effort, you will not have to wait for an application kit to prepare your application for funding. HUD is continuing to streamline programs and application submission requirements and encourages the applicant community to offer additional suggestions. Please pay attention to the submission requirements and format for submission specified in this NOFA to ensure that you have submitted all required elements of your application.

The published **Federal Register** document is the official document that HUD uses to evaluate applications. Therefore, if there is a discrepancy between any materials published by HUD in its **Federal Register** publications and other information provided in paper copy or on *http://www.Grants.gov/Find*, the **Federal Register** publication prevails. Please be sure to review your application submission against the requirements in the **Federal Register** file of the NOFA(s) for which you are interested in applying. Paper copies of these documents can be obtained from the NOFA Information Center by calling 800–HUD–8929. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free 800–HUD–2209.

2. *Guidebook and Further Information.* A guidebook to HUD programs titled "Connecting with Communities: A User's Guide to HUD Programs and the FY2004 NOFA Process" is available from the NOFA Information Center and HUD's Web site at *http://www.hud.gov*. The guidebook provides a brief description of all HUD programs, eligible applicants for the programs, and examples of how programs can work in combination to serve local community needs. To obtain a guidebook, or a paper copy of this notice, call the NOFA Information Center at 800–HUD–8929. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free 800–HUD–2209.

You may request general information, paper copies of this NOFA and HUD NOFA policy requirements, and applications from the NOFA Information Center (800–HUD–8929 or 800–HUD–2209 (TTY)) between the hours of 9 a.m. and 8 p.m. (Eastern time) Monday through Friday, except on federal holidays. When requesting information, please refer to the name of the program you are interested in. Be sure to provide your name, address (including ZIP Code), and telephone number (including area code). You can also obtain information on this NOFA and download application information for HUD programs issued via NOFA during FY2004 through the *http://www.Grants.gov Web site.*

### *B. Content and Form of Application Submission*

1. *Application Submission Requirements.* Be sure to read and follow the application submission requirements carefully.

a. *Page Numbering.* All pages of the application must be numbered sequentially. Your application must include an original and two copies of the items listed below.

b. *Application Items.* Your application must contain the items listed in this section. These items include the HUD standard forms and non-standard certifications that can be found in the Appendices to this NOFA. The items are as follows:

(1) A transmittal letter that must include the category under which you are applying, the dollar amount requested, the category under which you qualify for demographics of distress special factor under Rating Factor 2 "Need and Extent of the Problem", which of the five definitions of the term "rural area" set forth in Section III (I.B.9.) of this NOFA applies to the proposed service area, and accompanying documentation as indicated on the form.

(2) Table of Contents.

(3) A signed SF–424 (application form).

(4) Assurances Non-Construction Programs (HUD–424B).

(5) Disclosure of Lobbying Activities (SF–LLL).

(6) Applicant/Recipient Disclosure/ Update Report (HUD–2880).

(7) Client Comments and Suggestions (HUD 2994) (Optional).

(8) Survey on Ensuring Equal Opportunity for Applicants (HUD–23004).

(9) Program Outcome Logic Model (HUD–96010).

(10) SF–424 Supplement Survey on Equal Opportunity for Applicants (optional submission).

(11) A budget for all funds (federal and non-federal including HUD–424CB and HUD 424–CBW).

(12) Certification of Consistency with RC/EZ/EC Strategic Plan (HUD–2990), if applicable.

(13) Certification of Consistency with the Consolidated Plan (HUD–2991), if applicable.

(14) Racial and Ethnic Data Reporting Form (HUD–27061).

(15) Documentation of funds pledged in support of Rating Factor 4—" Leveraging Resources" (which will not be counted in the 15-page limitation). Documentation must be in the form of a firm commitment as defined in Section I.B.4. of this NOFA.

(16) The required certifications and assurances (signed, as appropriate, and attached as an Appendix).

(17) Acknowledgment of the Application receipt form (HUD 2993) (submitted with application and returned to you as verification of timely receipt).

(18) If you are a private nonprofit organization, a copy of your organization's IRS ruling providing tax-exempt status under section 501 of the Internal Revenue Code of 1986, as amended.

(19) Narrative response to Factors for Award.

(a) A description of your organization and assignment of responsibilities for the work to be carried out under the grant (Rating Factor 1).

(b) A description of the need and extent of the problem and populations to be served (Rating Factor 2).

(c) A workplan that demonstrates your soundness of approach and the clear linkage between rural housing and economic development (Rating Factor 3). In addressing this submission requirement, you must:

(i) Describe the activities you propose to undertake that address the needs, which have been identified, the linkage between rural housing and economic development, as well as the specific outcomes you expect to achieve.

(ii) Include a management plan that identifies the specific actions you will take to complete the proposed activities on time and a budget in the format provided that explains the uses of both federal and non-federal funds and the period of performance under the grant.

(iii) Include a discussion of the process by which the work accomplished with the grant will be evaluated to determine if the objectives of the grant were met.

(d) Identify the resources that will be leveraged by the amount of this grant's funding that you are requesting (Rating Factor 4). To receive the maximum number of points under Rating Factor 4 you must provide evidence of firm commitments.

(e) You must describe the extent to which your program reflects a coordinated, community-based process of identifying needs and building a system to address these needs, providing program beneficiaries with outcomes that result in increased independence and empowerment, and the potential for your organization to become financially self-sustaining. You must also describe how your activities will achieve the program outcomes, as described in Rating Factor 5 (Achieving Results and Program Evaluation), namely, where applicable, the number of housing units constructed, the number of housing units rehabilitated, the number of jobs created, the number of jobs retained, the number of participants trained, the number of new businesses created and the number of existing businesses assisted, number of housing units rehabilitated that will be made available to low-to-moderate income participants, percentage change in earnings as a result of employment for those participants, the percent of trained participants who find a job, annual estimated savings for low-income families as a result of energy efficiency improvements (Rating Factor 5).

(f) The total narrative response to all factors should not exceed 15 pages and must be submitted on 8.5" by 11" paper, using a 12 point font, with lines double spaced and printed only on one side. Please note that, although submitting pages in excess of the page limit will not disqualify your application, HUD will not consider or review the information on any excess pages, which may result in a lower score or failure to meet a threshold.

(20) Questionnaire for HUD's Initiative on Removal of Regulatory Barriers (HUD 27300).

*C. Submission Dates and Times*

1. Applications for the Rural Housing and Economic Development program must be postmarked at or before midnight of the application due date and received in HUD headquarters on or within five days after the application due date.

2. Applications received more than five days after the application due date will be deemed late and will not be considered.

3. Only one application will be accepted from any given organization. If more than one application is received from an organization, the application that was received first in HUD's Processing and Control Unit will be considered for funding. Any subsequent application from that organization will be deemed ineligible.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Application | | | May 24, 2004 |
| Transmittal Letter | | | |
| Application Form | | SF–424. | |
| Budget information | (per required form) | HUD–CB<br>HUD–CBW. | |
| Rating Factors: Narrative | Described in Section V.A. of this announcement. | | |
| Assurances | (per required form) | HUD–424B. | |
| Disclosure Update | do | HUD–2880. | |
| Disclosure of Lobby | do | SF–LLL. | |
| Certification of RC/EZ | do | HUD–2990. | |
| Certification of Consistency with Consolidated Plan. | do | HUD 2991. | |
| Acknowledgement of Receipt | do | HUD–2993. | |
| Comments and Suggestions | do | HUD–2994. | |
| Survey on Ensuring Equal Opportunity for Applicants. | do | HUD–23004. | |

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Racial and Ethnic Data Reporting Form. | .....do | HUD–27061. | |
| Logic Model | .....do | HUD–96010. | |
| Questionnaire for HUD's Initiative on Removal of Regulatory Barriers. | .....do | HUD–27300. | |

*D. Intergovernmental Agency Review*

Intergovernmental agency review is not required for this program.

*E. Funding Restrictions*

1. *Administrative Costs.* Administrative costs for assistance under the Rural Housing and Economic Development program may not exceed 15 percent of the total HUD Rural Housing and Economic Development grant award.

2. *Multiple Capacity Building Grants.* If you have received two or more Rural Housing and Economic Development grants for capacity building since 1999, you are not eligible to apply under Category 1: Capacity Building.

3. *Ineligible Activities.* RHED funds cannot be used for the following activities:

a. Income payments to subsidize individuals or families;

b. Political activities;

c. General governmental expenses other than expenses related to the administrative cost of the grant; or

d. Projects or activities intended for personal gain or private use.

HUD reserves the right to reduce or deobligate the award if suitable modifications to the proposed project are not submitted by the awardee within 90 days of the request. Any modification must be within the scope of the original application. HUD reserves the right not to make awards under this NOFA.

*F. Other Submission Requirements*

1. *Address for Submitting Applications.* Completed applications (one original and two complete copies) must be submitted to Processing and Control Unit, Room 7251, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, ATTN: Office of Rural Housing and Economic Development. When submitting your application, please include your name, mailing address (including ZIP Code), telephone number, and fax number (including area code).

2. *Delivery and Receipt Procedures.* The following procedures apply to the delivery and receipt of applications in HUD Headquarters. Please read the following instructions carefully and completely, because failure to comply with these procedures may disqualify your application. HUD's delivery and receipt policies are:

a. Hand deliveries will be permitted. However, if HUD staff are not available to accept your package or the courier service is not allowed to enter the building to deliver the package due to security or other reasons, the package will be determined not delivered and not accepted by HUD. In such instances, HUD recommends that you, the applicant, or your agent take your package to the nearest post office and follow the mailing instructions for postal service timely delivery. HUD will not take responsibility for ensuring that staff is available to take your package or breach security measures in order to accept an undeliverable package.

b. HUD will not accept or consider any application sent by facsimile.

c. HUD urges applicants sending packages by courier to the Robert C. Weaver Headquarters Building to use the following courier services, because these services have unescorted access to these buildings: DHL, Falcon Carrier, Federal Express (FedEx), and United Parcel Service (UPS). Packages may be mailed using the United States Postal Service. Mailed applications will be accepted as being timely submitted if they are received at the designated HUD location (including specified room number for receipt) within five days after the due date and show a postmark of being delivered to the postal facility for mailing by the application due date and time. If the Postal Service does not normally postmark large packages, the proof of timely submission shall be receipt of the application within five days after the due date at the designated HUD location and, upon request by an HUD official, proof of mailing using USPS Form 3817 (Certificate of Mailing) or a receipt from the Postal Service which contains the post office name, location, and date and time of mailing. For submission through the United States Postal Service, no other proof of timely submission will be accepted.

d. Applications mailed to a location or office not designated for receipt of the application, which results in the designated office not receiving your application in accordance with the requirements for timely submission, will result in your application being considered late and will not receive funding consideration. HUD will not be responsible for directing packages to the appropriate office.

Applicants should pay close attention to these submission and timely receipt instructions as it can make a difference in HUD accepting your application for funding consideration. Please remember that mail sent to federal facilities is screened prior to delivery, so please allow sufficient time for your package to be delivered. If an application is received late because of the processing time required for the screening, the application will not be considered for funding.

3. *Proof of Timely Submission.* Proof of timely submission of an application is specified below.

a. In the case of packages sent to HUD via a delivery service, other than the United States Postal Service, timely submission shall be evidenced via a delivery service receipt indicating that the application was delivered to a carrier service at least 24 hours prior to the application deadline, and, if applicable, that through no fault of the applicant, the delivery could not be made on or before the application due date. Couriers turned away from an HUD facility due to security issues will not be considered as meeting the requirement of "no fault of the applicant," because applicants have been advised that delivery delays can arise when using courier services, resulting in a late application submission.

b. For packages submitted via the United States Postal Service, proof of timely submission shall be a postmark not later than the application due date or receipt not later than five days after the application due date at the designated HUD facility and, upon request by an HUD official, proof of mailing using USPS Form 3817 (Certificate of Mailing) or a receipt from the Post Office which contains the post office name, location and date and time of mailing. For submission through the United States Postal Service, no other proof of timely submission will be accepted. Applications not meeting the

timely submission requirements will not be considered for funding.

4. *Addresses.* You, the applicant, must submit a complete application and the required number of copies to the location identified in this NOFA. When submitting your application, you must refer to the name of the program for which you are applying and include the correct room number to ensure that your application is properly directed. The address for deliveries to the Robert C. Weaver Federal Building is identified in this NOFA.

Please be sure to include the NOFA name and room number on your submission package.

5. *Electronic Submission of Packages using Grants.gov.* In FY2005, HUD intends to have applications submitted via the federal government's new electronic application portal called *http://www.Grants.gov*. Applicants are urged to become familiar with the Grants.gov site and to follow the steps under "Get Started" so that you will be prepared to apply on line for HUD and other federal agency programs.

For FY2004, paper applications will be considered by HUD to be the official application submission. HUD urges all applicants to become familiar with the *http://www.grants.gov* site and register to receive funding opportunity notifications. The Grants.gov site provides instructions on how to get a DUNS number, as well as registration and e-authentication procedures. The Grants.gov site provides a help desk to address Grants.gov technology issues, and HUD will establish a help line to address questions on program issues. The Grants.gov help line is 800–518-Grants. Individuals who personally apply for federal financial assistance, apart from any business or nonprofit organization they may operate, are excluded from the requirement to obtain a DUNS number. You can find a copy of HUD's DUNS regulation at *http://www.hud.gov/grants/index.cfm*.

**V. Application Review Information:**

*A. Criteria*

The following Rating Factors will be used to review, evaluate, and rate your application.

1. Rating Factor 1—Capacity of the Applicant and Relevant Organizational Experience (25 Points)

This rating factor addresses the extent to which you have the organizational resources necessary to successfully implement your proposed work plan, as further described in Rating Factor 3, within the 36-month award period.

a. *Rating standards applicable to individual funding categories.* The two funding categories have different objectives. Accordingly, in addition to the generally applicable rating standard discussed above, the different standards discussed below will be used to judge the experience and qualifications of the applicants for each of the two funding categories. HUD fully supports emerging organizations that desire to develop internal capacity. Therefore, the following categories will be evaluated:

(1) *For Capacity Building applications* (25 points). *Team members, composition, experience, organizational structure, and management capacity.* Your response to this sub-factor should clearly state the need that your organization will address with the requested assistance. In addition, you should describe how the enhanced capacity realized through the assistance will fulfill that need. HUD will evaluate the experience (including its recentness and relevancy) of your project director, core staff, and any outside consultant, contractor, subrecipient, or project partner as it relates to innovative housing and economic development and to the implementation of the activities in your workplan. HUD also will assess the services that consultants or other parties will provide to fill gaps in your staffing structure to enable you to carry out the proposed workplan; the experience of your project director in managing projects of similar size, scope, and dollar amount; the lines of authority and procedures that you have in place for ensuring that workplan goals and objectives are being met, that consultants and other project partners are performing as planned, and that beneficiaries are being adequately served In responding to this sub-factor, please indicate how the capacity building assistance will strengthen or otherwise affect your organization's current housing or economic development program portfolio or, if you are a new grantee, how the capacity assistance will ensure that you can carry out your proposed activities. In judging your response to this factor, HUD will only consider work experience gained within the last three years. When responding, please be sure to provide the dates, job titles and relevancy of the past experience to work to be undertaken by the employee or contractor under your Rural Housing and Economic Development program application. The more recent, relevant, and successful the experience of your team members is in relationship to the workplan activities, the greater the number of points you will receive.

(2) *For Support for Innovative Rural Housing and Economic Development Activities applications:*

(a) *Team members, composition, and experience* (10 points). HUD will evaluate the experience (including its recentness and relevancy) of your project director, core staff, and any outside consultant, contractor, subrecipient, or project partner as it relates to innovative housing and economic development and to the implementation of the activities in your workplan. HUD also will assess the services that consultants or other parties will provide to fill gaps in your staffing structure to enable you to carry out the proposed workplan; the experience of your project director in managing projects of similar size, scope, and dollar amount; the lines of authority and procedures that you have in place for ensuring that workplan goals and objectives are being met, that consultants and other project partners are performing as planned, and that beneficiaries are being adequately served. In judging your response to this factor, HUD will only consider work experience gained within the last seven years. When responding, please be sure to provide the dates, job titles and relevancy of the past experience to work to be undertaken by the employee or contractor under your proposed Rural Housing and Economic Development award. The more recent, relevant, and successful the experience of your team members are in relationship to the workplan activities, the greater the number of points that you will receive.

(b) *Organizational structure and management capacity* (5 points). HUD will evaluate the extent to which you can demonstrate your organization's ability to manage a workforce composed of full-time or part-time staff, as well as any consultant staff, and your ability to work with community-based groups or organizations in resolving issues related to affordable housing and economic development. In evaluating this subfactor, HUD will take into account your experience in working with community-based organizations to design and implement programs that address the identified housing and economic development issues. The more recent, relevant, and successful the experience of your organization and any participating entity, the greater the number of points you will receive.

(c) *Experience with performance-based funding requirements* (10 points). HUD will evaluate your performance in any previous grant program undertaken with HUD funds or other federal, state, local, or nonprofit or for-profit organization funds. In assessing points for this sub-factor, HUD reserves the right to take into account your past performance in meeting performance

and reporting goals for any previous HUD award, in particular whether the program achieved its outcomes. HUD will deduct one point for each of the following activities related to previous HUD grant programs for which unsatisfactory performance has been verified: (1) Mismanagement of funds, including the inability to account for funds appropriately; (2) untimely use of funds received either from HUD or other federal, state, or local programs; and (3) significant and consistent failure to measure performance outcomes. Among the specific outcomes to be measured are the increases in program accomplishments as a result of capacity building assistance and the increase in organizational resources as a result of assistance.

b. *Past Rural Housing and Economic Development program performance.* The past performance of previously awarded Rural Housing and Economic Development grantees will be taken into consideration when evaluating Rating Factor 1 "Capacity of the Applicant and Relevant Organizational Experience." Applicants who have been awarded Rural Housing and Economic Development program funds prior to FY2004 should indicate fiscal year and funding amount. HUD local field offices may be consulted to verify information submitted by the applicant as a part of the review of applications.

2. Rating Factor 2—Need and Extent of the Problem (20 Points)

The Rural Housing and Economic Development program is designed to address the problems of rural poverty, inadequate housing and lack of economic opportunity. This factor addresses the extent to which there is a need for funding the proposed activities based on levels of distress and the urgency of meeting the need/distress in the applicant's target area. In responding to this factor, applications will be evaluated on the extent to which the level of need for the proposed activity and the urgency in meeting the need are documented and compared to target area and national data.

a. In applying this factor, HUD will compare the current levels of need in the area (*i.e.*, Census Tract(s) or Block Group(s)) immediately surrounding the project site or the target area to be served by the proposed project and the national levels of need. This means that an application that provides data that show levels of need in the project area expressed as a percent greater than the national average will be rated higher under this factor. Notwithstanding the above, an applicant proposing a project to be located outside the target area could still receive points under Rating Factor 2, if a clear rationale is provided linking the proposed project location and the benefits to be derived by persons living in distressed parts of the applicant's target area.

b. Applicants should provide data that address indicators of need as follows:

(1) *Poverty Rate* (5 points)—Data should be provided in both absolute and percentage form (*i.e.*, whole numbers and percents) for the target area(s). An application that compares the local poverty rate in the following manner to the national average at the time of submission will receive points under this section as follows:

(a) Less than the national average = 0 points;

(b) Equal to but less than twice the national average = 1 point;

(c) Twice but less than three times the national average = 3 points;

(d) Three or more times the national average = 5 points.

(2) *Unemployment* (5 points)—for the target area:

(a) Less than the national average = 0 points;

(b) Equal to but less than twice the national average = 1 point;

(c) Twice but less than three times the national average = 2 points;

(d) Three but less than four times the national average = 3 points;

(e) Four but less than five times the national average = 4 points;

(f) Five or more times the national average = 5 points.

(3) *Other indicators of social or economic decline that best capture the applicant's local situation* (5 points).

(a) Data that could be provided under this section are information on the community's stagnant or falling tax base, including recent commercial or industrial closings; housing conditions, such as the number and percentage of substandard or overcrowded units; rent burden (defined as average housing cost divided by average income) for the target area; local crime statistics, falling property values, *etc.* To the extent that the applicant's statewide or local Consolidated Plan, its Analysis of Impediments to Fair Housing Choice (AI), or its anti-poverty strategy identify the level of distress in the community and the neighborhood in which the project is to be carried out, references to such documents should be included in preparing the response to this factor.

(b) In rating applications under this factor, HUD reserves the right to consider sources of available objective data other than or in addition to those provided by applicants, and to compare such data to those provided by applicants for the project site. These may include U.S. Census data.

(c) HUD requires use of sound, verifiable, and reliable data (*e.g.*, U.S. Census data, state statistical reports, university studies/reports, or Home Mortgage Disclosure Act or Community Reinvestment Act databases) to support distress levels cited in each application. See *http://www.ffiec.gov/webcensus/ffieccensus.htm.* A source for all information along with the publication or origination date must also be provided.

(d) Updated Census data are available for the following indicators:

(i) Unemployment rate—estimated monthly for counties, with a two-month lag;

(ii) Population—estimated for incorporated places and counties, through 2000;

(iii) Poverty rate—through 2000.

(4) *Demographics of Distress—Special Factors (5 points).* Because HUD is concerned with meeting the needs of certain underserved areas, you will be awarded a total of five points if you are located in or propose to serve one or more of the following populations, or if your application demonstrates that 100 percent of the beneficiaries supported by Rural Housing and Economic Development funds are in one or more of the following populations. You must also specifically identify how each population will be served and that the proposed service area meets the definition of "eligible rural area" in Section I of this NOFA:

(a) Areas with very small populations in non-urban areas (2,500 population or less);

(b) Seasonal farm workers;

(c) Federally recognized Indian tribes;

(d) Colonias;

(e) Appalachia's Distressed Counties; or

(f) The Lower Mississippi Delta Region (8 states and 240 counties/parishes).

For these underserved areas, you should ensure that the populations that you serve and the documentation that you provide are consistent with the information described in the above paragraphs under this rating factor.

3. Rating Factor 3—Soundness of Approach (20 Points)

This factor addresses the overall quality of your proposed workplan, taking into account the project and the activities proposed to be undertaken; the cost-effectiveness of your proposed program; and the linkages between identified needs, the purposes of this program, and your proposed activities and tasks. In addition, this factor

addresses your ability to ensure that a clear linkage exists between innovative rural housing and economic development. In assessing cost-effectiveness, HUD will take into account your staffing levels; beneficiaries to be served; and your timetable for the achievement of program outcomes, the delivery of products and reports, and any anticipated outcome or product. You will receive a greater number of points if your workplan is consistent with the purpose of the Rural Housing and Economic Development program, your program goals, and the resources provided.

a. *Management Plan* (13 points). A clearly defined management plan should be submitted that identifies each of the projects and activities you will carry out to further the objectives of this program; describes the linkage between rural housing and economic development activities; and addresses the needs identified in Factor 2, including needs that previously were identified in a statewide or local Analysis of Impediments to Fair Housing Choice (AI) or Consolidated Plan. The populations that were described in Rating Factor 2 for the purpose of documenting need should be the same populations that will receive the primary benefit of the activities, both immediately and over the long term. The benefits should be affirmatively marketed to those populations least likely to apply for and receive these benefits without such marketing. Your timetable should address the measurable goals and objectives to be achieved through the proposed activities; the method you will use for evaluating and monitoring program progress with respect to those activities; and the method you will use to ensure that the activities will be completed on time and within your proposed budget estimates. Your management plan should also include the budget for your program, broken out by line item. Documented projected cost estimates from outside sources are also required. Applicants should submit their workplan on a spreadsheet showing each project to be undertaken and the tasks (to the extent necessary or appropriate) in your workplan to implement the project with your associated budget estimate for each activity/task. Your workplan should provide the rationale for your proposed activities and assumptions used in determining your project timeline and budget estimates. Failure to provide your rationale may result in your application receiving fewer points for lack of clarity in the proposed management plan.

This subfactor should include information that indicates the extent to which you have coordinated your activities with other known organizations (*e.g.*, through letters of participation or coordination) that are not directly participating in your proposed work activities, but with which you share common goals and objectives and that are working toward meeting these objectives in a holistic and comprehensive manner. The goal of this coordination is to ensure that programs do not operate in isolation. Additionally, your application should demonstrate the extent to which your program has the potential to be financially self-sustaining by decreasing dependence on Rural Housing and Economic Development funding and relying more on state, local, and private funding. The goal of sustainability is to ensure that the activities proposed in your application can be continued after your grant award is complete.

b. *Policy Priorities* (7 Points). Policy priorities are further outlined in Section V.B.3. below. You should document the extent to which HUD's policy priorities are furthered by the proposed activities. Applicants that include activities that can result in the achievement of these departmental policy priorities will receive higher rating points in evaluating their application for funding. Six departmental policy priorities are listed below. When policy priorities are included, describe in brief detail how those activities will be carried out.

The point values for policy priorities are as follows:

(1) Providing increased homeownership and rental opportunities for low- and moderate-income persons, persons with disabilities, the elderly, minorities, and families with limited English proficiency = 1 point;

(2) Improving our Nation's communities = 1 point;

(3) Encouraging accessible design features = 1 point;

(4) Providing full and equal access to grassroots faith-based and other community-based organizations in HUD program implementation = 1 point;

(5) Ending chronic homelessness within ten years = 1 point and;

(6) Removal of barriers to affordable housing = up to 2 points.

4. Rating Factor 4—Leveraging Resources (10 Points)

This factor addresses the extent to which applicants for either of the two funding categories have obtained firm commitments of financial or in-kind resources from other federal, state, local, and private sources. For every Rural Housing and Economic Development program dollar anticipated, you should provide the specific amount of dollars leveraged. In assigning points for this criterion, HUD will consider the level of outside resources obtained in the form of cash or in-kind goods or services that support activities proposed in your application. HUD will award a greater number of points based upon a comparison of the extent of leveraged funds with the requested Rural Housing and Economic Development award. This criterion is applicable to both funding categories under this NOFA. The level of outside resources for which commitments are obtained will be evaluated based on their importance to the total program. Your application must provide evidence of leveraging in the form of letters of firm commitment from any entity, including your own organization, which will be providing matching funds to the project. Each commitment described in the narrative of this factor must be in accordance with the definition of "firm commitment," as defined in this NOFA. The commitment letter must be on letterhead of the participating organization, must be signed by an official of the organization legally able to make commitments on behalf of the organization, and must not be dated earlier than the date this NOFA is published.

Points for this factor will be awarded based on the satisfactory provisions of evidence of leveraging and financial sustainability, as described above, and the ratio of leveraged funds to requested HUD Rural Housing and Economic Development funds as follows:

a. 50% or more of requested HUD Rural Housing and Economic Development funds = 10 points;

b. 49–40% of requested HUD Rural Housing and Economic Development funds = 8 points;

c. 39–30% of requested HUD Rural Housing and Economic Development funds = 6 points;

d. 29–20% of requested HUD Rural Housing and Economic Development funds = 4 points;

e. 19–9% of requested HUD Rural Housing and Economic Development funds = 2 points;

f. Less than 9% of HUD requested Rural Housing and Economic Development funds = 0 points.

5. Rating Factor 5—Achieving Results and Program Evaluation (25 Points)

This factor emphasizes HUD's commitment to ensuring that applicants keep promises made in their application

and assesses their performance to ensure that rigorous and useful performance measures are used and goals are met. Achieving results means you, the applicant, have clearly identified the benefits or outcomes of your program. Outcomes are ultimate project end goals. Benchmarks or outputs are interim activities or products that lead to the ultimate achievement of your goals. Program evaluation requires that you, the applicant, identify program outcomes, interim products or benchmarks, and performance indicators that will allow you to measure your performance. Performance indicators should be objectively quantifiable and measure actual achievements against anticipated achievements. Your evaluation plan should identify what you are going to measure, how you are going to measure it, and the steps you have in place to make adjustments to your work plan if performance targets are not met within established time frames.

Applicants must also complete the "Logic Model" HUD Form (HUD–96010) included in the appendix to this NOFA and submit the completed form with their application. This rating factor reflects HUD's goal to embrace high standards of ethics, management, and accountability. HUD will hold a training broadcast via satellite for potential applicants to learn more about Rating Factor 5. For more information about the date and time of the broadcast, consult the HUD Web site at *http://www.hud.gov/grants/index.cfm.*

Program outcomes for the Rural Housing and Economic Development program must include where applicable:

a. Number of housing units constructed;

b. Number of housing units rehabilitated that will be made available to low-to-moderate-income participants;

c. Number of jobs created;

d. Percentage change in earnings as a result of employment for those participants;

e. Number of participants trained;

f. Percent of participants trained who find a job;

g. Number of new businesses created;

h. Number of existing businesses assisted; and

i. Annual estimated savings for low-income families as a result of energy efficiency improvements.

j. Increase in program accomplishments as a result of capacity building assistance (*e.g.*, number of employees hired or retained, efficiency or effectiveness of services provided); and

k. Increase in organizational resources as a result of assistance (*e.g.*, dollars leveraged).

6. RC/EZ/EC Bonus Points (2 points)

HUD will award two bonus points to all applications that include documentation stating that the proposed eligible activities/projects will be located in and serve federally designated Rural Renewal Communities, Rural Empowerment Zones, or Rural Enterprise Communities (Rural EZs/ECs). A listing of federally designated Rural RCs, EZs, and ECs is available on the Internet at *http://www.hud.gov/grants/index.cfm.*

This notice contains a certification that must be completed for the applicant to be considered for Rural EZ/EC bonus points.

*B. Review and Selection Process*

1. Application Selection Process

a. Rating and Ranking

(1) *General.* To review and rate applications, HUD may establish panels which may include outside experts or consultants to obtain certain expertise and outside points of view, including views from other federal agencies.

(2) *Rating.* All applicants for funding will be evaluated against applicable criteria. In evaluating applications for funding, HUD will take into account an applicant's past performance in managing funds, including the ability to account for funds appropriately; its timely use of funds received either from HUD or other federal, state or local programs; its success in meeting performance targets for completion of activities; and the number of persons to be served or targeted for assistance. HUD may use information relating to these items based on information at hand or available from public sources such as newspapers, Inspector General or Government Accounting Office reports or findings, hotline complaints that have been found to have merit, or other such sources of information. In evaluating past performance, HUD will deduct points from rating scores as specified under Rating Factor 1, Capacity of the Applicant and Relevant Organizational Experience.

(3) *Ranking.* Applicants will be ranked separately within each of the two funding categories. Applicants will be selected for funding in accordance with their rank order in each category. An application must receive a minimum score of 75 points to be eligible for funding. If two or more applications are rated fundable and have the same score, but there are insufficient funds to fund all of them, the application(s) with the highest score for Rating Factor 2 (Need and Extent of the Problem) will be selected. If applications still have the same score, the highest score in the following factors will be selected sequentially until one highest score can be determined: Rating Factor 3 (Soundness of Approach), Rating Factor 1 (Capacity and Experience), Rating Factor 5 (Achieving Results and Program Evaluation), and Rating Factor 4 (Leveraging Resources).

b. *Initial screening.* During the period immediately following the application deadline, HUD will screen each application to determine eligibility. Applications will be rejected, if they do not meet the Threshold Requirements described in Section III.C.3. of this NOFA.

(1) Are submitted by ineligible applicants;

(2) Do not serve an eligible rural area as defined in Section III of this NOFA;

(3) Do not meet the objectives of the Rural Housing and Economic Development program; or

(4) Propose a project for which the majority of the activities are ineligible.

c. *Rating Factors for Award Used to Evaluate and Rate Applications.* The factors for rating and ranking applicants and the maximum points for each factor are provided above. The maximum number of points for this program is 102. This includes 100 points for all five rating factors and two Rural EZ/EC bonus points, as described above

d. *Forms, Certifications and Assurances.* Applicants are required to submit signed copies of the standard forms, certifications and assurances included in the appendices of this NOFA signed by the managing officer of your organization.

e. *Environmental Review.* Each application constitutes an assurance that the applicant agrees to assist HUD in complying with the provisions set forth in 24 CFR part 50. Selection for award does not constitute approval of any proposed site. Following selection for award, HUD will perform an environmental review of activities proposed for assistance under this part, in accordance with 24 CFR part 50. The results of the environmental review may require that proposed activities be modified or that proposed sites be rejected. Applicants are particularly cautioned not to undertake or commit HUD funds for acquisition or development of proposed properties (including establishing lines of credit that permit financing of such activities or making commitments for loans that would finance such activities from a revolving loan fund capitalized by funds under this NOFA) prior to HUD

approval of specific properties or areas. Each application constitutes an assurance that you, the applicant, will assist HUD in complying with part 50; will supply HUD with all available relevant information to perform an environmental review for each proposed property; will carry out mitigating measures required by HUD or select alternate property; and will not acquire, rehabilitate, convert, demolish, lease, repair, or construct property, or commit or expend HUD or local funds for these program activities with respect to any eligible property until HUD approval of the property is received. In supplying HUD with environmental information, grantees must use the guidance provided in Notice CPD–99–01, entitled "Field Environmental Processing for HUD Colonias Initiative (HCI) grants," issued January 27, 1999. HUD's funding commitment is contingent upon HUD's site approval following an environmental review.

f. *Adjustments to Funding.*

(1) HUD will not fund any portion of your application that is not eligible for funding under the Rural Housing and Economic Development program statutory or regulatory requirements, does not meet the requirements of this NOFA, or is duplicative of other funded programs or activities from prior year awards or other selected applicants. Only the eligible non-duplicative portions of your application may be funded.

(2) HUD reserves the right to utilize this year's funding to correct errors in the prior year's selection process prior to the rating and ranking of this year's applications. Additionally, HUD reserves the right to reallocate funds between categories to achieve the maximum allocation of funds in both categories.

(3) If after all eligible applicants have been selected for funding in Category 1 and funds remain, the remaining funds will be allocated to Category 2 to fund additional eligible applications in that category. If a balance of funds remains, HUD reserves the right to utilize those funds toward the following year's awards.

(4) In the event HUD commits an error that, when corrected, would result in selection of an otherwise eligible applicant during the funding round of a NOFA, HUD may select that applicant when sufficient funds become available.

(5) Performance and Compliance Actions of Funding Recipients. HUD will measure and address the performance and compliance actions of funding recipients in accordance with the applicable standards and sanctions of the Rural Housing and Economic Development program.

g. *Corrections to Deficient Applications.* After the application due date, HUD may not, consistent with its regulations in 24 CFR part 4, subpart B, consider any unsolicited information you, the applicant, may want to provide. HUD may contact you, however, to clarify an item in your application or to correct technical deficiencies. You should note, however, that HUD may not seek clarification of items or responses that improve the substantive quality of your response to any eligibility or selection factor.

Examples of curable (correctable) technical deficiencies include inconsistencies in the funding request, a failure to submit the proper certifications or failure to submit an application that contains an original signature by an authorized official. In each case, HUD will notify you in writing of a technical deficiency. HUD will notify applicants by facsimile or by USPS, return receipt requested. Clarifications or corrections of technical deficiencies in accordance with the information requested by HUD must be submitted within five calendar days after the date you receive HUD notification. (If the due date falls on a Saturday, Sunday, or federal holiday, your correction must be received by HUD on the next day that is not a Saturday, Sunday or federal holiday). The determination of when you received the deficiency letter will be based on the confirmation of the facsimile transmission, return receipt, or postal tracking information, as appropriate. If the deficiency is not corrected within this time period, HUD will reject the application as incomplete and it will not be considered for funding.

2. HUD's Strategic Goals

Implementing HUD's Strategic Framework and Demonstrating Results. HUD is committed to ensuring that programs result in the achievement of HUD's strategic mission. To support this effort, grant applications submitted for HUD programs will be rated on how well they tie proposed outcomes to HUD's policy priorities and annual goals and objectives and on the quality of the applicant's proposed evaluation and monitoring plan. HUD's Strategic Framework establishes the following goals and objectives for the Department:

a. *Increase Homeownership Opportunities*

(1) Expand national homeownership opportunities.

(2) Increase minority homeownership.

(3) Make the home buying process less complicated and less expensive.

(4) Fight practices that permit predatory lending.

(5) Help HUD-assisted renters become homeowners.

(6) Keep existing homeowners from losing their homes.

b. *Promote Decent Affordable Housing*

(1) Expand access to affordable rental housing.

(2) Improve the physical quality and management accountability of public and assisted housing.

(3) Increase housing opportunities for the elderly and persons with disabilities.

(4) Help HUD-assisted renters make progress toward self-sufficiency.

c. *Strengthen Communities*

(1) Improve economic conditions in distressed communities.

(2) Make communities more livable.

(3) End chronic homelessness.

(4) Mitigate housing conditions that threaten health.

d. *Ensure Equal Opportunity in Housing*

(1) Resolve discrimination complaints on a timely basis.

(2) Promote public awareness of Fair Housing laws.

(3) Improve housing accessibility for persons with disabilities.

e. *Embrace High Standards of Ethics, Management, and Accountability*

(1) Rebuild HUD's human capital and further diversify its workforce.

(2) Improve HUD's management, internal controls, and systems and resolve audit issues.

(3) Improve accountability, service delivery, and customer service of HUD and our partners.

(4) Ensure program compliance.

f. *Promote Participation of Grassroots Faith-Based and Other Community-Based Organizations*

(1) Reduce regulatory barriers to participation by grassroots faith-based and other community-based organizations.

(2) Conduct outreach to inform potential partners of HUD opportunities.

(3) Expand technical assistance resources deployed to grassroots faith-based and other community-based organizations.

(4) Encourage partnerships between grassroots faith-based and other community-based organizations and HUD's traditional grantees.

You can find out about HUD's Strategic Framework and Annual Performance Plans at *http://www.hud.gov/offices/cfo/reports/cforept.cfm.*

3. Policy Priorities

HUD encourages applicants to undertake specific activities that will

assist the Department in implementing its policy priorities and that help the Department achieve its goals for FY2004 and beyond, when the majority of funding recipients will be reporting programmatic results and achievements. Applicants that include work activities that specifically address one or more of these policy priorities will receive higher rating scores than applicants that do not address these HUD priorities. Above, this NOFA specifies which priorities relate to this program and how many points will be awarded for addressing those priorities.

Listed below are HUD's FY2004 policy priorities:

a. *Providing Increased Homeownership and Rental Opportunities for Low- and Moderate-Income Persons, Persons with Disabilities, the Elderly, Minorities, and Families with Limited English Proficiency.* Too often, these individuals and families are shut out of the housing market through no fault of their own. Developers of housing, housing counseling agencies, and other organizations engaged in the housing industry must work aggressively to open up the realm of homeownership and rental opportunities to low- and moderate-income persons, persons with disabilities, the elderly, minorities, and families with limited English proficiency. Many of these families are anxious to have a home of their own, but are not aware of the programs and assistance that are available. Applicants are encouraged to address the housing, housing counseling, and other related supportive service needs of these individuals and coordinate their proposed activities with funding available through HUD's affordable housing programs and home loan programs.

Proposed activities support strategic goals a, b, and d.

b. *Improving our Nation's Communities.* HUD wants to improve the quality of life for those living in distressed communities. Applicants are encouraged to include activities which:

(1) Bring private capital into distressed communities;

(a) Finance business investment to grow new businesses;

(b) Maintain and expand existing businesses;

(c) Create a pool of funds for new small and minority-owned businesses; and

(d) Create decent jobs for low-income persons.

(2) Improve the environmental health and safety of families living in public and privately-owned housing by including activities which:

(a) Coordinate lead hazard reduction programs with weatherization activities funded by state and local governments, and the federal government; and

(b) Reduce or eliminate health related hazards in the home caused by toxic agents such as molds and other allergens, carbon monoxide, and other hazardous agents and conditions.

(3) Make communities more livable by:

(a) Providing public and social services; and

(b) Improving infrastructure and community facilities.

Activities support strategic goals b, c, and d.

c. *Encouraging Accessible Design Features.* As described in Section III.C.3.c., applicants must comply with applicable civil rights laws including the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. These laws and the regulations implementing them provide for nondiscrimination based on disability and require housing and other facilities to incorporate certain features intended to provide for their use and enjoyment by persons with disabilities. HUD is encouraging applicants to add accessible design features beyond those required under civil rights laws and regulations. These features would eliminate many other barriers limiting the access of persons with disabilities to housing and other facilities. Copies of the Uniform Federal Accessibility Standards (UFAS) are available from the NOFA Information Center (800–HUD–8929 or 800–HUD–2209 (TTY)) and also from the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Room 5230, 451 Seventh Street, SW., Washington, DC 20410–2000, 202–755–5404 or toll-free 800–877–8339 (TTY Federal Information Relay Service).

Accessible design features are intended to promote visitability and incorporate features of universal design as described below:

(1) Visitability in New Construction and Substantial Rehabilitation. Applicants are encouraged to incorporate visitability standards where feasible in new construction and substantial rehabilitation projects. Visitability standards allow a person with mobility impairments access into the home, but do not require that all features be made accessible. Visitability means that there is at least one entrance at grade (no steps) approached by an accessible route such as a sidewalk and that the entrance door and all interior passage doors are at least 2 feet 10 inches wide, allowing 32 inches of clear passage space. A visitable home also serves persons without disabilities, such as a mother pushing a stroller or a person delivering a large appliance. More information about visitability is available at *http://www.concretechange.org.*

Activities support strategic goals b, c, and d.

(2) Universal Design. Applicants are encouraged to incorporate universal design in the construction or rehabilitation of housing, retail establishments. and community facilities funded with HUD assistance. Universal design is the design of products and environments to be usable by all people to the greatest extent possible, without the need for adaptation or specialized design. The intent of universal design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost. Universal design benefits people of all ages and abilities. In addition to any applicable required accessibility features under Section 504 of the Rehabilitation Act of 1973 or the design and construction requirements of the Fair Housing Act, the Department encourages applicants to incorporate the principles of universal design when developing housing, community facilities, and electronic communication mechanisms or when communicating with community residents at public meetings or events.

HUD believes that by creating housing that is accessible to all, it can increase the supply of affordable housing for all, regardless of ability or age. Likewise, creating places where people work, train, and interact that are useable and open to all residents increases opportunities for economic and personal self-sufficiency. More information on universal design is available from the Center for Universal Design, at *http://www.design.ncsu.edu:8120/cud/,* or the Resource Center on Accessible Housing and Universal Design, at *http://www.abledata.com/Site_2/accessib.htm.*

Activities support strategic goals a, b, c, and d.

d. *Providing Full and Equal Access to Grassroots Faith-Based and Other Community-Based Organizations in HUD Program Implementation.*

(1) HUD encourages nonprofit organizations, including grassroots faith-based and other community-based organizations, to participate in the vast array of programs for which funding is available through HUD's programs. HUD also encourages states, units of local government, universities and colleges,

and other organizations to partner with grassroots organizations, *e.g.*, civic organizations, faith-communities, and grassroots faith-based and other community-based organizations, that have not been effectively utilized. These grassroots organizations have a strong history of providing vital community services, such as assisting the homeless and preventing homelessness, counseling individuals and families on fair housing rights, providing elderly housing opportunities, developing first-time homeownership programs, increasing homeownership and rental housing opportunities in neighborhoods of choice, developing affordable and accessible housing in neighborhoods across the country, creating economic development programs, and supporting the residents of public housing facilities. HUD wants to make its programs more effective, efficient, and accessible by expanding opportunities for grassroots organizations to participate in developing solutions for their own neighborhoods. Additionally, HUD encourages applicants to include these grassroots faith-based and other community-based organizations in their workplans. Potential applicants, their partners, and their participants must review the individual FY2004 HUD program announcements to determine whether they are eligible to apply for funding directly or whether they must establish a working relationship with an eligible applicant in order to participate in a HUD funding opportunity. Grassroots faith-based and other community-based organizations, and applicants who currently or propose to partner, fund, subgrant, or subcontract with grassroots organizations (including grassroots faith-based or other community-based nonprofit organizations eligible under applicable program regulations) in conducting their work programs will receive higher rating points as specified in rating factor 3 above.

(2) Definition of Grassroots Organizations:

(a) HUD will consider an organization a "grassroots organization" if the organization is headquartered in the local community to which it provides services; and,

(i) Has a social services budget of $300,000 or less, or

(ii) Has six or fewer full-time equivalent employees.

(b) Local affiliates of national organizations are not considered "grassroots organizations." Local affiliates of national organizations are encouraged, however, to partner with grassroots organizations, and must demonstrate that they are currently working with a grassroots organization (*e.g.*, by having a faith community or civic organization, or other charitable organization provide volunteers).

(c) The cap provided in paragraph (2)(a)(i) above includes only that portion of an organization's budget allocated to providing social services. It does not include other portions of the budget such as salaries and expenses not directly expended in the provision of social services.

Activities support strategic goal f.

e. *Participation of Minority-Serving Institutions in HUD Programs.* Pursuant to Executive Orders 13256, "President's Board of Advisors on Historically Black Colleges and Universities," 13230, "President's Advisory Commission on Educational Excellence for Hispanic Americans," 13216, "Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs," and 13270, "Tribal Colleges and Universities," HUD is strongly committed to broadening the participation of Minority-Serving Institutions (MSIs) in its programs. HUD is interested in increasing the participation of MSIs in order to advance the development of human potential, strengthen the nation's capacity to provide high quality education, and increase opportunities for MSIs to participate and benefit from federal financial assistance programs. HUD encourages all applicants and recipients to include meaningful participation of MSIs in their work programs. A listing of MSIs can be found on the Department of Education Web site at *http://www.ed.gov/about/offices/list/ocr/edlite-minorityinst.html* or HUD's Web site at *http://www.hud.gov/grants/index.cfm.*

Activities support strategic goals c and d.

f. *Ending Chronic Homelessness within 10 Years.* President Bush has set a national goal to end chronic homelessness within 10 years. Secretary Alphonso Jackson has embraced this goal and has pledged that HUD's grant programs will be used to support the President's goal and more adequately meet the needs of chronically homeless individuals. A person experiencing chronic homelessness is defined as an unaccompanied individual with a disabling condition who has been continuously homeless for a year or more or has experienced four or more episodes of homelessness over the last three years. Applicants are encouraged to target assistance to chronically homeless persons by undertaking activities that will result in:

(1) Creation of affordable group homes or rental housing units;

(2) Establishment of a set-aside of units of affordable housing for the chronically homeless;

(3) Establishment of substance abuse treatment programs targeted to the homeless population;

(4) Establishment of job training programs that will provide opportunities for economic self-sufficiency;

(5) Establishment of counseling programs that assist homeless persons in finding housing, financial management, anger management, and building interpersonal relationships;

(6) Provision of supportive services, such as health care assistance that will permit homeless individuals to become productive members of society;

(7) Provision of service coordinators or one-stop assistance centers that will ensure that chronically homeless persons have access to a variety of social services.

Applicants who are developing programs to meet the goals set in this policy priority should be mindful of the requirements of the regulations implementing Section 504 of the Rehabilitation Act of 1973, in particular, 24 CFR 8.4(b)(1)(iv), 8.4(c)(1), and 8.4(d).

Activities support strategic goals b and c.

g. *Removal of Regulatory Barriers to Affordable Housing.* HUD is seeking input into how it can more effectively work with the public and private sectors to remove regulatory barriers to affordable housing. The notice addresses how HUD will evaluate the effectiveness of state and local government efforts to remove regulatory barriers to affordable housing.

Increasing the affordablity of rental and homeownership housing continues to be a high priority of the Department. Over the last 15 years, there has been increased recognition that unnecessary, duplicative, excessive, or discriminatory public processes often significantly increase the cost of housing development and rehabilitation. Often referred to as "regulatory barriers to affordable housing," many public statutes, ordinances, regulatory requirements, or processes and procedures significantly impede the development or availability of affordable housing without providing a commensurate or demonstrable health or safety benefit. "Affordable housing" is decent quality housing that low-, moderate-, and middle-income families can afford to buy or rent without spending more than 30 percent of their income; spending more than 30 percent of income on shelter may require

families to sacrifice other necessities of life.

Addressing these barriers to housing affordability is a necessary component of any overall national housing policy. However, addressing such barriers must be viewed as a complement to, not a substitute for, other efforts to meet affordable housing needs. For many families, federal, state and local subsidies are fundamental tools for meeting these affordable needs. In many instances, however, other sometimes well-intentioned public policies work at cross-purposes with subsidy programs by imposing significant constraints. From zoning that keeps out affordable housing, especially multifamily housing, to other regulations and requirements that unnecessarily raise the costs of construction, the need to address this issue is clear. For example, affordable rehabilitation is often constrained by outmoded building codes that require excessive renovation. Barrier removal will not only make it easier to find and get approval for affordable housing sites, but it will also allow available subsidies to go further in meeting these needs. For housing for moderate-income families often referred to as "work force" housing, barrier removal can be the most essential component of meeting housing needs.

Under this policy priority, higher rating points are available to (1) governmental applicants that are able to demonstrate successful efforts in removing regulatory barriers to affordable housing, and (2) nongovernmental applicants that are associated with jurisdictions that have undertaken successful efforts in removing barriers. To obtain the policy priority points for efforts to successfully remove regulatory barriers, applicants must complete form HUD–27300, "Questionnaire for HUD's Initiative on Removal of Regulatory Barriers." A copy of HUD's Notice entitled "America's Affordable Communities Initiative, HUD's Initiative on Removal of Regulatory Barriers: Announcement of Incentive Criteria on Barrier Removal in HUD's FY2004 Competitive Funding Allocations" can be found on HUD's Web site at *http://www.hud.gov/grants/index.cfm.*

Local jurisdictions and counties with land use and building regulatory authority applying for funding, as well as housing authorities, nonprofit organizations, and other qualified applicants applying for funding for a project located in these jurisdictions, are invited to answer the 20 questions in PART A of form HUD–27300. For those applications in which regulating authority is split between jurisdictions (*e.g.*, county and town) the applicant should answer the question for that jurisdiction that has regulatory authority over the issue at question. An applicant that scores at least five in Column 2 will receive one point in the NOFA evaluation. An applicant that scores 10 or more in Column 2 will receive two points in the evaluation.

State agencies or departments applying for funding, as well as housing authorities, nonprofit organizations and other qualified applicants applying for funds for projects located in unincorporated areas or areas otherwise not covered in Part A are invited to answer the 15 questions in PART B. Under Part B an applicant that scores at least four in Column 2 will receive one point in the NOFA evaluation. Under Part B an applicant that scores eight or greater will receive two points in the respective evaluation. Applicants that propose to provide services in multiple jurisdictions may choose to address the questions in either PART A or Part B for that jurisdiction in which the preponderance of services will be performed if an award is made. In no case will an applicant receive for this policy priority more than two points for barrier removal activities. An applicant that is a tribe or tribally designated housing entity (TDHE) may choose to complete either PART A or PART B based upon a determination by the tribe or TDHE as to whether the tribe's or the TDHE's association with the local jurisdiction or the state would be more advantageous to its application.

**Note:** Upon completion of all NOFA evaluations, grant selections, and awards, it is HUD's intent to add relevant data obtained from this evaluative factor to the database on state and local regulatory reform actions maintained at the Regulatory Barrier Clearinghouse Web site at *http://www.huduser.org/rbc/* used by states, localities, and housing providers to identify regulatory barriers and learn of exemplary local efforts at regulatory reform.

Form HUD–27300 can be found in the appendix to this NOFA. A limited number of questions on form HUD–27300 expressly request the applicant to provide brief documentation with its response. Other questions require that for each affirmative statement made, the applicant must supply a reference, URL, or brief statement indicating where the back-up information may be found and a point of contact, including a telephone number or e-mail address. Applicants are encouraged to read the March 22, 2004, **Federal Register** notice (69 FR 13450) to obtain a more complete understanding of this policy priority and how it can impact their score. HUD also will be providing a satellite broadcast on this subject as part of its NOFA training. The NOFA webcast schedule can be found on HUD's Web site at: *http://www.hud.gov/grants/index.cfm.*

Activities support strategic goals a and b.

*C. Anticipated Announcement and Award Dates*

June 1, 2004.

**VI. Award Administration Information**

*A. Award Notices*

1. *Award Notice.* Successful Rural Housing and Economic Development program applicants will be notified of grant award and will receive post-award instructions by mail.

2. *Applicant Debriefing.* For a period of at least 120 days, beginning 30 days after the awards for assistance are publicly announced, HUD will provide to a requesting applicant a debriefing related to its application. All debriefing requests must be made in the form of a letter and mailed by the authorized official whose signature appears on the SF–424 or his or her successor in office and submitted to the person or organization identified as the Contact under the section entitled "VII. Agency Contact(s)" in this NOFA. Information provided during a debriefing will include, at a minimum, the final score you received for each rating factor, final evaluator comments for each rating factor, and the final assessment indicating the basis upon which assistance was provided or denied.

Any applicant may obtain a debriefing of its application. Applicants requesting a debriefing must mail a letter of request to Jackie L. Williams, Ph.D., Director, Office of Rural Housing and Economic Development, 451 Seventh Street, SW., Room 7137, Washington, DC 20410–7000.

3. *Negotiation.* After HUD has rated and ranked all applications and made selections, HUD may require that a selected applicant participate in negotiations to determine the specific terms of the funding agreement and budget. In cases where HUD cannot successfully conclude negotiations with a selected applicant or a selected applicant fails to provide HUD with requested information, an award will not be made to that applicant. In such an instance, HUD may offer an award and proceed with negotiations with the next highest-ranking applicant.

*B. Administrative and National Policy Requirements*

1. *Lead-Based Paint Hazard Control.* All property assisted under the Rural

Housing and Economic Development program is covered by the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846) and HUD's implementing regulations at 24 CFR part 35.

2. *Audit Requirements.* Any grantee that expends $500,000 or more in federal financial assistance in a single year (this can be program year or fiscal year) must meet the audit requirements established in 24 CFR parts 84 and 85 in accordance with OMB A–133.

3. *Participation in HUD-sponsored Program Evaluation.* As a condition of receipt of award under this NOFA, you will be required to cooperative with HUD staff or contractors performing HUD-funded research and evaluation studies relating to the work conducted under the award.

4. *Accounting System Requirements.* The Rural Housing and Economic Development program requires that successful applicants have in place an accounting system that meets the policies, guidance, and requirements described in the following applicable OMB Circulars and Code of Federal Regulations:

a. OMB Circular A–87 (Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments);

b. OMB Circular A–122 (Cost Principles for Non-Profit Organizations);

c. OMB Circular A–133 (Audits of States, Local Governments, and Non-Profit Organizations);

d. 24 CFR part 84 (Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations); and

e. 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally recognized Indian tribal governments).

*C. Reporting*

Reporting documents apply to the award, acceptance and use of assistance under the Rural Housing and Economic Development program and to the remedies for noncompliance, except when inconsistent with the provisions of the Consolidated Appropriations Act, 2004, other federal statutes, or the provisions of this NOFA.

For each reporting period, as part of your required report to HUD, you must include a completed Logic Model (Form HUD 96010), which identifies output and outcome achievements.

**VII. Agency Contact(s)**

*Further Information and Technical Assistance:* For information concerning the HUD Rural Housing and Economic Development program, contact Ms. Holly A. Kelly, Economic Development Program Specialist, or Ms. Linda L. Streets, Community Development Specialist, Office of Rural Housing and Economic Development, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7137, Washington, DC 20410–7000; telephone 202–708–2290 (this is not a toll-free number). Persons with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Prior to the application deadline, Ms. Kelly or Ms. Streets will be available at the number above to provide general guidance and clarification of the NOFA, but not guidance in actually preparing your application. Following selection, but prior to award, HUD staff will be available to assist in clarifying or confirming information that is a prerequisite to the offer of an award by HUD.

**VIII. Other Information**

*1. Satellite Broadcast*

HUD will hold an information webcast via satellite for potential applicants to learn more about the program and preparation of an application. For more information about the date and time of this webcast, consult the HUD Web site at *http://www.hud.gov.*

*2. The Paperwork Reduction Act*

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2506–0169. In accordance with the Paperwork Reduction Act, HUD 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. Public reporting burden for the collection of information is estimated to average 100 hours per annum per respondent for the application and grant administration. This includes the time for collecting, reviewing and reporting the data for the application, semi-annual reports, and final report. The information will be used for grantee selection and monitoring the administration of funds.

*3. Grants.gov and Public Law 106–107 Streamlining Activities*

The Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) directs each federal agency to develop and implement a plan that, among other things, streamlines and simplifies the application, administrative, and reporting procedures for federal financial assistance programs administered by the agency. This law also requires the Director of the Office of Management and Budget (OMB) to direct, coordinate, and assist federal agencies in establishing (1) a common application and reporting system, and (2) an interagency process for addressing ways to streamline and simplify federal financial assistance application and administrative procedures and reporting requirements for program applicants.

HUD is working with the 26 federal grant-making agencies on President George W. Bush's Grants.gov "FIND and APPLY" Initiative. This initiative is an effort by federal agencies to develop a common electronic application and reporting system for federal financial assistance. This system will provide "one-stop shopping" for funding opportunities for all federal programs. This system is being developed in response to public and government concerns that it is difficult for organizations to know all the funding available from the federal government and how to apply for funding. It also is an effort by the federal government to develop common application requirements and further streamlining the application process, making it easier for you, HUD's customers, to apply for funding.

The first segment of the initiative focuses on allowing the public to easily FIND funding opportunities and then APPLY via Grants.gov. Funding decisions will still be under the control of the federal agency sponsoring the program funding opportunity. In FY2004, HUD is posting all of its funding notices on *http://www.Grants.gov/FIND* with links to HUD's Web site for copies of the NOFA sections and fillable forms which applicants can download and complete for submission of paper copy applications. During FY2004 HUD applicants will be able to continue to submit paper copies of their application to HUD for funding consideration and, in fact, the paper copy will be the official copy to submit to the Department. To find out more about Grants.gov, please go to its Web site and look at the Tutorials and Getting Started information. It is HUD's intent to move to a fully electronic application system in FY2005, so an early test of this feature would benefit both the applicant community and HUD.

*4. Executive Orders and Congressional Intent*

a. *Executive Order 13132, Federalism.* Executive Order 13132 prohibits, to the extent practicable and permitted by law, an agency from promulgating policies that have federalism implications and either impose substantial direct compliance costs on state and local governments and are not required by statute, or preempt state law, unless the relevant requirements of section 6 of the executive order are met. This NOFA does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the executive order.

b. *Sense of Congress.* It is the sense of Congress, as published in Division G of the Consolidated Appropriations Act, 2004 (Public Law 108–199, approved January 23, 2004) that, to the greatest extent practicable, all equipment and products purchased with funds made available in the Consolidated Appropriations Act, 2004, should be American-made.

*5. Public Access, Documentation, and Disclosure*

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) (HUD Reform Act) and the regulations codified in 24 CFR part 4, subpart A, contain a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 14, 1992, HUD published a notice that also provides information on the implementation of Section 102 (57 FR 1942). The documentation, public access, and disclosure requirements of Section 102 apply to assistance awarded under this NOFA as follows:

a. Documentation, public access, and disclosure requirements. HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations (24 CFR part 15).

b. *Form HUD–2880.* HUD will also make available to the public for five years all applicant disclosure reports (Form HUD–2880) submitted in connection with this NOFA. Update reports (also reported on Form HUD–2880) will be made available along with the applicant disclosure reports, but in no case for a period of less than three years. All reports, both applicant disclosures and updates, will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations (24 CFR part 5).

c. *Publication of Recipients of HUD Funding.* HUD's regulations at 24 CFR part 4 provide that HUD will publish a notice in the **Federal Register** to notify the public of all decisions made by the Department to provide:

(1) Assistance subject to Section 102(a) of the HUD Reform Act; and

(2) Assistance provided through grants or cooperative agreements on a discretionary (non-formula, non-demand) basis, but that is not provided on the basis of a competition.

*6. Section 103 of the HUD Reform Act*

HUD's regulations implementing Section 103 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3537a), codified at 24 CFR 4.26(c) and 4.28, apply to this funding competition. The regulations continue to apply until the announcement of the selection of successful applicants. HUD employees involved in the review of applications and in the making of funding decisions are prohibited by the regulations from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions or otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants or employees who have ethics-related questions should contact HUD's Ethics Law Division at 202–708–3815. (This is not a toll-free number.) The TTY number for persons with hearing or speech impairment is 800–877–8339. HUD employees who have specific program questions should contact the appropriate field office counsel or Headquarters counsel for the Rural Housing and Economic Development program.

*7. The FY2004 HUD NOFA Process and Future HUD Funding Processes*

Each year, HUD strives to improve its NOFA process. The FY2004 NOFAs have been revised based upon comments received during the FY2003 funding process. HUD continues to welcome comments and feedback from applicants and other members of the public on how HUD may further improve its competitive funding process. In FY2004, as part of Public Law 106–107 streamlining efforts and the interagency eGrants Initiative, HUD is making considerable changes to the format and presentation of its funding notices. HUD is continually striving to ensure effective communication with our program funding recipients and potential funding recipients. HUD has been posting pertinent documents related to these efforts on its Web site. HUD encourages you to visit our Web site on an ongoing basis to keep abreast of the latest developments. The Web site address for information on the Grants.gov Initiative is *http://www.hud.gov/offices/adm/grants/egrants/egrants.cfm.* Information on Grant streamlining activities can be found at *http://www.hud.gov/offices/adm/grants/pl-106107/pl106–107.cfm.*

Dated: April 19, 2004.

**Roy A. Bernardi,**

*Assistant Secretary for Community Planning and Development.*

The Appendix of Forms for the Rural Housing and Economic Development NOFA follows:

BILLING CODE 4210–29–P

**APPLICATION FOR FEDERAL ASSISTANCE**

Version 7/03

| | | | |
|---|---|---|---|
| **1. TYPE OF SUBMISSION:** Application ☐ Construction ☐ Non-Construction / Pre-application ☐ Construction ☐ Non-Construction | | **2. DATE SUBMITTED** | Applicant Identifier |
| | | **3. DATE RECEIVED BY STATE** | State Application Identifier |
| | | **4. DATE RECEIVED BY FEDERAL AGENCY** | Federal Identifier |

**5. APPLICANT INFORMATION**

| | | | |
|---|---|---|---|
| Legal Name: | | **Organizational Unit:** Department: | |
| Organizational DUNS: | | Division: | |
| Address: Street: | | **Name and telephone number of person to be contacted on matters involving this application (give area code)** Prefix: | First Name: |
| City: | | Middle Name | |
| County: | | Last Name | |
| State: | Zip Code | Suffix: | |
| Country: | | Email: | |
| **6. EMPLOYER IDENTIFICATION NUMBER** *(EIN)*: ☐☐-☐☐☐☐☐☐☐ | | Phone Number (give area code) | Fax Number (give area code) |

| | |
|---|---|
| **8. TYPE OF APPLICATION:** ☐ New ☐ Continuation ☐ Revision<br>If Revision, enter appropriate letter(s) in box(es)<br>(See back of form for description of letters.) ☐ ☐<br>Other (specify) | **7. TYPE OF APPLICANT:** (See back of form for Application Types)<br>Other (specify)<br>**9. NAME OF FEDERAL AGENCY:** |
| **10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER:** ☐☐-☐☐☐<br>TITLE (Name of Program):<br>**12. AREAS AFFECTED BY PROJECT** *(Cities, Counties, States, etc.)*: | **11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:** |
| **13. PROPOSED PROJECT** Start Date: / Ending Date: | **14. CONGRESSIONAL DISTRICTS OF:** a. Applicant / b. Project |

| | | | |
|---|---|---|---|
| **15. ESTIMATED FUNDING:** | | **16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?** | |
| a. Federal | $ .00 | a. Yes. ☐ THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON DATE: | |
| b. Applicant | $ .00 | | |
| c. State | $ .00 | | |
| d. Local | $ .00 | b. No. ☐ PROGRAM IS NOT COVERED BY E. O. 12372 | |
| e. Other | $ .00 | ☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW | |
| f. Program Income | $ .00 | **17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?** | |
| g. TOTAL | $ .00 | ☐ Yes If "Yes" attach an explanation. ☐ No | |

**18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT. THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED.**

a. Authorized Representative

| | | |
|---|---|---|
| Prefix | First Name | Middle Name |
| Last Name | | Suffix |
| b. Title | | c. Telephone Number (give area code) |
| d. Signature of Authorized Representative | | e. Date Signed |

Previous Edition Usable
Authorized for Local Reproduction

Standard Form 424 (Rev.9-2003)
Prescribed by OMB Circular A-102

## INSTRUCTIONS FOR THE SF-424

Public reporting burden for this collection of information is estimated to average 45 minutes 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. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0043), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

This is a standard form used by applicants as a required face sheet for pre-applications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

| Item: | Entry: | Item: | Entry: |
|---|---|---|---|
| 1. | Select Type of Submission. | 11. | Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project. |
| 2. | Date application submitted to Federal agency (or State if applicable) and applicant's control number (if applicable). | 12. | List only the largest political entities affected (e.g., State, counties, cities). |
| 3. | State use only (if applicable). | 13 | Enter the proposed start date and end date of the project. |
| 4. | Enter Date Received by Federal Agency<br>Federal identifier number: If this application is a continuation or revision to an existing award, enter the present Federal Identifier number. If for a new project, leave blank. | 14. | List the applicant's Congressional District and any District(s) affected by the program or project |
| 5. | Enter legal name of applicant, name of primary organizational unit (including division, if applicable), which will undertake the assistance activity, enter the organization's DUNS number (received from Dun and Bradstreet), enter the complete address of the applicant (including country), and name, telephone number, e-mail and fax of the person to contact on matters related to this application. | 15 | Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate only the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15. |
| 6. | Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service. | 16. | Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process. |
| 7. | Select the appropriate letter in the space provided.<br>A. State<br>B. County<br>C. Municipal<br>D. Township<br>E. Interstate<br>F. Intermunicipal<br>G. Special District<br>H. Independent School District<br>I. State Controlled Institution of Higher Learning<br>J. Private University<br>K. Indian Tribe<br>L. Individual<br>M. Profit Organization<br>N. Other (Specify)<br>O. Not for Profit Organization | 17. | This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes. |
| 8. | Select the type from the following list:<br>• "New" means a new assistance award.<br>• "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.<br>• "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation. If a revision enter the appropriate letter:<br>A. Increase Award B. Decrease Award<br>C. Increase Duration D. Decrease Duration | 18 | To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.) |
| 9. | Name of Federal agency from which assistance is being requested with this application. | | |
| 10. | Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested. | | |

| Grant Application Detailed Budget | U.S. Department of Housing and Urban Development | | | | | | | | OMB Approval No. 2501-0017 (exp. 03/31/2005) |
|---|---|---|---|---|---|---|---|---|---|
| | Functional Categories | | | | | | | | [Year 1:__] [Year 2:__] [Year 3:__] [All Years:__] |
| Name of Project/Activity: | Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 |
| | HUD Share | Applicant Match | Other HUD Funds | Other Fed Share | State Share | Local/Tribal Share | Other | Program Income | Total |
| a. Personnel (Direct Labor) | $ | $ | $ | $ | $ | $ | $ | $ | $ |
| b. Fringe Benefits | | | | | | | | | |
| c. Travel | | | | | | | | | |
| d. Equipment (only items > $5,000 depreciated value) | | | | | | | | | |
| e. Supplies (only items w/depreciated Value < $5,000 ) | | | | | | | | | |
| f. Contractual | | | | | | | | | |
| g. Construction | | | | | | | | | |
| 1. Administration and legal expenses | | | | | | | | | |
| 2. Land, structures, rights-of way, appraisals, etc. | | | | | | | | | |
| 3. Relocation expenses and payments | | | | | | | | | |
| 4. Architectural and engineering fees | | | | | | | | | |
| 5. Other architectural and engineering fees | | | | | | | | | |
| 6. Project inspection fees | | | | | | | | | |
| 7. Site work | | | | | | | | | |
| 8. Demolition and removal | | | | | | | | | |
| 9. Construction | | | | | | | | | |
| 10. Equipment | | | | | | | | | |
| 11. Contingencies | | | | | | | | | |
| 12. Miscellaneous | | | | | | | | | |
| h. Other (Direct Costs) | | | | | | | | | |
| i. Subtotal of Direct Costs | | | | | | | | | |
| j. Indirect Costs (% Approved Indirect Cost Rate:__ ) | | | | | | | | | |
| Grand Total (Year:___): | | | | | | | | | |
| Grand Total (All Years): | | | | | | | | | |



form HUD-424-CB (1/2004)

## Instructions for the HUD Grant Application Detailed Budget Form

Public reporting Burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB Control Number.

### General Instructions

This form is designed so that an application can be made for any of HUD's grant programs. Separate sheets must be used for each proposed program year and for a summary of all years.

Check applicable program year or all years box at top of page to indicate which applies.

On the final sheet enter the Grand Total for all years in the applicable box at the bottom of the page. In preparing the budget, adhere to any existing HUD requirements which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, HUD may require budgets to be shown separately by function or activity. Your budget information should show the entire cost of your proposed program of activities per year. If you are not using funds in any of the line item categories, you should leave the item blank. Pages may be duplicated to show budget data for individual programs, projects or activities.

NOTE: Not all budget categories on this form are eligible for funding under all programs. Please see eligible activities under the specific program for which you are seeking funding.

### Budget Categories

The budget categories identifies how your program funds will be allocated by type of use, e.g., funds going for salaries, travel, contracts, etc. Each of these line items should be broken out under each applicable column.

**Lines e-f.**--Show the totals of Lines a to f in each column.

**Lines g.** Show construction related expenses in the appropriate categories below.

**Line g.1.**--Enter estimated amounts needed to cover administrative expenses. Do not include costs which are related to the normal functions of government.

**Line g.2.**--Enter estimated site and right(s)-of-way acquisition costs (this includes purchase, lease, and/or easements).

**Line g.3.**--Enter estimated costs related to relocation advisory assistance, replacement housing, relocation payments to displaced persons and businesses, etc.

**Line g.4.**--Enter estimated basic engineering fees related to construction (this includes start-up services and preparation of project performance work plan).

**Line g.5.**--Enter estimated engineering costs, such as surveys, tests, soil borings, etc.

**Line g.6.**--Enter estimated engineering inspection costs.

**Line g.7.**--Enter the estimated site preparation and restoration which are not included in the basic construction contract.

**Line g.8.**--Enter the estimated costs related to demolition activities.

**Line g.9.**--Enter estimated costs of the construction contract.

**Line g.10.**--Enter estimated cost of office, shop, laboratory, safety equipment, etc. to be used at the facility, if such costs are not included in the construction contract.

**Line g.11.**--Enter any estimated contingency costs.

**Line g.12.**--Enter estimated miscellaneous costs.

**Line h.**--Enter any other direct costs not already addressed above.

**Line i.**--Calculate the totals of all applicable columns to determine the Subtotal of Direct Costs.

**Line j.**--Indicate the approved Indirect Cost Rate (if any) and calculate the indirect cost in accordance with the terms of your approved indirect cost rate and enter the resulting amount.

**Grand Total (Year:__)**--Enter the sum of lines i. and j. under column 9 for each year, and enter the applicable year, in the blank, for each sheet completed.

**Grand Total (All Years)**--Enter the sum of all the, "Grand Total (Year:__)" amounts from each sheet completed, under column 9, for all proposed years.

For each budget category (personnel, fringe benefits, travel, etc) you should identify the amount of funding you plan on using in your grant program. You should complete each column as follows:

**Column 1** - Identify the amount of funds that you will need from the HUD grant program for which you are seeking funding.

**Column 2** - Identify any matching funds that you are required to include in your proposed program in order to be eligible for assistance.

**Column 3** - Identify any other HUD funds that you will be adding to this program either through your formula or competitive grant programs.

**Column 4** - Identify any other Federal funds that you will be adding to this program either through your formula or competitive grant programs.

**Column 5** - Identify any State funds that you will be adding to this program.

**Column 6** - Identify any Local or Tribal Government funds that you will be adding to this program.

**Column 7** - Identify any additional funds not previously identified in Columns 1 - 6, that you intend to use for your proposed program.

**Column 8** - Identify any program income that you expect to generate under this program.

**Column 9** - Add columns 1 - 8 across and place the total in Column 9.

OMB Approval No. 2501-0017

# Grant Application Detailed Budget Worksheet

(Exp 03/31/2005)

Name and Address of Applicant:

Category — Detailed Description of Budget (for full grant period)

| 1. Personnel (Direct Labor) | Estimated Hours | Rate per Hour | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Position or Individual | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Total Direct Labor Cost | | | | | | | | | | | |

| 2. Fringe Benefits | Rate (%) | Base | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Total Fringe Benefits Cost | | | | | | | | | | | |

3. Travel

| 3a. Transportation - Local Private Vehicle | Mileage | Rate per Mile | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Trans - Local Private Vehicle | | | | | | | | | | | |



form HUD-424-CBW (2/2003)

# Grant Application Detailed Budget Worksheet

**Detailed Description of Budget**

| 3b. Transportation - Airfare (show destination) | Trips | Fare | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Transportation - Airfare | | | | | | | | | | | |

| 3c. Transportation - Other | Quantity | Unit Cost | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Transportation - Other | | | | | | | | | | | |

| 3d. Per Diem or Subsistence (Indicate location) | Days | Rate per Day | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Per Diem or Subsistence | | | | | | | | | | | |
| **Total Travel Cost** | | | | | | | | | | | |

| 4. Equipment (Only items over $5,000 Depreciated value) | Quantity | Unit Cost | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| **Total Equipment Cost** | | | | | | | | | | | |



form HUD-424-CBW (2/2003)

# Grant Application Detailed Budget Worksheet

**Detailed Description f Budget**

**5. Supplies and Materials (Items under $5,000 Depreciated Value)**

| 5a. Consumable Supplies | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Consumable Supplies | | | | | | | | | | |
| **5b. Non-Consumable Materials** | **Quantity** | **Unit Cost** | **Estimated Cost HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Non-Consumable Materials | | | | | | | | | | |
| **Total Supplies and Materials Cost** | | | | | | | | | | |
| **6. Consultants (Type)** | **Days** | **Rate per Day** | **Estimated Cost HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| **Total Consultants Cost** | | | | | | | | | | |
| **7. Contracts and Sub-Grantees (List Individually)** | **Quantity** | **Unit Cost** | **Estimated Cost HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| **Total Subcontracts Cost** | | | | | | | | | | |



form HUD-424-CBW (2/2003)

# Grant Application Detailed Budget Worksheet

**Detailed Description f Budget**

**8. Construction Costs**

| **8a. Administrative and legal expenses** | **Quantity** | **Unit Cost** | **Estimated Cost** | **HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Administrative and legal expenses | | | | | | | | | | | |

| **8b. Land, structures, rights-of way, appraisal, etc** | **Quantity** | **Unit Cost** | **Estimated Cost** | **HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Land, structures, rights-of way, ... | | | | | | | | | | | |

| **8c. Relocation expenses and payments** | **Quantity** | **Unit Cost** | **Estimated Cost** | **HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Relocation expenses and payments | | | | | | | | | | | |

| **8d. Architectural and engineering fees** | **Quantity** | **Unit Cost** | **Estimated Cost** | **HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Architectural and engineering fees | | | | | | | | | | | |

| **8e. Other architectural and engineering fees** | **Quantity** | **Unit Cost** | **Estimated Cost** | **HUD Share** | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Subtotal - Other architectural and engineering fees | | | | | | | | | | | |

# Grant Application Detailed Budget Worksheet

| 8f. Project inspection fees | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Project inspection fees | | | | | | | | | | |

| 8g. Site work | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Site work | | | | | | | | | | |

| 8h. Demolition and removal | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Demolition and removal | | | | | | | | | | |

| 8i. Construction | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Construction | | | | | | | | | | |

| 8j. Equipment | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Equipment | | | | | | | | | | |

| 8k. Contingencies | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Contingencies | | | | | | | | | | |

| 8l. Miscellaneous | Quantity | Unit Cost | Estimated Cost HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| Subtotal - Miscellaneous | | | | | | | | | | |
| **Total Construction Costs** | | | | | | | | | | |

## Grant Application Detailed Budget Worksheet

| 9. Other Direct Costs | Quantity | Unit Cost | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Item | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Total Other Direct Costs | | | | | | | | | | | |
| Subtotal of Direct Costs | | | | | | | | | | | |

| 10. Indirect Costs | Rate | Base | Estimated Cost | HUD Share | Applicant Match | Other HUD Funds | Other Federal Share | State Share | Local/Tribal Share | Other | Program Income |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Type | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| Total Indirect Costs | | | | | | | | | | | |
| **Total Estimated Costs** | | | | | | | | | | | |



form HUD-424-CBW (2/2003)

OMB Approval No. 2501-0017

## Grant Application Detailed Budget Worksheet

(Exp. 03/31/2005)

| Detailed Description of Budget | | | |
|---|---|---|---|
| Analysis of Total Estimated Costs | | Estimated Cost | Percent of Total |
| | | | |
| 1 | Personnel (Direct Labor) | | |
| 2 | Fringe Benefits | | |
| 3 | Travel | | |
| 4 | Equipment | | |
| 5 | Supplies and Materials | | |
| 6 | Consultants | | |
| 7 | Contracts and Sub-Grantees | | |
| 8 | Construction | | |
| 9 | Other Direct Costs | | |
| 10 | Indirect Costs | | |
| | Total: | | |
| | | | |
| | Federal Share: | | |
| | Match (Expressed as a percentage of the Federal Share): | | |
| | | | |



form HUD-424-CBW (2/2003)

## Instructions for Completing the Grant Application Detailed Budget Worksheet

| Item | Discussion |
|---|---|
| This form is to be used to provide detailed budget information regarding your proposed program. If your program requires you to provide program activity information you should use a separate HUD-424-CBW to provide information related to each program activity. The detailed information provided on this form can be summarized on the HUD-424-CB form by checking the "All Years" box at the top of the form and inputting the summary information. | |
| 1 - Personnel (Direct Labor) | This section should show the labor costs for all individuals supporting the grant program effort (regardless of the source of their salaries). The hours and costs are for the full life of the grant. If an individual is employed by a contractor or sub-grantee, their labor costs should not be shown here.<br><br>Please include all labor costs that are associated with the proposed grant program, including those costs that will be paid for with in-kind or matching funds.<br><br>Do not show fringe or other indirect costs in this section.<br><br>Please use the hourly labor cost for salaried employees (use 2080 hours per year or the value your organization uses to perform this calculation). An employee working less than full time on the grant should show the numbers of hours they will work on the grant. |
| 2 - Fringe Benefits | Use the standard fringe rates used by your organization. You may use a single fringe rate (a percentage of the total direct labor) or list each of the individual fringe charges. The spreadsheet is set up to use the Total Direct Labor Cost as the base for the fringe calculation. If your organization calculates fringe benefits differently, please use a different base and discuss how you calculate fringe as a comment. |
| 3 - Travel | |
| 3a - Transportation - Local Private Vehicle | If you plan on reimbursing staff for the use of privately owned vehicles or if you are required to reimburse your organization for mileage charges, show your mileage and cost estimates in this section. |
| 3b - Transportation - Airfare | Show the estimated cost of airfare required to support the grant program effort. Show the destination and the purpose of the travel as well as the estimated cost of the tickets.<br><br>Each program notice of funding availability (NOFA) discusses the travel requirements that should be listed here. |
| 3c - Transportation - Other | If you or are charged monthly by your organization for a vehicle for use by the grant program, indicate those costs in this section.<br><br>Provide estimates for other transportation costs that may be incurred (taxi, etc.). |

form HUD-424-CBW-I (1/2004)

| | |
|---|---|
| 3d - Per Diem or Subsistence | For travel which will require the payment of subsistence or per diem in accordance with your organization's policies. Indicate the location of the travel.<br><br>Each program NOFA discusses the travel requirements that should be listed here. |
| 4 – Equipment | Equipment is defined by HUD regulations as tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.<br><br>Each program NOFA describes what equipment may be purchased using grant funding. |
| 5 - Supplies and Materials | Supplies and materials are consumable and non-consumable items that have a depreciated unit value of less than $5,000. Please list the proposed supplies and materials as either Consumable Supplies or as Non-Consumable Materials. |
| 5a - Consumable Supplies | List the consumable supplies you propose to purchase. General office or other common supplies may be estimated using an anticipated consumption rate. |
| 5b - Non-consumable materials | List furniture, computers, printers, and other items that will not be consumed in use. Please list the quantity and unit cost. |
| 6 – Consultants | Please indicate the consultants you will use. Indicate the type of consultant (skills), the number of days you expect to use them, and their daily rate. |
| 7 - Contracts and Sub-Grantees | List the contractors and sub-grantees that will help accomplish the grant effort. Examples of contracts that should be shown here include contracts with Community Based Organizations; liability insurance; and training and certification for contractors and workers.<br><br>If any contractor, sub-contractor, or sub-grantee is expected to receive over 10% of the total Federal amount requested, a separate Grant Application Detailed Budget (Worksheet) should be developed for that contractor or sub-grantee and the total amount of their proposed effort should be shown as a single entry in this section.<br><br>Unless your proposed program will perform the primary grant effort with in-house employees (which should be listed in section 1), the costs of performing the primary grant activities should be shown in this section.<br><br>Types of activities which should be shown in this section:<br>• Contracts for all services<br>• Training for individuals not on staff<br>• Contracts with Community Based Organizations or Other Governmental Organizations (note the 10% requirement discussed above)<br>• Insurance if your program will procure it separately<br><br>Please provide a short description of the activity the contractor or subgrantee will perform, if not evident. |

form HUD-424-CBW-I (1/2004)

| | |
|---|---|
| 8 – Construction Costs | |
| 8a – Administrative and legal expenses | Enter estimated amounts needed to cover administrative expenses. Do not include costs that are related to the normal functions of government. |
| 8b – Land, structures, rights-of way, appraisal, etc. | Enter estimated site and right(s)-of-way acquisition costs (this includes purchase, lease, and/or easements). |
| 8c – Relocation expenses and payments | Enter estimated costs related to relocation advisory assistance, replacement housing, relocation payments to displaced persons and businesses, etc. |
| 8d – Architectural and engineering fees | Enter estimated basic engineering fees related to construction (this includes start-up services and preparation of project performance work plan). |
| 8e – Other architectural and engineering fees | Enter estimated engineering costs, such as surveys, tests, soil borings, etc. |
| 8f – Project inspection fees | Enter estimated engineering inspection costs. |
| 8g – Site work | Enter the estimated site preparation and restoration costs that are not included in the basic construction contract. |
| 8h – Demolition and removal | Enter the estimated costs related to demolition activities. |
| 8i – Construction | Enter estimated costs of the construction contract. |
| 8j - Equipment | Enter estimated cost of office, shop, laboratory, safety equipment, etc. to be used at the facility, if such costs are not included in the construction contract. |
| 8k – Contingencies | Enter any estimated contingency costs. |
| 8l – Miscellaneous | Enter estimated miscellaneous costs. |
| 9 - Other Direct Costs | Other Direct Costs include a number of items that are not appropriate for other sections.<br><br>Other Direct Costs may include:<br>• Staff training<br>• Telecommunications<br>• Printing and postage<br>Relocation, if costs are paid directly by your organization (if relocation costs are paid by a subgrantee, it should be reflected in Section 7) |
| 10 - Indirect Costs | Indirect costs (including Facilities and Administration costs) are those costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved.<br><br>Indicate your approved Indirect Cost Rate (if any) and calculate the indirect costs in accordance with the terms of your approved indirect cost rate and enter the resulting amount. Also show the applicable cost base amount and identify the proposed cost base type. |
| Total Estimated Costs | Enter the grand total of all the applicable columns. |

The eight rightmost columns allow you to identify how the costs will be spread between the HUD Share and other contributors (including Match funds and Program Income). This information will help the reviewers better understand your program and priorities.

| Applicant Assurances and Certifications | U.S. Department of Housing and Urban Development | OMB Approval No. 2501-0017 (exp. 03/31/2005) |
|---|---|---|

## Instructions for the HUD-424-B Assurances and Certifications

As part of your application for HUD funding, you, as the official authorized to sign on behalf of your organization or as an individual must provide the following assurances and certifications. By submitting this form, you are stating that to the best of your knowledge and belief, all assertions are true and correct.

As the duly authorized representative of the applicant, I certify that the applicant [Insert below the Name and title of the Authorized Representative, name of Organization and the date of signature]:

Name:_____, Title:_____.

Organization:_____, Date:_____.

1. Has the legal authority to apply for Federal assistance, has the institutional, managerial and financial capability (including funds to pay the non-Federal share of program costs) to plan, manage and complete the program as described in the application and the governing body has duly authorized the submission of the application, including these assurances and certifications, and authorized me as the official representative of the applicant to act in connection with the application and to provide any additional information as may be required.

2. Will administer the grant in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d)) and implementing regulations (24 CFR Part 1), which provide that no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance OR if the applicant is a Federally recognized Indian tribe or its tribally designated housing entity, is subject to the Indian Civil Rights Act (25 U.S.C. 1301-1303).

3. Will administer the grant in compliance with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended, and implementing regulations at 24 CFR Part 8, and the Age Discrimination Act of 1975 (42 U.S.C. 6101-07), as amended, and implementing regulations at 24 CFR Part 146 which together provide that no person in the United States shall, on the grounds of disability or age, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance; except if the grant program authorizes or limits participation to designated populations, then the applicant will comply with the nondiscrimination requirements within the designated population.

4. Will comply with the Fair Housing Act (42 U.S.C. 3601-19), as amended, and the implementing regulations at 24 CFR Part 100, which prohibit discrimination in housing on the basis of race, color, religion, sex, disability, familial status, or national origin; except an applicant which is an Indian tribe or its instrumentality which is excluded by statute from coverage does not make this certification; and further except if the grant program authorizes or limits participation to designated populations, then the applicant will comply with the nondiscrimination requirements within the designated population.

5. Will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601) and implementing regulations at 49 CFR Part 24 and 24 CFR 42, Subpart A.

6. Will comply with the environmental requirements of the National Environmental Policy Act (42 U.S.C.4321 et seq.) and related Federal authorities prior to the commitment or expenditure of funds for property acquisition and physical development activities subject to implementing regulations at 24 CFR parts 50 or 58.

7. That no Federal appropriated funds have been paid, or will be paid, by or on behalf of the applicant, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, and officer or employee of Congress, or an employee of a Member of Congress, in connection with the awarding of this Federal grant or its extension, renewal, amendment or modification. If funds other than Federal appropriated funds have or will be paid for influencing or attempting to influence the persons listed above, I shall complete and submit Standard Form-LLL, Disclosure Form to Report Lobbying. I certify that I shall require all sub awards at all tiers (including sub-grants and contracts) to similarly certify and disclose accordingly.

Federally recognized Indian Tribes and tribally designated housing entities (TDHEs) established by Federally-recognized Indian tribes as a result of the exercise of the tribe's sovereign power are excluded from coverage by the Byrd Amendment, but State-recognized Indian tribes and TDHEs established under State law are not excluded from the statute's coverage.

These certifications and assurances are material representations of the fact upon which HUD can rely when awarding a grant. If it is later determined that, I the applicant, knowingly made an erroneous certification or assurance, I may be subject to criminal prosecution. HUD may also terminate the grant and take other available remedies.

## Applicant/Recipient Disclosure/Update Report

U.S. Department of Housing and Urban Development

OMB Approval No. 2510-0011 (exp. 12/31/2006)

**Instructions.** (See Public Reporting Statement and Privacy Act Statement and detailed instructions on page 2.)

**Applicant/Recipient Information** Indicate whether this is an Initial Report ☐ or an Update Report ☐

| 1. Applicant/Recipient Name, Address, and Phone (include area code): ( ) - | 2. Social Security Number or Employer ID Number: - - |
|---|---|
| 3. HUD Program Name | 4. Amount of HUD Assistance Requested/Received |

5. State the name and location (street address, City and State) of the project or activity:

**Part I Threshold Determinations**

1. Are you applying for assistance for a specific project or activity? These terms do not include formula grants, such as public housing operating subsidy or CDBG block grants. (For further information see 24 CFR Sec. 4.3).
☐ Yes ☐ No

2. Have you received or do you expect to receive assistance within the jurisdiction of the Department (HUD), involving the project or activity in this application, in excess of $200,000 during this fiscal year (Oct. 1 - Sep. 30)? For further information, see 24 CFR Sec. 4.9
☐ Yes ☐ No.

If you answered "No" to either question 1 or 2, **Stop!** You do not need to complete the remainder of this form.
***However***, you must sign the certification at the end of the report.

**Part II Other Government Assistance Provided or Requested / Expected Sources and Use of Funds.**

Such assistance includes, but is not limited to, any grant, loan, subsidy, guarantee, insurance, payment, credit, or tax benefit.

| Department/State/Local Agency Name and Address | Type of Assistance | Amount Requested/Provided | Expected Uses of the Funds |
|---|---|---|---|
| | | | |
| | | | |

(Note: Use Additional pages if necessary.)

**Part III Interested Parties.** You must disclose:

1. All developers, contractors, or consultants involved in the application for the assistance or in the planning, development, or implementation of the project or activity and
2. any other person who has a financial interest in the project or activity for which the assistance is sought that exceeds $50,000 or 10 percent of the assistance (whichever is lower).

| Alphabetical list of all persons with a reportable financial interest in the project or activity (For individuals, give the last name first) | Social Security No. or Employee ID No. | Type of Participation in Project/Activity | Financial Interest in Project/Activity ($ and %) |
|---|---|---|---|
| | | | |

(Note: Use Additional pages if necessary.)

**Certification**

**Warning:** If you knowingly make a false statement on this form, you may be subject to civil or criminal penalties under Section 1001 of Title 18 of the United States Code. In addition, any person who knowingly and materially violates any required disclosures of information, including intentional non-disclosure, is subject to civil money penalty not to exceed $10,000 for each violation.
I certify that this information is true and complete.

| Signature: X | Date: (mm/dd/yyyy) |
|---|---|

**Public reporting burden** for this collection of information is estimated to average 2.0 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not conduct or sponsor, and a person is not required to respond to, a collection information unless that collection displays a valid OMB control number.

**Privacy Act Statement.** Except for Social Security Numbers (SSNs) and Employer Identification Numbers (EINs), the Department of Housing and Urban Development (HUD) is authorized to collect all the information required by this form under section 102 of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. 3531. Disclosure of SSNs and EINs is optional. The SSN or EIN is used as a unique identifier. The information you provide will enable HUD to carry out its responsibilities under Sections 102(b), (c), and (d) of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235, approved December 15, 1989. These provisions will help ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. They will also help ensure that HUD assistance for a specific housing project under Section 102(d) is not more than is necessary to make the project feasible after taking account of other government assistance. HUD will make available to the public all applicant disclosure reports for five years in the case of applications for competitive assistance, and for generally three years in the case of other applications. Update reports will be made available along with the disclosure reports, but in no case for a period generally less than three years. All reports, both initial reports and update reports, will be made available in accordance with the Freedom of Information Act (5 U.S.C. §552) and HUD's implementing regulations at 24 CFR Part 15. HUD will use the information in evaluating individual assistance applications and in performing internal administrative analyses to assist in the management of specific HUD programs. The information will also be used in making the determination under Section 102(d) whether HUD assistance for a specific housing project is more than is necessary to make the project feasible after taking account of other government assistance. You must provide all the required information. Failure to provide any required information may delay the processing of your application, and may result in sanctions and penalties, including imposition of the administrative and civil money penalties specified under 24 CFR §4.38.

**Note:** This form only covers assistance made available by the Department. States and units of general local government that carry out responsibilities under Sections 102(b) and (c) of the Reform Act must develop their own procedures for complying with the Act.

## Instructions

### Overview.

A. Coverage. You must complete this report if:
   (1) You are applying for assistance from HUD for a specific project or activity and you have received, or expect to receive, assistance from HUD in excess of $200,000 during the during the fiscal year;
   (2) You are updating a prior report as discussed below; or
   (3) You are submitting an application for assistance to an entity other than HUD, a State or local government if the application is required by statute or regulation to be submitted to HUD for approval or for any other purpose.

B. **Update reports (filed by "Recipients" of HUD Assistance):** **General.** All recipients of covered assistance must submit update reports to the Department to reflect substantial changes to the initial applicant disclosure reports.

### Line-by-Line Instructions.

**Applicant/Recipient Information.**
All applicants for HUD competitive assistance, must complete the information required in blocks 1-5 of form HUD-2880:

1. Enter the full name, address, city, State, zip code, and telephone number (including area code) of the applicant/recipient. Where the applicant/recipient is an individual, the last name, first name, and middle initial must be entered.
2. Entry of the applicant/recipient's SSN or EIN, as appropriate, is optional.
3. Applicants enter the HUD program name under which the assistance is being requested.
4. Applicants enter the amount of HUD assistance that is being requested. Recipients enter the amount of HUD assistance that has been provided and to which the update report relates. The amounts are those stated in the application or award documentation. NOTE: In the case of assistance that is provided pursuant to contract over a period of time (such as project-based assistance under section 8 of the United States Housing Act of 1937), the amount of assistance to be reported includes all amounts that are to be provided over the term of the contract, irrespective of when they are to be received.
5. Applicants enter the name and full address of the project or activity for which the HUD assistance is sought. Recipients enter the name and full address of the HUD-assisted project or activity to which the update report relates. The most appropriate government identifying number must be used (e.g., RFP No.; IFB No.; grant announcement No.; or contract, grant, or loan No.) Include prefixes.

**Part I. Threshold Determinations - Applicants Only**

Part I contains information to help the applicant determine whether the remainder of the form must be completed. **Recipients filing Update Reports should not complete this Part.**

If the answer to *either* questions 1 or 2 is No, the applicant need not complete Parts II and III of the report, but must sign the certification at the end of the form.

**Part II. Other Government Assistance and Expected Sources and Uses of Funds.**

A. Other Government Assistance. This Part is to be completed by both applicants and recipients for assistance and recipients filing update reports. Applicants and recipients must report any other government assistance involved in the project or activity for which assistance is sought. Applicants and recipients must report any other government assistance involved in the project or activity. Other government assistance is defined in note 4 on the last page. For purposes of this definition, other government assistance is expected to be made available if, based on an assessment of all the circumstances involved, there are reasonable grounds to anticipate that the assistance will be forthcoming.

Both applicant and recipient disclosures must include all other government assistance involved with the HUD assistance, as well as any other government assistance that was made available before the request, but that has continuing vitality at the time of the request. Examples of this latter category include tax credits that provide for a number of years of tax benefits, and grant assistance that continues to benefit the project at the time of the assistance request.

The following information must be provided:

1. Enter the name and address, city, State, and zip code of the government agency making the assistance available.
2. State the type of other government assistance (e g., loan, grant, loan insurance).
3. Enter the dollar amount of the other government assistance that is, or is expected to be, made available with respect to the project or activities for which the HUD assistance is sought (applicants) or has been provided (recipients).
4. Uses of funds. Each reportable use of funds must clearly identify the purpose to which they are to be put. Reasonable aggregations may be used, such as "total structure" to include a number of structural costs, such as roof, elevators, exterior masonry, etc.

B. Non-Government Assistance. Note that the applicant and recipient disclosure report must specify all expected sources and uses of funds - both from HUD ***and any other source*** - that have been or are to be, made available for the project or activity. Non-government sources of

funds typically include (but are not limited to) foundations and private contributors.

**Part III. Interested Parties.**

This Part is to be completed by both applicants and recipients filing update reports. Applicants must provide information on:

1. All developers, contractors, or consultants involved in the application for the assistance or in the planning, development, or implementation of the project or activity and
2. any other person who has a financial interest in the project or activity for which the assistance is sought that exceeds $50,000 or 10 percent of the assistance (whichever is lower).

**Note:** A financial interest means any financial involvement in the project or activity, including (but not limited to) situations in which an individual or entity has an equity interest in the project or activity, shares in any profit on resale or any distribution of surplus cash or other assets of the project or activity, or receives compensation for any goods or services provided in connection with the project or activity. Residency of an individual in housing for which assistance is being sought is not, by itself, considered a covered financial interest.

The information required below must be provided.

1. Enter the full names and addresses. If the person is an entity, the listing must include the full name and address of the entity as well as the CEO. Please list all names alphabetically.
2. Entry of the Social Security Number (SSN) or Employee Identification Number (EIN), as appropriate, for each person listed is optional.
3. Enter the type of participation in the project or activity for each person listed: i.e., the person's specific role in the project (e.g., contractor, consultant, planner, investor).
4. Enter the financial interest in the project or activity for each person listed. The interest must be expressed both as a dollar amount and as a percentage of the amount of the HUD assistance involved.

**Note** that if any of the source/use information required by this report has been provided elsewhere in this application package, the applicant need not repeat the information, but need only refer to the form and location to incorporate it into this report. (It is likely that some of the information required by this report has been provided on SF 424A, and on various budget forms accompanying the application.) If this report requires information beyond that provided elsewhere in the application package, the applicant must include in this report all the additional information required.

Recipients must submit an update report for any change in previously disclosed sources and uses of funds as provided in Section I.D.5., above.

**Notes:**

1. All citations are to 24 CFR Part 4, which was published in the Federal Register. [April 1, 1996, at 63 Fed. Reg. 14448.]
2. Assistance means any contract, grant, loan, cooperative agreement, or other form of assistance, including the insurance or guarantee of a loan or mortgage, that is provided with respect to a specific project or activity under a program administered by the Department. The term does not include contracts, such as procurements contracts, that are subject to the Fed. Acquisition Regulation (FAR) (48 CFR Chapter 1).
3. See 24 CFR §4.9 for detailed guidance on how the threshold is calculated.
4. "Other government assistance" is defined to include any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance from the Federal government (other than that requested from HUD in the application), a State, or a unit of general local government, or any agency or instrumentality thereof, that is, or is expected to be made, available with respect to the project or activities for which the assistance is sought.
5. For the purpose of this form and 24 CFR Part 4, "person" means an individual (including a consultant, lobbyist, or lawyer); corporation; company; association; authority; firm; partnership; society; State, unit of general local government, or other government entity, or agency thereof (including a public housing agency); Indian tribe; and any other organization or group of people.

## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

| 1. Type of Federal Action: | 2. Status of Federal Action: | 3. Report Type: |
|---|---|---|
| ☐ a. contract<br>b. grant<br>c. cooperative agreement<br>d. loan<br>e. loan guarantee<br>f. loan insurance | ☐ a. bid/offer/application<br>b. initial award<br>c. post-award | ☐ a. initial filing<br>b. material change<br>**For Material Change Only:**<br>year _____ quarter _____<br>date of last report _____ |

| 4. Name and Address of Reporting Entity: | 5. If Reporting Entity In No. 4 Is a Subawardee, Enter Name and Address of Prime: |
|---|---|
| ☐ Prime ☐ Subawardee<br>Tier _____, *if known*:<br><br>**Congressional District**, *if known*: 4c | **Congressional District**, *if known*: |
| **6. Federal Department/Agency:** | **7. Federal Program Name/Description:**<br><br>CFDA Number, *if applicable*: _____ |
| **8. Federal Action Number**, *if known*: | **9. Award Amount**, *if known*:<br>$ |
| **10. a. Name and Address of Lobbying Registrant** (*if individual, last name, first name, MI*): | **b. Individuals Performing Services** (*including address if different from No. 10a*) (*last name, first name, MI*): |
| **11.** Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure. | Signature: _____<br>Print Name: _____<br>Title: _____<br>Telephone No.: _____ Date: _____ |
| **Federal Use Only:** | Authorized for Local Reproduction<br>Standard Form LLL (Rev. 7-97) |

## INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, State and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawerdee," then enter the full name, address, city, State and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal egency making the award or loan commitment. Include at least one organizationallevel below egency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For e covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, State and zip code of the lobbying registrant under the Lobbying Disclosure Act of 1995 engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

## Certification of Consistency with the RC/EZ/EC Strategic Plan

U.S. Department of Housing and Urban Development

I certify that the proposed activities/projects in this application are consistent with the Strategic Plan of a Federally-designated Empowerment Zone (EZ), Enterprise Community (EC), an Urban Enhanced Enterprise Community, Strategic Planning Community or Renewal Community.

(Type or clearly print the following information)

Applicant Name _____

Name of the Federal Program to which the applicant is applying _____

Name of RC/EZ/EC _____

I further certify that the proposed activities/projects will be located within the RC/EZ/EC/Urban Enhanced EC or Strategic Planning Community and will serve the RC/EZ/EC/Urban Enhanced EC, Strategic Planning Community residents, or Renewal Community. (2 points)

Name of the Official Authorized to Certify the RC/EZ/EC _____

Title _____

Signature _____

Date (mm/dd/yyyy) _____

## Certification of Consistency with the Consolidated Plan

U.S. Department of Housing and Urban Development

I certify that the proposed activities/projects in the application are consistent with the jurisdiction's current, approved Consolidated Plan.

(Type or clearly print the following information:)

Applicant Name: _____

Project Name: _____

Location of the Project: _____

_____

_____

Name of the Federal Program to which the applicant is applying: _____

Name of Certifying Jurisdiction: _____

Certifying Official of the Jurisdiction Name: _____

Title: _____

Signature: _____

Date: _____

## Acknowledgment of Application Receipt

U.S. Department of Housing and Urban Development

Type or clearly print the Applicant's name and full address in the space below.

(fold line)

Type or clearly print the following information:

Name of the Federal Program to which the applicant is applying: _____

**To Be Completed by HUD**

☐ HUD received your application by the deadline and will consider it for funding. In accordance with Section 103 of the Department of Housing and Urban Development Reform Act of 1989, no information will be released by HUD regarding the relative standing of any applicant until funding announcements are made. However, you may be contacted by HUD after initial screening to permit you to correct certain application deficiencies.

☐ HUD did not receive your application by the deadline; therefore, your application will not receive further consideration. Your application is:

- ☐ Enclosed
- ☐ Being sent under separate cover

Processor's Name _____

Date of Receipt _____

form HUD-2993 (2/99)

**Client Comments and Suggestions**

**U.S. Department of Housing and Urban Development**

# You are our Client! Your comments and suggestions, please!

The Department of Housing and Urban Development in preparing this Notice of Funding Availability and application forms, has tried to produce a more user friendly, customer driven funding process. Please let us have your comments and recommendations for improvements to this document. You may leave this form attached to your application, or feel free to detach the form and return it to:

The Department of Housing and Urban Development
Office of Departmental Grants Management and Oversight
Room 3156
451 7th Street, SW
Washington, DC 20410

**Please Provide Comments on HUD's Efforts:**

**The NOFA** (insert title) _____

is: (please check one)

(a) ☐ is clear and easily understandable

(b) ☐ better than before, but still needs improvement (please specify)

(c) other (please specify)

**The application form** (insert title) _____

is: (please check one)

(a) ☐ is acceptable given the volume of information required by statute and the volume of information required for accountability in selecting and funding projects.

(b) ☐ is simpler and more user-friendly than before, but still needs work (please specify).

(c) other comments (please specify)

**Name & Organization** (Optional):

Are additional pages attached? ☐ Yes ☐ No

Previous versions obsolete

form **HUD-2994** (03/2003)

# SURVEY ON ENSURING EQUAL OPPORTUNITY FOR APPLICANTS

OMB No. 1890-0014 Exp. 1/131/2006

**Purpose:** The Federal government is committed to ensuring that all qualified applicants, small or large, non-religious or faith-based, have an equal opportunity to compete for Federal funding. In order for us to better understand the population of applicants for Federal funds, we are asking nonprofit private organizations (not including private universities) to fill out this survey.

Upon receipt, the survey will be separated from the application. Information provided on the survey will not be considered in any way in making funding decisions and will not be included in the Federal grants database. While your help in this data collection process is greatly appreciated, completion of this survey is voluntary.

**Instructions for Submitting the Survey:** If you are applying using a hard copy application, please place the completed survey in an envelope labeled "Applicant Survey." Seal the envelope and include it along with your application package. If you are applying electronically, please submit this survey along with your application.

**Applicant's (Organization) Name:** _____

**Applicant's DUNS Number:** _____

**Grant Name:** _____ **CFDA Number:** _____

1. Does the applicant have 501(c)(3) status?

☐ Yes ☐ No

2. How many full-time equivalent employees does the applicant have? *(Check only one box).*

☐ 3 or Fewer ☐ 15-50
☐ 4-5 ☐ 51-100
☐ 6-14 ☐ over 100

3. What is the size of the applicant's annual budget? *(Check only one box.)*

☐ Less Than $150,000
☐ $150,000 - $299,999
☐ $300,000 - $499,999
☐ $500,000 - $999,999
☐ $1,000,000 - $4,999,999
☐ $5,000,000 or more

4. Is the applicant a faith-based/religious organization?

☐ Yes ☐ No

5. Is the applicant a non-religious community-based organization?

☐ Yes ☐ No

6. Is the applicant an intermediary that will manage the grant on behalf of other organizations?

☐ Yes ☐ No

7. Has the applicant ever received a government grant or contract (Federal, State, or local )?

☐ Yes ☐ No

8. Is the applicant a local affiliate of a national organization?

☐ Yes ☐ No

## Survey Instructions on Ensuring Equal Opportunity for Applicants

**Provide the applicant's (organization) name and DUNS number and the grant name and CFDA number.**

1. 501(c)(3) status is a legal designation provided on application to the Internal Revenue Service by eligible organizations. Some grant programs may require nonprofit applicants to have 501(c)(3) status. Other grant programs do not.

2. For example, two part-time employees who each work half-time equal one full-time equivalent employee. If the applicant is a local affiliate of a national organization, the responses to survey questions 2 and 3 should reflect the staff and budget size of the local affiliate.

3. Annual budget means the amount of money your organization spends each year on all of its activities.

4. Self-identify.

5. An organization is considered a community-based organization if its headquarters/service location shares the same zip code as the clients you serve.

6. An "intermediary" is an organization that enables a group of small organizations to receive and manage government funds by administering the grant on their behalf.

7. Self-explanatory.

8. Self-explanatory.

**Paperwork Burden Statement**

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1890-0014. The time required to complete this information collection is estimated to average five (5) minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. **If you have any comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to:** U.S. Department of Housing and Urban Development, Office of Departmental Grants Management and Oversight, Room 3156, Washington, D.C. 20410.

**If you have comments or concerns regarding the status of your individual submission of this form, write directly to the address above.**

OMB No. 1890-0014 Exp. 1/31/2006
SF 424 Supplement

**Race and Ethnic Data Reporting Form**

**U.S. Department of Housing and Urban Development**
Office of Administration

OMB Approval No. 2535-0113
(exp. 10/31/2006)

Program Title:

Grantee/Recipient Name:

Grantee Reporting Organization:

Reporting Period From (mm/dd/yyyy): _____ To (mm/dd/yyyy): _____

| Racial Categories | Total Number of Race Responses | Total Number of Hispanic or Latino Responses |
|---|---|---|
| American Indian or Alaska Native | | |
| Asian | | |
| Black or African American | | |
| Native Hawaiian or Other Pacific Islander | | |
| White | | |
| American Indian or Alaska Native *and* White | | |
| Asian *and* White | | |
| Black or African American *and* White | | |
| American Indian or Alaska Native *and* Black or African American | | |
| * Other multiple race combinations greater than one percent: [Per the form instructions, write in a description using the box on the right] | | |
| Balance of individuals reporting more than one race | | |
| **Total:** | | |

* If the aggregate count of any reported multiple race combination that is not listed above exceeds 1% of the total population being reported, you should separately indicate the combination. See detailed instructions under "Other multiple race combinations."

Public reporting burden for this collection is estimated to average 1.15 hours per response, including the time for reviewing instructions, searching existing data sources, gathering the data needed, and completing and reviewing the information collection instrument. HUD may not collect this information, and you are not required to complete this form unless it displays a currently valid OMB control number.



form **HUD-27061** (10/2003)

## Instructions for the Race and Ethnic Data Reporting form (HUD-27061)

**A. General Instructions:**

This form is intended to be used by two categories of respondents: (1) applicants requesting funding from the Department of Housing and Urban Development (HUD); and (2) organizations who receive HUD Federal financial assistance that are required to report race and ethnic information.

In compliance with OMB direction to revise the standards for collection of racial data, HUD has revised its standards as depicted on this form. The revised standards are designed to acknowledge the growing diversity of the U.S. population. Using the revised standards, HUD offers organizations that are responding to HUD data requests for racial information, the option of selecting one or more of nine racial categories to identify the racial demographics of the individuals and/or the communities they serve, or are proposing to serve. HUD's collection of racial data treats ethnicity as a separate category from race and has changed the terminology for certain racial and ethnic groups from the way it has been requested in the past using two distinct ethnic categories. The revised definitions of ethnicity and race have been standardized across the Federal government and are provided below.

1. The two ethnic categories as revised by the Office of Management and Budget (OMB) are defined below.

**Hispanic or Latino.** A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. The term "Spanish origin" can be used in addition to "Hispanic" or "Latino."

**Not Hispanic or Latino.** A person not of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.

2. The five racial categories as revised by the Office of Management and Budget are defined below:

**American Indian or Alaska Native.** A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

**Asian.** A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

**Black or African American.** A person having origins in any of the black racial groups of Africa. Terms such as "Haitian" or "Negro" can be used in addition to "Black" or "African American."

**Native Hawaiian or Other Pacific Islander.** A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

**White.** A person having origins in any of the original peoples of Europe, the Middle East or North Africa.

**Note:** The information required to be reported may be collected and submitted to HUD via the use of this form or by other means, such as summary reports or via electronic reporting mechanisms. The primary goal to be achieved is the provision of the summary racial and ethic data of the population(s) proposed to be served or that is being served by your organization in a consistent manner across all HUD programs.

**B. Specific Instructions for Completing the Form:**

Organizations using this form should collect the individual responses from the community of individuals you intend to serve or those that you are serving, as applicable. After the individual collections are gathered, you should report (via this form or by the use of other means such as electronic reports that provide the summary data required by this form) the aggregate totals of the racial and ethnic data that you collect via the applicable categories as described below:

**Total Number of Racial Responses:** Under this column you should indicate the total number of responses collected in the blocks next to the applicable categories.

**Total Number of Hispanic or Latino Responses:** Under this column you should indicate the total number of responses collected in the blocks next to the applicable racial categories (e.g., you would enter the total number of Asian respondents that indicated they are Hispanic or Latino). When collecting this information from beneficiaries of the Federal financial assistance all respondents should be required to indicate their ethnic category, which requires either a "yes" or "no" response.

**Other Multiple Race Combinations:** Next to this racial category, indicate all racial categories (if any) identified by respondents that do not fit one of the five single race categories or four double race combinations above, and which have a total count that exceeds one percent of the total population being reported. You must identify each such racial combination, including the actual count, the percentage of the total population (in parenthesis), and the actual Hispanic or Latino count.

For example, if you obtain data that indicates that the total population being served is 200 and includes 10 Native Hawaiian or Other Pacific Islander *and* White and 12 Native Hawaiian or Other Pacific Islander *and* Asian, and those numbers (of Native Hawaiian or Other Pacific Islander *and* White and Native Hawaiian or Other Pacific Islander *and* Asian) each equates to more than one percent of the total population being served, and 2 of the Native Hawaiian or Other Pacific Islander *and* White indicate they belong to the Hispanic/Latino ethic category and 3 of the Native Hawaiian or Other Pacific Islander *and* Asian indicate they belong to the Hispanic/Latino ethnic category, you should complete the form as follows:

| Racial Categories | Total Number of Race Responses | Total Number of Hispanic or Latino Responses |
|---|---|---|
| * Other multiple race combinations: [Per the form instruction, write in a description using the box on the right] | Native Hawaiian or Other Pacific Islander<br>AND White<br>10 (5%)<br>Native Hawaiian or Other Pacific Islander<br>AND Asian<br>12 (6%) | 2<br><br>3 |

How the percentage should be applied will vary by program depending on whether the program is required to provide data on the total community, or on the beneficiaries/individuals that are being served or that are proposed to be served.

**Balance of individuals reporting more than one race:** This block is intended to capture the balance of any racial categories that are not included in the list of nine above, and are not included under **"Other multiple race combinations greater than on percent."** Indicate the total number of all racial categories reported that do not fit the nine racial categories above, and do not equate to one percent of the total population being reported. Be sure to also indicate the total number of all related Hispanic or Latino responses.

**Total:** On the last row of the form you should indicate the aggregate totals of all the information you have gathered including the total of all racial categories and the total of all the Hispanic or Latino categories.

## Logic Model

**U.S. Department of Housing and Urban Development**
**Office of Departmental Grants Management and Oversight**

OMB Approval No. 2535-0114
(Exp. 12/31/2006)

**Program Name:** _____

**Component Name:** _____

| Strategic Goals | Policy Priorities | Problem, Need, Situation | Service or Activity | Benchmarks: Output Goal | Benchmarks: Output Result | Outcomes: Achievement Outcome Goals | Outcomes: End Results | Measurement Reporting Tools | Evaluation Process |
|---|---|---|---|---|---|---|---|---|---|
| 1 | | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| Policy | | Planning | | Intervention | | Impact | | Accountability | |
| | | | | Short Term | | | | a.<br>b.<br>c.<br>d.<br>e. | |
| | | | | Intermediate Term | | | | a.<br>b.<br>c.<br>d.<br>e. | |
| | | | | Long Term | | | | a.<br>b.<br>c.<br>d.<br>e. | |

*HUD's Strategic Goals*

1. Increase homeownership opportunities
2. Promote decent affordable housing.
3. Strengthen communities.
4. Ensure equal opportunity in housing.
5. Embrace high standards of ethics, management, and accountability.
6. Promote participation of grass-roots faith-based and other community-based organizations.

*Policy Priorities*

1. Provide Increased Homeownership and Rental Opportunities for Low- and Moderate-Income Persons, Persons with Disabilities, the Elderly, Minorities, and Families with Limited English Proficiency.
2. Improving the Quality of Life in our Nation's Communities.
3. Encouraging Accessible Design Features.
4. Providing Full and Equal Access to Grass-Roots Faith-Based and Other Community-Based Organization in HUD Program Implementation.
5. Participation of Minority-Serving Institutions in HUD Programs
6. Ending Chronic Homelessness within Ten Years.
7. Removal of Barriers to Affordable Housing.

form HUD-96010 (11/2003)

**Logic Model Instructions** U.S. Department of Housing And Urban Development Office of Departmental Grants Management and Oversight

OMB Approval No. 2535-0114

The public reporting burden for this collection of information for the Logic Model is estimated to average 18 hours per response for applicants, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information and preparing the application package for submission to HUD. HUD may not conduct, and a person is not required to respond to, a collection of information unless the collection displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions to reduce this burden, to the Reports Management Officer, Paperwork Reduction Project, in the Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600. When providing comments, please refer to OMB Approval No. 2535-0114.

The information submitted in response to the Notice of Funding Availability for the Logic Model is subject to the disclosure requirements of the Department of Housing and Urban Development Reform Act of 1989 (Public Law 101-235, approved December 15, 1989, 42 U.S.C. 3545).

Instructions:

Responses to rating factor five should be in this format. Your response should be in bullet format rather than narrative. Please read each NOFA carefully to ensure the performance measures requested for this factor are reflected on the logic model form.

Program Name: The HUD funding program under which you are applying. If you are applying for a component of a program please include the Program Name as well as the Component Name.

Component Name: The HUD funding program under which you are applying.

Column 1: ***HUD's Strategic Goals***: Indicate in this column **the number** of the goal(s) that your proposed service or activity is designed to achieve. HUD's strategic goals are:

1. Increase homeownership opportunities.
2. Promote decent affordable housing.
3. Strengthen communities.
4. Ensure equal opportunity in housing.
5. Embrace high standards of ethics, management, and accountability.
6. Promote participation of grass-roots faith-based and other community-based organizations.

***Policy Priority***: Indicate in this column **the number** of the HUD Policy Priority(ies), if any, your proposed service or activity promotes. Applicants are encouraged to undertake specific activities that will assist the Department in implementing its Policy Priorities. HUD's Policy Priorities are:

1. Provide Increased Homeownership and Rental Opportunities for Low- and Moderate-Income Persons, Persons with Disabilities, the Elderly, Minorities, and Families with Limited English Proficiency.
2. Improving the Quality of Life in our Nation's Communities.
3. Encouraging Accessible Design Features.
4. Providing Full and Equal Access to Grass-Roots Faith-Based and Other Community-Based Organization in HUD Program Implementation.
5. Participation of Minority-Serving Institutions in HUD Programs
6. Ending Chronic Homelessness within Ten Years.
7. Removal of Barriers to Affordable Housing.

Column 2: **Problem, Need, or Situation**: Provide a general statement of need that provides the rationale for the proposed service or activity.

Column 3: **Service or Activity:** Identify the activities or services that you are undertaking in your work plan, which are crucial to the success of your program. Not every activity or service yields a direct outcome.

Column 4 and Column 5: **Benchmarks:** These columns ask you to identify benchmarks that will be used in measuring the progress of your services or activities. Column 4 asks for specific interim or final products (called outputs) that you establish for your program's services or activities. Column 5 should identify the results associated with the product or output. These may be numerical measures characterizing the results of a program activity, service or intervention and are used to measure performance. These outputs should lead to targets for achievement of outcomes. Results should be represented by both the actual # and % of the goal achieved.

Column 4: **Benchmarks/Output Goal:** Set quantifiable output goals, including timeframes. These should be products or interim products, which will allow you and HUD to monitor and assess your progress in achieving your program workplan.

Column 5: **Benchmark/ Output Result:** Report actual result of your benchmarks. The actual result could be number of housing units developed or rehabilitated, jobs created, or number of persons assisted. Outputs may be short, intermediate or long-term. ***(Do not fill out this section with the application)***

Column 6 and Column 7: **Outcomes:** Column 6 and Column 7 ask you to report on your expected and actual outcomes – the ultimate impact you hope to achieve. Column 6 asks you to identify outcomes in terms of the impact on the community, people's lives, changes in economic or social status, etc. Column 7 asks for the actual result of the outcome measure listed in Column 6, which should be updated as applicable.

Column 6: **Outcomes/ Goals:** Identify the outcomes that resulted in broader impacts for individuals, families/households, and/or the community. For example, the program may seek to improve the environmental conditions in a neighborhood, increase affordable housing, increase the assets of a low-income family, or improve self-sufficiency.

Proxy Outcome(s): Often direct measurement of the intended outcome is difficult or even impossible -- to measure. In these cases, applicants/grantees should use a proxy or surrogate measure that corresponds with the desired outcome. For example, improving quality of life in a neighborhood could be measured by a proxy indicator such as increases in home prices or decreases in crime. Training programs could be measured by the participant's increased wages or reading skills. The person receiving the service must meet eligibility requirements of the program.

Column 7: **Outcomes/Actual Result:** Identify specific achievements of outcomes listed in Column 6. ***(Do not fill out this section with the application)***

Column 8: **Measurement Reporting Tools:** (a) List the tools used to track output or outcome information (e.g., survey instrument; attendance log; case report; pre-post test; waiting list; etc); (b) Identify the place where data is maintained, e.g. central database; individual case records; specialized access database, tax assessor database; local precinct; other; (c) Identify the location, e.g. on-site; subcontractor; other; (d) Indicate how often data is required to be collected, who will collect it and how often data is reported to HUD; and (e) Describe methods for retrieving data, e.g. data from case records is retrieved manually, data is maintained in an automated database. This tool will be available for HUD review and monitoring and should be used in submitting reporting information.

Column 9: **Evaluation Process:** Identify the methodology you will periodically use to assess your success in meeting your benchmark output goals and output results, outcomes associated to the achievement of the purposes of the program, as well as the impact that the work has made on the individuals assisted, the community, and the strategic goals of the Department. If you are not meeting the goals and results projected for your performance period, the evaluation process should be used as a tool to ensure that you can adjust schedules, timing, or business practices to ensure that goals are met within your performance period.

| America's Affordable Communities Initiative | U.S. Department of Housing and Urban Development | OMB approval no. 2510-0013 (exp. 01/01/2006) |
|---|---|---|

Public reporting burden for this collection of information is estimated to average 3 hours. This includes the time for collecting, reviewing, and reporting the data. The information will be used for encourage applicants to pursue and promote efforts to remove regulatory barriers to affordable housing. Response to this request for information is required in order to receive the benefits to be derived. This agency may not collect this information, and you are not required to complete this form unless it displays a currently valid OMB control number.

## Questionnaire for HUD's Initiative on Removal of Regulatory Barriers

**A. Local Jurisdictions and Other Applicants Applying for Projects Located in Incorporated Jurisdictions ("Jurisdiction")**

| | 1 | 2 |
|---|---|---|
| 1. Does your Jurisdiction's comprehensive plan (or in the case of a tribe or TDHE, a local Indian Housing Plan) include a "housing element? A local comprehensive plan means the adopted official statement of a legislative body of a local government that sets forth (in words, maps, illustrations, and/or tables) goals, policies, and guidelines intended to direct the present and future physical, social, and economic development that occurs within its planning jurisdiction and that includes a unified physical plan for the public development of land and water. If your jurisdiction does not have a local comprehensive plan with a "housing element," please enter no. If no, skip to question # 4. | ☐ No | ☐ Yes |
| 2. If your jurisdiction has a comprehensive plan with a housing element, does the plan provide estimates of current and anticipated housing needs, taking into account the anticipated growth of the region, for existing and future residents, including low, moderate and middle income families, for at least the next five years? | ☐ No | ☐ Yes |
| 3. Does your zoning ordinance and map, development and subdivision regulations or other land use controls conform to the jurisdiction's comprehensive plan regarding housing needs by providing: a) sufficient land use and density categories (multifamily housing, duplexes, small lot homes and other similar elements); and, b) sufficient land zoned or mapped "as of right" in these categories, that can permit the building of affordable housing addressing the needs identified in the plan? (For purposes of this notice, "as-of-right," as applied to zoning, means uses and development standards that are determined in advance and specifically authorized by the zoning ordinance. The ordinance is largely self-enforcing because little or no discretion occurs in its administration.). If the jurisdiction has chosen not to have either zoning, or other development controls that have varying standards based upon districts or zones, the applicant may also enter yes. | ☐ No | ☐ Yes |
| 4. Does your Jurisdiction's zoning ordinance set minimum building size requirements that exceed the local housing or health code or is otherwise not based upon explicit health standards? | ☐ No | ☐ Yes |

| | | |
|---|---|---|
| 5. If your jurisdiction has development impact fees, are the fees specified and calculated under local or state statutory criteria? If no, skip to question #7. Alternatively, if your jurisdiction does not have impact fees, you may enter yes. | ☐ No | ☐ Yes |
| 6. If yes, to the above, does the statute provide criteria that sets standards for the allowable type of capital investments that have a direct relationship between the fee and the development (nexus), and a method for fee calculation? | ☐ No | ☐ Yes |
| 7. If your jurisdiction has impact or other significant fees, does the jurisdiction provide waivers of these fees for affordable housing? | ☐ No | ☐ Yes |
| 8. Has your jurisdiction adopted specific building code language regarding housing rehabilitation that encourages such rehabilitation through gradated regulatory requirements applicable as different levels of work are performed in existing buildings? Such code language increases regulatory requirements in proportion to the extent of rehabilitation that an owner/developer chooses to do on a voluntary basis and the additional improvements required as a matter of regulatory policy. For further information see HUD publication: "*Smart Codes in Your Community: A Guide to Building Rehabilitation Codes*" (www.huduser.org/publications/destech/smartcodes.html) | ☐ No | ☐ Yes |
| 9. Does your Jurisdiction use a recent version (i.e. published within the last 5 years or, if no recent version has been published, the last version published) of one of the nationally recognized model building codes (i.e. the International Code Council (ICC), the Building Officials and Code Administrators International (BOCA), the Southern Building Code Congress International (SBCI), the International Conference of Building Officials (ICBO), the National Fire Protection Association (NFPA)) without significant technical amendment or modification. In the case of a tribe or TDHE, has a recent version of one of the model building codes as described above been adopted or, alternatively, has the tribe or TDHE adopted a building code that is substantially equivalent to one or more of the recognized model building codes<br><br>Alternatively, if a significant technical amendment has been made to the above model codes, can the jurisdiction supply supporting data that the amendments do not negatively impact affordability. | ☐ No | ☐ Yes |
| 10. Does your Jurisdiction's zoning ordinance or land use regulations permit manufactured (HUD-Code) housing "as of right" in all residential districts and zoning classifications in which similar site-built housing is permitted, subject to design, density, building size, foundation requirements, and other similar requirements applicable to other housing that will be deemed realty, irrespective of the method of production? | ☐ No | ☐ Yes |

| | | |
|---|---|---|
| 11. Within the past five years, has a jurisdiction official (i.e., chief executive, mayor, county chairman, city manager, administrator, or a tribally recognized official, etc.), the local legislative body, or planning commission, directly, or in partnership with major private or public stakeholders, convened or funded comprehensive studies, commissions, or hearings, or has the jurisdiction established a formal ongoing process, to review the rules, regulations, development standards, and processes of the jurisdiction to assess their impact on the supply of affordable housing? | ☐ No | ☐ Yes |
| **12.** Within the past five years, has the jurisdiction initiated major regulatory reforms either as a result of the above study or as a result of information identified in the barrier component of the jurisdiction's "HUD Consolidated Plan?" If yes, attach a brief list of these major regulatory reforms. | ☐ No | ☐ Yes |
| **13.** Within the past five years has your jurisdiction modified infrastructure standards and/or authorized the use of new infrastructure technologies (*e.g.* water, sewer, street width) to significantly reduce the cost of housing? | ☐ No | ☐ Yes |
| **14.** Does your jurisdiction give "as-of-right" density bonuses sufficient to offset the cost of building below market units as an incentive for any market rate residential development that includes a portion of affordable housing? (As applied to density bonuses, "as of right" means a density bonus granted for a fixed percentage or number of additional market rate dwelling units in exchange for the provision of a fixed number or percentage of affordable dwelling units and without the use of discretion in determining the number of additional market rate units.) | ☐ No | ☐ Yes |
| **15.** Has your jurisdiction established a single, consolidated permit application process for housing development that includes building, zoning, engineering, environmental, and related permits? Alternatively, does your jurisdiction conduct concurrent, not sequential, reviews for all required permits and approvals? | ☐ No | ☐ Yes |
| **16.** Does your jurisdiction provide for expedited or for expedited or "fast track" permitting and approvals for all affordable housing projects in your community? | ☐ No | ☐ Yes |
| 17. Has your jurisdiction established time limits for government review and approval or disapproval of development permits in which failure to act, after the application is deemed complete, by the government within the designated time period, results in automatic approval? | ☐ No | ☐ Yes |
| **18.** Does your jurisdiction allow "accessory apartments" either as: 1) a special exception or conditional use in all single-family residential zones or, 2) "as of right" in a majority of residential districts otherwise zoned for single-family housing? | ☐ No | ☐ Yes |
| **19.** Does your jurisdiction have an explicit policy that adjusts or waives existing parking requirements for all affordable housing developments? | ☐ No | ☐ Yes |
| **20.** Does your jurisdiction require affordable housing projects to undergo public review or special hearings when the project is otherwise in full compliance with the zoning ordinance and other development regulations | ☐ No | ☐ Yes |
| **Total Points:** | | |

**B. State Agencies and Departments or Other Applicants for Projects Located in Unincorporated Areas**

| | | 1 | 2 |
|---|---|---|---|
| 1 | Does your state, either in its planning and zoning enabling legislation or in any other legislation, require localities regulating development have a comprehensive plan with a "housing element?" If no, skip to question # 4 | ☐ No | ☐ Yes |
| 2. | Does you state require that a local jurisdiction's **comprehensive** plan estimate current and anticipated housing needs, taking into account the anticipated growth of the region, for existing and future residents, including low, moderate, and middle income families, for at least the next five years? | ☐ No | ☐ Yes |
| 3. | Does your state's zoning enabling legislation require that a local jurisdiction's zoning ordinance have a) sufficient land use and density categories (multifamily housing, duplexes, small lot homes and other similar elements); and, b) sufficient land zoned or mapped in these categories, that can permit the building of affordable housing that addresses the needs identified in the comprehensive plan? | ☐ No | ☐ Yes |
| 4. | Does your state have an agency or office that includes a specific mission to determine whether local governments have policies or procedures that are raising costs or otherwise discouraging affordable housing? | ☐ No | ☐ Yes |
| 5. | Does your state have a legal or administrative requirement that local governments undertake periodic self-evaluation of regulations and processes to assess their impact upon housing affordability address these barriers to affordability? | ☐ No | ☐ Yes |
| 6. | Does your state have a technical assistance or education program for local jurisdictions that includes assisting them in identifying regulatory barriers and in recommending strategies to local governments for their removal? | ☐ No | ☐ Yes |
| 7. | Does your state have specific enabling legislation for local impact fees? If no skip to question #10. | ☐ No | ☐ Yes |
| 8. | If yes, to the above, does the State statute provide criteria that sets standards for the allowable type of capital investments that have a direct relationship between the fee and the development (*nexus*) and a method for fee calculation? | ☐ No | ☐ Yes |
| 9. | Does your state provide significant financial assistance to local governments for housing, community development and/or transportation that includes funding prioritization or linking funding on the basis of local regulatory barrier removal activities? | ☐ No | ☐ Yes |

| | | |
|---|---|---|
| 10. Does your state have a mandatory state-wide building code that a) does not permit local technical amendments and b) uses a recent version (i.e. published within the last 5 years or, if no recent version has been published, the last version published) of one of the nationally recognized model building codes (i.e. the International Code Council (ICC), the Building Officials and Code Administrators International (BOCA), the Southern Building Code Congress International (SBCI), the International Conference of Building Officials (ICBO), the National Fire Protection Association (NFPA)) without significant technical amendment or modification? | ☐ No | ☐ Yes |
| 11. Alternatively, if the state has made significant technical amendment to the model code, can the state supply supporting data that the amendments do not negatively impact affordability? | ☐ No | ☐ Yes |
| 12. Has your state adopted mandatory building code language regarding housing rehabilitation that encourages rehabilitation through gradated regulatory requirements applicable as different levels of work are performed in existing buildings? Such language increases regulatory requirements in proportion to the extent of rehabilitation that an owner/developer chooses to do on a voluntary basis and the additional improvements required as a matter of regulatory policy. For further information see HUD publication: "*Smart Codes in Your Community: A Guide to Building Rehabilitation Codes*" (www.huduser.org/publications/destech/smartcodes.html) | ☐ No | ☐ Yes |
| 13. Within the past five years has your state made any changes to its own processes or requirements to streamline or consolidate the state's own approval processes involving permits for water or wastewater, environmental review, or other State-administered permits or programs involving housing development. If yes, briefly list these changes. | ☐ No | ☐ Yes |
| 14. Within the past five years, has your state (i.e., Governor, legislature, planning department) directly or in partnership with major private or public stakeholders, convened or funded comprehensive studies, commissions, or panels to review state or local rules, regulations, development standards, and processes to assess their impact on the supply of affordable housing? | ☐ No | ☐ Yes |
| 15. Within the past five years, has the state initiated major regulatory reforms either as a result of the above study or as a result of information identified in the barrier component of the states' "Consolidated Plan submitted to HUD?" If yes, briefly list these major regulatory reforms. | ☐ No | ☐ Yes |
| 16. Has the state undertaken any other actions regarding local jurisdiction's regulation of housing development including permitting, land use, building or subdivision regulations, or other related administrative procedures? If yes, briefly list these actions. | ☐ No | ☐ Yes |
| **Total Points:** | | |



[FR Doc. 04–9276 Filed 4–20–04; 3:46 pm]

BILLING CODE 4210–29–C

# Reader Aids

Federal Register

Vol. 69, No. 79

Friday, April 23, 2004

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | 202–741–6000 |
| **Laws** | 741–6000 |
| **Presidential Documents** | |
| Executive orders and proclamations | 741–6000 |
| **The United States Government Manual** | 741–6000 |
| **Other Services** | |
| Electronic and on-line services (voice) | 741–6020 |
| Privacy Act Compilation | 741–6064 |
| Public Laws Update Service (numbers, dates, etc.) | 741–6043 |
| TTY for the deaf-and-hard-of-hearing | 741–6086 |

### ELECTRONIC RESEARCH

**World Wide Web**

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal register/**

**E-mail**

**FEDREGTOC-L** (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (orchange settings);* then follow the instructions.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list* (or change settings); then follow the instructions.

**FEDREGTOC-L** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

## FEDERAL REGISTER PAGES AND DATE, APRIL

17033–17282 ..... 1
17283–17584 ..... 2
17585–17898 ..... 5
17899–18244 ..... 6
18245–18470 ..... 7
18471–18800 ..... 8
18801–19076 ..... 9
19077–19310 ..... 12
19311–19752 ..... 13
19753–19920 ..... 14
19921–20536 ..... 15
20537–20804 ..... 16
20805–21038 ..... 19
21039–21392 ..... 20
21393–21688 ..... 21
21689–21940 ..... 22
21941–22376 ..... 23

## CFR PARTS AFFECTED DURING APRIL

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**1 CFR**

51 ..... 18801

**3 CFR**

**Proclamations:**
7765 ..... 18465
7766 ..... 18467
7767 ..... 18469
7768 ..... 19077
7769 ..... 19307
7770 ..... 19751
7771 ..... 20537
7772 ..... 21683
7773 ..... 21685
7774 ..... 21687

**Executive Orders:**
13334 ..... 19917

**Administrative Orders:**
Presidential Determinations:
No. 2004–26 of March 24, 2004 ..... 21675
No. 2004–27 of April 6, 2004 ..... 21677
No. 2004–28 of April 14, 2004 ..... 21679

**5 CFR**

537 ..... 21039

**Proposed Rules:**
1650 ..... 18294
1653 ..... 18294
1655 ..... 18294
1690 ..... 18294

**7 CFR**

301 ..... 21039
319 ..... 21941
772 ..... 18471
905 ..... 19079
916 ..... 19753
917 ..... 19753
925 ..... 21689
929 ..... 18803
979 ..... 21947
981 ..... 21692
982 ..... 19082
983 ..... 17844
984 ..... 17899
989 ..... 21695
1000 ..... 21950
1001 ..... 21950
1005 ..... 21950
1006 ..... 21950
1007 ..... 21950
1030 ..... 21950
1032 ..... 21950
1033 ..... 21950
1124 ..... 21950
1126 ..... 21950
1131 ..... 21950

**Proposed Rules:**
272 ..... 20724
273 ..... 20724
301 ..... 19950
330 ..... 17984
761 ..... 20834
762 ..... 20834
763 ..... 20834
764 ..... 20834
765 ..... 20834
766 ..... 20834
767 ..... 20834
768 ..... 20834
769 ..... 20834
926 ..... 19118
1033 ..... 19292
1124 ..... 18834
1216 ..... 21439

**8 CFR**

103 ..... 20528

**Proposed Rules:**
103 ..... 18296

**9 CFR**

1 ..... 17899
2 ..... 17899
3 ..... 17899
77 ..... 20805
93 ..... 21040
94 ..... 21042
98 ..... 21042
301 ..... 18245
309 ..... 18245
310 ..... 18245
311 ..... 18245
313 ..... 18245
318 ..... 18245
319 ..... 18245
320 ..... 18245, 21047
381 ..... 21047

**10 CFR**

**Proposed Rules:**
71 ..... 21978

**11 CFR**

**Proposed Rules:**
110 ..... 18301, 18841

**12 CFR**

229 ..... 19921
335 ..... 19085
609 ..... 21699
611 ..... 21699
612 ..... 21699
614 ..... 21699
615 ..... 21699
617 ..... 21699
1700 ..... 18808

**Proposed Rules:**
32 ..... 21978
222 ..... 19123
303 ..... 20558
701 ..... 21439

705.....21443
742.....21439
1710.....19126

**13 CFR**

102.....21952

**14 CFR**

25.....18246, 19311
39.....17033, 17034, 17901, 17903, 17905, 17906, 17909, 17911, 17913, 17914, 17915, 17917, 17918, 17919, 17921, 17924, 17925, 18250, 19313, 19618, 19756, 19758, 19759, 20539, 20809, 20811, 20815, 20817, 20818, 21049, 21393, 21395, 21397, 21401, 21402, 21699, 21701
71.....17283, 19314, 19315, 19316, 19317, 19318, 19319, 19922, 19923, 20820, 20821, 20822, 20823, 21404
73.....18471, 21053
91.....21953
97.....17284
121.....19761
135.....18472
1260.....21703

**Proposed Rules:**

39.....17072, 17073, 17076, 17077, 17080, 17082, 17084, 17086, 17088, 17091, 17095, 17097, 17101, 17103, 17105, 17107, 17109, 17111, 17113, 17115, 17610, 17984, 17987, 17989, 17991, 17993, 17996, 18304, 18306, 18843, 18845, 18848, 19132, 19135, 19777, 19950, 19952, 19954, 19956, 20566, 21444, 21766, 21768, 21771, 21774
61.....21073
71.....18308, 18309, 18508, 19359, 19360, 19958, 19960, 19961, 19962, 19963, 20834, 20835, 20837, 21447, 21448, 21449
91.....21073
119.....21073
121.....21073
135.....21073
136.....21073
399.....21450

**15 CFR**

738.....21055
740.....21055
774.....17926

**16 CFR**

316.....21024
1210.....19762

**Proposed Rules:**

316.....18851
682.....21388
801.....18686
802.....18686
803.....18686

**17 CFR**

200.....21057
232.....21954
239.....22300
274.....22300

**Proposed Rules:**

30.....17998
230.....21650
232.....17864
239.....21650
240.....17864, 21650
249.....17864, 21650

**18 CFR**

**Proposed Rules:**

1.....21777

**19 CFR**

**Proposed Rules:**

24.....18296

**20 CFR**

404.....19924
641.....19014

**Proposed Rules:**

404.....18310

**21 CFR**

Ch. 1.....17285
1.....19763, 19765, 19766
20.....19766
173.....17297
201.....18255
206.....18728
250.....18728
312.....17927
314.....18728
520.....21956
522.....17585
573.....19320
600.....18728
601.....18728
606.....18255
610.....18255
807.....18472
1308.....17034

**Proposed Rules:**

Ch. 1.....17615
101.....20838
201.....21778
208.....21778
209.....21778

**22 CFR**

126.....18810

**24 CFR**

**Proposed Rules:**

30.....19906
200.....21036
203.....19906
320.....19746

**25 CFR**

**Proposed Rules:**

30.....20839
37.....20839
39.....20839
42.....20839
44.....20839
47.....20839

**26 CFR**

1.....17586, 21405

**Proposed Rules:**

1.....17117, 17477, 18314, 21454
20.....20840
301.....17117, 20840

**27 CFR**

9.....20823

**28 CFR**

803.....21058
804.....21059

**29 CFR**

35.....17570
541.....22122
1952.....20826, 20828
1981.....17587
4022.....19925
4044.....19925

**Proposed Rules:**

1910.....17774
1917.....19361
1918.....19361
1926.....20840

**30 CFR**

75.....17480
925.....19927
931.....19321

**Proposed Rules:**

200.....19137
917.....21075

**31 CFR**

1.....17298
103.....19093, 19098
240.....17272

**32 CFR**

199.....17035
719.....20540
725.....20540
727.....20541
752.....20542
1602.....20542
1605.....20542
1609.....20542
1656.....20542
2001.....17052

**Proposed Rules:**

519.....18314

**33 CFR**

101.....17927
104.....17927
117.....17055, 17057, 17595, 17597, 18473, 19103, 19325, 20544, 21061, 21062, 21064, 21956
147.....19933, 21065
165.....18473, 19326, 21067
167.....18476
334.....20545, 20546, 20547
402.....18811

**Proposed Rules:**

100.....18002
110.....17119, 20568
117.....17122, 17616, 17618, 18004
165.....18794, 18797, 21981
334.....20570

**34 CFR**

99.....21670

**36 CFR**

223.....18813
400.....17928

**Proposed Rules:**

13.....17355
242.....19964
292.....21796

**37 CFR**

1.....21704
401.....17299

**38 CFR**

20.....19935, 21068

**Proposed Rules:**

17.....21075

**39 CFR**

111.....17059

**Proposed Rules:**

111.....19363, 20841, 21455

**40 CFR**

9.....19105
51.....21604
52.....17302, 17929, 18815, 19937, 19939, 20548, 21711, 21713, 21715, 21717, 21731
63.....19106, 19734, 19943, 20968, 21737, 21906
68.....18819
78.....21604
80.....17932
81.....20550, 21731
97.....21604
141.....21958
142.....21958
143.....21958
147.....18478
166.....17303
180.....17304, 18255, 18263, 18275, 18480, 19767, 21959
257.....17308
261.....21754
262.....21737
271.....21962
745.....18489

**Proposed Rules:**

52.....17368, 17374, 18006, 18319, 18323, 18853, 19968, 21482, 21797, 21799, 21800, 21983
63.....18327, 18338, 19139, 19743, 19968, 21198
81.....17374, 18853, 21800
86.....17532
122.....18166
136.....18166
141.....18166
143.....18166
257.....17380
261.....21800
262.....21800
264.....21198
265.....21198
266.....21198
270.....21198
271.....21077, 21198
300.....19363
403.....18166
430.....18166
455.....18166
465.....18166

**42 CFR**

411.....17933
414.....17935
424.....17933, 21963

**Proposed Rules:**

50.....20778
93.....20778

**44 CFR**

64.....17310

65 .....17597, 17600, 21966, 21969
67 .....17312, 17606, 17608, 21973

**Proposed Rules:**
67 .....17381, 17619, 17620, 21988, 21989, 21992

**45 CFR**

1206.....19110
2551.....20829
2552.....19774
2553.....20830

**46 CFR**

515.....19774

**47 CFR**

1.....17946
2 .....18275, 18832, 21760
22.....17063
24.....17063
25.....18275, 21761
27.....17946
73 .....17070, 17071, 19328, 20554, 20555, 20556
74.....17946
80.....19947
90.....17946, 17959
97.....21760
101.....17946

**Proposed Rules:**
0.....17124
1 .....17124, 18006, 19779
11.....18857
13.....18007
54.....18508
61.....17124, 18006
64.....20845
69.....17124, 18006
73 .....17124, 17125, 18860, 19363, 19364, 20571
80.....18007
87.....19140

**48 CFR**

Ch. 1.....17740, 17770
1.....17741
2.....17741, 17764
4.....17768
8.....17741
15.....17768
29.....17769
31.....17764
45.....17741
49.....17741
52.....17741, 17770
53.....17741
601.....19329
602.....19329
603.....19329
604.....19329
605.....19329
606.....19329
609.....19329
611.....19329
612.....19329
613.....19329
616.....19329
617.....19329
619.....19329
622.....19329
623.....19329
625.....19329
626.....19329
628.....19329
630.....19329
632.....19329
636.....19329
637.....19329
642.....19329
651.....19329
652.....19329
653.....19329
1801.....21761
1803.....21761
1804.....21761
1805.....21761
1806.....21761
1807.....21761
1808.....21761
1809.....21761
1811.....21761
1812.....21761
1813.....21761
1814.....21761
1815.....21761
1816.....21761
1817.....21761
1819.....21761
1822.....21761
1823.....21761
1824.....21761
1825.....21761

**Proposed Rules:**
19.....18244
45.....17584
52.....17584
217.....21996
219.....21996, 21997
1842.....21804
1843.....21804
1844.....21804
1845.....21804
1846.....21804
1847.....21804
1848.....21804
1849.....21804
1850.....21804
1851.....21804

**49 CFR**

172.....20831
192.....18228, 21975
219.....19270
375.....17313
512.....21409
541.....17960
542.....17960
543.....17960
571.....18496
579.....20556
595.....21069
1104.....18498
1572.....17969

**Proposed Rules:**
541.....18010
544.....18861
571.....17622, 18015
572.....17622

**50 CFR**

17 .....18279, 18499, 21425
92.....17318
216.....17973
223.....18444
224.....18444
229.....21070
622.....19346
648.....17980, 18291
660 .....17329, 18444, 19347
679 .....17982, 19116, 19358, 19776, 20833, 21975

**Proposed Rules:**
14.....21806
17 .....17383, 17627, 17634, 18016, 18018, 18035, 18515, 18516, 18770, 19364, 19620, 21484
100.....19964
223.....20571
229.....19365
300.....19147
635.....19147
648.....19805

## REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

## RULES GOING INTO EFFECT APRIL 23, 2004

**AGRICULTURE DEPARTMENT**

**Agricultural Marketing Service**

Grapes grown in—
- California; published 4-22-04

Raisins produced from grapes grown in—
- California; published 4-22-04

**FEDERAL COMMUNICATIONS COMMISSION**

Frequency allocations and radio treaty matters:
- 76-81 GHz frequency and frequency bands above 95 GHz reallocation; domestic and international consistency realignment; published 3-24-04

**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Food and Drug Administration**

Animal drugs, feeds, and related products:
- Moxidectin and praziquantel gel; published 4-23-04

Human drugs:
- Labeling of drug products (OTC)—
  - Calcium-, magnesium-, and potassium-containing orally ingested drug products; published 3-24-04
  - Sodium; technical amendment, effective date delay terminated, and compliance date; published 3-24-04

**SMALL BUSINESS ADMINISTRATION**

Freedom of Information Act; implementation; correction; published 4-23-04

**TRANSPORTATION DEPARTMENT**

**Research and Special Programs Administration**

Pipeline safety:
- Hazardous liquid transportation—
  - Gas transmission pipelines; integrity management in high consequence areas; correction; published 4-23-04

## RULES GOING INTO EFFECT APRIL 24, 2004

**AGRICULTURE DEPARTMENT**

**Agricultural Marketing Service**

Melons grown in—
- Texas; published 4-23-04

## COMMENTS DUE NEXT WEEK

**AGRICULTURE DEPARTMENT**

**Federal Crop Insurance Corporation**

Crop insurance regulations:
- Apples; comments due by 4-28-04; published 3-29-04 [FR 04-06938]

**COMMERCE DEPARTMENT**

**National Oceanic and Atmospheric Administration**

Fishery conservation and management:
- Magnuson-Stevens Act provisions—
  - Essential fish habitat; comments due by 4-26-04; published 2-25-04 [FR 04-04149]
- Northeastern United States fisheries—
  - Atlantic mackerel, squid, and butterfish; comments due by 4-26-04; published 3-26-04 [FR 04-06856]
  - Northeast multispecies; comments due by 4-30-04; published 2-24-04 [FR 04-04018]
  - Summer flounder, scup, and black sea bass; comments due by 4-29-04; published 4-14-04 [FR 04-08488]

**COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA**

Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

**ENERGY DEPARTMENT**

**Federal Energy Regulatory Commission**

Electric rate and corporate regulation filings:
- Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

**ENVIRONMENTAL PROTECTION AGENCY**

Air pollutants, hazardous; national emission standards; and air pollution; standards of performance for new stationary sources:
- Electric utility steam generating units; comments due by 4-30-04; published 3-16-04 [FR 04-04457]

Air programs; State authority delegations:
- Louisiana; comments due by 4-26-04; published 3-26-04 [FR 04-06299]

Air quality implementation plans; approval and promulgation; various States:
- Florida; comments due by 4-28-04; published 3-29-04 [FR 04-06824]

Environmental statements; availability, etc.:
- Coastal nonpoint pollution control program—
  - Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]

Water pollution control:
- National Pollutant Discharge Elimination System—
  - North Dakota; comments due by 4-28-04; published 3-29-04 [FR 04-06928]

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Federal sector equal employment opportunity:
- Complaint processing data posting; comments due by 4-26-04; published 3-23-04 [FR 04-06393]

**FEDERAL COMMUNICATIONS COMMISSION**

Common carrier services:
- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and Telephone Consumer Protection Act of 1991; implementation—
  - Consumer protection from unwanted mobile service commercial messages and national do-not-call registry revisions; comments due by 4-30-04; published 3-31-04 [FR 04-07226]

Radio stations; table of assignments:
- Illinois; comments due by 4-26-04; published 3-17-04 [FR 04-06043]

**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Centers for Medicare & Medicaid Services**

Medicare and Medicaid:
- Long term care facilities; nursing services; nurse staffing information posting; comments due by 4-27-04; published 2-27-04 [FR 04-03732]

**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Food and Drug Administration**

Biological products:
- Human cells, tissues, and cellular and tissue-based products; establishment registration and listing; comments due by 4-26-04; published 1-27-04 [FR 04-01733]

Food additives:
- Polymers—
  - Polymer films/layers; technical amendment; comments due by 4-26-04; published 3-26-04 [FR 04-06738]

Reports and guidance documents; availability, etc.:
- Evaluating safety of antimicrobial new animal drugs with regard to their microbiological effects on bacteria of human health concern; Open for comments until further notice; published 10-27-03 [FR 03-27113]

**HOMELAND SECURITY DEPARTMENT**

**Coast Guard**

Anchorage regulations:
- Maryland; Open for comments until further notice; published 1-14-04 [FR 04-00749]

Drawbridge operations:
- Connecticut; comments due by 4-30-04; published 3-1-04 [FR 04-04489]

Maritime security:
- Continuous Synopsis Record; application availability; comments due by 4-27-04; published 2-27-04 [FR 04-04210]

Regattas and marine parades:
- Cuyahoga Rowing Regatta; comments due by 4-26-04; published 3-11-04 [FR 04-05466]

**INTERIOR DEPARTMENT**

**Fish and Wildlife Service**

Endangered and threatened species:
- Critical habitat designations—
  - Mexican spotted owl; comments due by 4-26-04; published 3-26-04 [FR 04-06764]
  - Santa Ana sucker; comments due by 4-26-

04; published 2-26-04 [FR 04-04226]

**INTERIOR DEPARTMENT**
**Surface Mining Reclamation and Enforcement Office**
Permanent program and abandoned mine land reclamation plan submissions:
Iowa; comments due by 4-26-04; published 3-25-04 [FR 04-06734]
West Virginia; comments due by 4-26-04; published 3-25-04 [FR 04-06735]

**JUSTICE DEPARTMENT**
**Drug Enforcement Administration**
Schedules of controlled substances:
Alpha-methyltryptamine and 5-methoxy-N,N-diisopropyltryptamine; placement into Schedule I; comments due by 4-30-04; published 3-31-04 [FR 04-07218]

**LABOR DEPARTMENT**
**Occupational Safety and Health Administration**
Safety and health standards:
Assigned protection factors; comments due by 4-29-04; published 3-30-04 [FR 04-07074]

**NATIONAL CREDIT UNION ADMINISTRATION**
Credit unions:
Share insurance and appendix—
Living trust accounts; comments due by 4-26-04; published 2-26-04 [FR 04-04217]

**PERSONNEL MANAGEMENT OFFICE**
Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002; Title II implementation; comments due by 4-26-04; published 3-31-04 [FR 04-07197]

**SECURITIES AND EXCHANGE COMMISSION**
Investment companies:
Investment advisory contracts approval; disclosure requirements; comments due by 4-26-04; published 2-19-04 [FR 04-03535]
Securities:
Section 18 covered securities; designation; comments due by 4-26-04; published 3-26-04 [FR 04-06815]

**SMALL BUSINESS ADMINISTRATION**
Disaster loan areas:
Maine; Open for comments until further notice; published 2-17-04 [FR 04-03374]

**TRANSPORTATION DEPARTMENT**
**Federal Aviation Administration**
Airworthiness directives:
Airbus; comments due by 4-26-04; published 3-25-04 [FR 04-06678]
Boeing; comments due by 4-26-04; published 2-26-04 [FR 04-04258]
Bombardier; comments due by 4-30-04; published 3-31-04 [FR 04-06774]
Eurocopter France; comments due by 4-27-04; published 2-27-04 [FR 04-04356]
General Electric Co.; comments due by 4-26-04; published 2-26-04 [FR 04-03798]
McDonnell Douglas; comments due by 4-26-04; published 3-11-04 [FR 04-05518]
McDonnell Douglas; comments due by 4-27-04; published 2-27-04 [FR 04-04475]
Raytheon; comments due by 4-26-04; published 3-1-04 [FR 04-04372]
Saab; comments due by 4-26-04; published 3-26-04 [FR 04-06685]
Short Brothers; comments due by 4-26-04; published 3-25-04 [FR 04-06680]
Air worthiness standands Special conditons
Avidyne Corp., Inc.; various airplane models; comments due by 4-26-04; published 3-26-04 [FR 04-06748]

**TRANSPORTATION DEPARTMENT**
**National Highway Traffic Safety Administration**
Fuel economy standards:
Corporate Average Fuel Economy Program; comments due by 4-27-04; published 12-29-03 [FR 03-31890]
Corporate Average Fuel Economy Program; product plan information request; comments due by 4-27-04; published 12-29-03 [FR 03-31891]
Motor vehicle safety standards:
Bus emergency exits and window retention and release; comments due by 4-26-04; published 3-12-04 [FR 04-05691]
Rear impact guards; comments due by 4-27-04; published 2-27-04 [FR 04-04276]

**TREASURY DEPARTMENT**
**Comptroller of the Currency**
Corporate activities:
National banks; operating subsidies annual report; comments due by 4-26-04; published 3-25-04 [FR 04-06710]

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**S. 2057/P.L. 108–220**

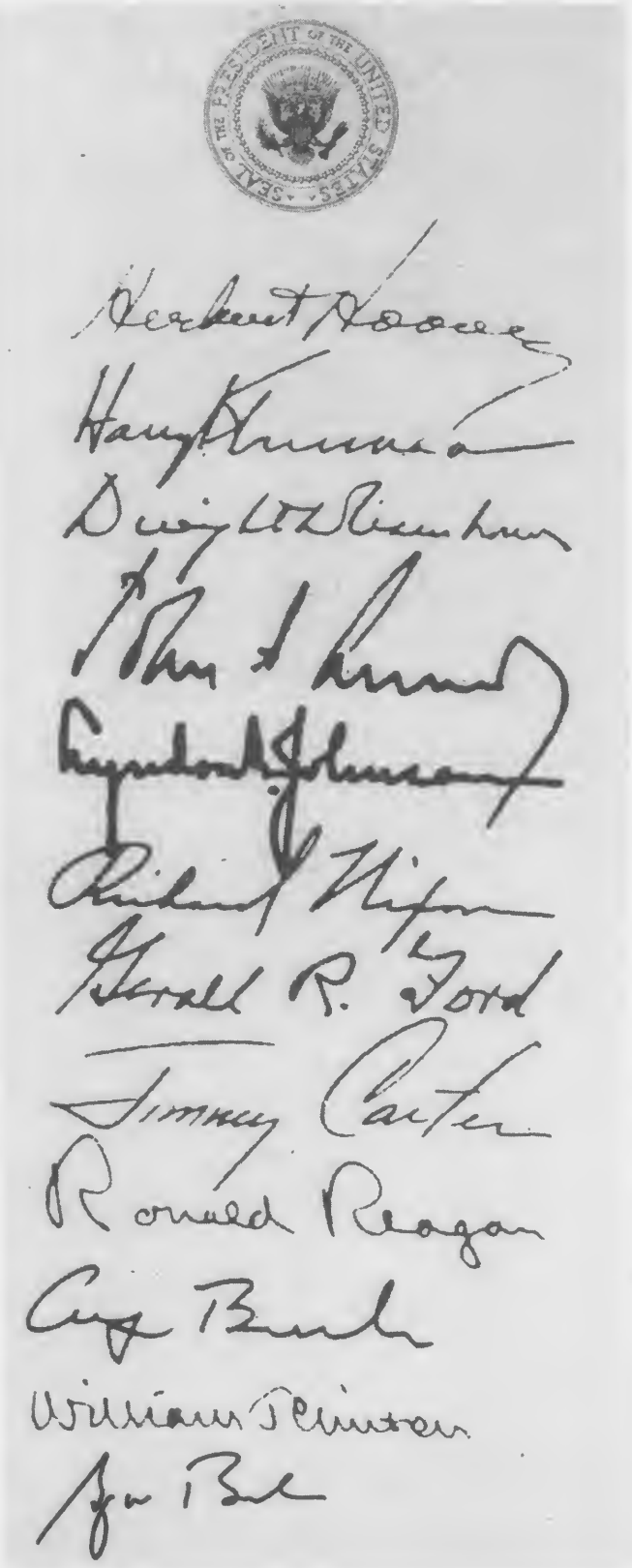
To require the Secretary of Defense to reimburse members of the United States Armed Forces for certain transportation expenses incurred by the members in connection with leave under the Central Command Rest and Recuperation Leave Program before the program was expanded to include domestic travel. (Apr. 22, 2004; 118 Stat. 618)

**Last List April 15, 2004**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

**Note:** This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.



# Public Papers of the Presidents of the United States

**William J. Clinton**

1997
(Book I) .....$69.00

1997
(Book II) .....$78.00

1998
(Book I) .....$74.00

1998
(Book II) .....$75.00

1999
(Book I) .....$71.00

1999
(Book II) .....$75.00

2000–2001
(Book I) .....$68.50

2000–2001
(Book II) .....$63.00

2000–2001
(Book III) .....$75.00

**George W. Bush**

2001
(Book I) .....$70.00

Published by the Office of the Federal Register,
National Archives and Records Administration

Mail order to:
Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954
(Rev 6/03)

## INFORMATION ABOUT THE SUPERINTENDENT OF DOCUMENTS' SUBSCRIPTION SERVICE

**Know when to expect your renewal notice and keep a good thing coming.** To keep our subscription prices down, the Government Printing Office mails each subscriber *only one renewal notice*. You can learn when you will get your renewal notice by checking the number that follows month/year code on the top line of your label *as shown in this example:*

A renewal notice will be sent approximately 90 days **before the shown date.**

```
                                        /
AFR SMITH212J                      DEC97 R 1
JOHN SMITH
212 MAIN STREET
FORESTVILLE MD 20704
```

A renewal notice will be sent approximately 90 days **before the shown date.**

```
                                        /
AFRDO SMITH212J                    DEC97 R 1
JOHN SMITH
212 MAIN STREET
FORESTVILLE MD 20704
```

To be sure that your service continues without interruption, please return your renewal notice promptly. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents, Washington, DC 20402–9372 with the proper remittance. Your service will be reinstated.

**To change your address:** Please SEND YOUR MAILING LABEL, along with your new address to the Superintendent of Documents, Attn: Chief, Mail List Branch, Mail Stop: SSOM, Washington, DC 20402–9373.

**To inquire about your subscription service:** Please SEND YOUR MAILING LABEL, along with your correspondence, to the Superintendent of Documents, Attn: Chief, Mail List Branch, Mail Stop: SSOM, Washington, DC 20402–9373.

**To order a new subscription:** Please use the order form provided below.

---

### Superintendent of Documents **Subscription** Order Form

Order Processing Code:
*** 5468**

*Charge your order. It's Easy!*

**To fax your orders (202) 512–2250**
**Phone your orders (202) 512–1800**

☐ **YES**, enter my subscription(s) as follows:

_____ subscriptions to **Federal Register (FR);** *including* the daily Federal Register, monthly Index and List of CFR Sections Affected (LSA), at $764 each per year.

_____ subscriptions to **Federal Register**, *daily only* (FRDO), at $699 each per year.

The total cost of my order is $_____. **Price includes regular domestic postage and handling**, and is subject to change. International customers please add 25%.

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, ZIP code

Daytime phone including area code

Purchase order number (optional)

**May we make your name/address available to other mailers?** YES ☐ NO ☐

**Please Choose Method of Payment:**

☐ Check Payable to the Superintendent of Documents

☐ GPO Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard Account

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (Credit card expiration date)

*Thank you for your order!*

Authorizing signature 10/01

Mail To: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954

# Microfiche Editions Available...

### Federal Register

The Federal Register is published daily in 24x microfiche format and mailed to subscribers the following day via first class mail. As part of a microfiche Federal Register subscription, the LSA (List of CFR Sections Affected) and the Cumulative Federal Register Index are mailed monthly.

### Code of Federal Regulations

The Code of Federal Regulations, comprising approximately 200 volumes and revised at least once a year on a quarterly basis, is published in 24x microfiche format and the current year's volumes are mailed to subscribers as issued.


### Microfiche Subscription Prices:

### Federal Register:

One year: $264.00
Six months: $132.00

### Code of Federal Regulations:

Current year (as issued): $298.00

---

Superintendent of Documents **Subscription** Order Form

Order Processing Code
* 5419

*Charge your order. It's Easy!* MasterCard VISA

**To fax your orders (202) 512–2250**
**Phone your orders (202) 512–1800**

☐ **YES**, enter the following indicated subscription in 24x microfiche format:

_____ **Federal Register** (MFFR) ☐ One year at $264 each ☐ Six months at $132.00

_____ **Code of Federal Regulations** (CFRM7) ☐ One year at $298 each

The total cost of my order is $_____. **Price includes regular domestic postage and handling** and is subject to change. International customers please add 25%.

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, ZIP code

Daytime phone including area code

Purchase order number (optional)

May we make your name/address available to other mailers? YES ☐ NO ☐

**Please Choose Method of Payment:**

☐ Check Payable to the Superintendent of Documents
☐ GPO Deposit Account ☐☐☐☐☐☐☐–☐
☐ VISA ☐ MasterCard Account
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐ (Credit card expiration date)

*Thank you for your order!*

Authorizing signature 10/01

Mail To: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954

# Public Laws

**108th Congress**

Pamphlet prints of public laws, often referred to as slip laws, are the initial publication of Federal laws upon enactment and are printed as soon as possible after approval by the President. Legislative history references appear on each law. Subscription service includes all public laws, issued irregularly upon enactment, for the 108th Congress.

Individual laws also may be purchased from the Superintendent of Documents, U.S. Government Printing Office. Prices vary. See Reader Aids Section of the Federal Register for announcements of newly enacted laws or access the online database at http://www.access.gpo.gov/nara1/nara005.html

---

Superintendent of Documents **Subscriptions** Order Form

Order Processing Code:
*** 6216**

☐ **YES**, enter my subscription(s) as follows:

***Charge your order. It's Easy!***

**To fax your orders (202) 512–2250**
**Phone your orders (202) 512–1800**

_____ subscriptions to **PUBLIC LAWS** for the 108th Congress for $285 per subscription.

The total cost of my order is $ _____. **Price includes regular domestic postage and handling** and is subject to change. International customers please add 25%.

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, ZIP code

Daytime phone including area code

Purchase order number (optional)

**May we make your name/address available to other mailers?** YES ☐ NO ☐

**Please Choose Method of Payment:**

☐ Check Payable to the Superintendent of Documents
☐ GPO Deposit Account ☐☐☐☐☐☐☐ – ☐
☐ VISA ☐ MasterCard Account
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐ (Credit card expiration date)

***Thank you for your order!***

Authorizing signature 2/03

Mail To: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954

Printed on recycled paper